ORAL ARGUMENT HAS NOT BEEN SCHEDULED

In the United States Court of Appeals for the District of Columbia Circuit

Nos. 18-1018, *et al.*

NORTH CAROLINA UTILITIES COMMISSION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITIONS FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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Washington, D.C. 20426

September 4, 2018

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and Amici

The parties before this Court are identified in Petitioner's Rule 28(a)(1) certificate.

B. Rulings Under Review

Petition No. 18-1018:

1. *Transcontinental Gas Pipe Line Co., LLC*, 158 FERC ¶ 61,125 (2017) ("Atlantic Sunrise Certificate Order"), JA 284; and

2. *Transcontinental Gas Pipe Line Co., LLC*, 161 FERC ¶ 61,250 (2017) ("Atlantic Sunrise Rehearing Order"), JA 418.

Petition No. 18-1019:

1. *Transcontinental Gas Pipe Line Co., LLC*, 156 FERC ¶ 61,022 (2016) ("Virginia Southside Certificate Order"), JA 184; and

2. *Transcontinental Gas Pipe Line Co., LLC*, 161 FERC ¶ 61,212 (2017) ("Virginia Southside Rehearing Order"), JA 213.

Petition No. 18-1020:

1. *Transcontinental Gas Pipe Line Co., LLC*, 156 FERC ¶ 61,092 (2016) ("Dalton Certificate Order"), JA 80; and

2. *Transcontinental Gas Pipe Line Co., LLC*, 161 FERC ¶ 61,211 (2017) ("Dalton Rehearing Order"), JA 150.

C. Related Cases

This case has not previously been before this Court or any other court. The orders challenged in No. 18-1018 are also pending review on other issues in *Allegheny Defense Project, et al. v. FERC*, Nos. 17-1098, *et al.*

/s/ Beth G. Pacella
Beth G. Pacella
Deputy Solicitor

September 4, 2018

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1996 Policy Statement	*Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines*, 74 FERC ¶ 61,076, *clarified*, 74 FERC ¶ 61,194, *on reh'g*, 75 FERC ¶ 61,024 (1996)
2003 Policy Modification	*Modification of Negotiated Rate Policy*, 104 FERC ¶ 61,134 (2003)
2003 Policy Modification Rehearing Order	*Modification of Negotiated Rate Policy*, 114 FERC ¶ 61,042 (2006)
Atlanta Gas	Atlanta Gas Light Co.
Atlantic Sunrise Certificate Order	*Transcontinental Gas Pipe Line Co., LLC*, 158 FERC ¶ 61,125 (2017)
Atlantic Sunrise Rehearing Order	*Transcontinental Gas Pipe Line Co., LLC*, 161 FERC ¶ 61,250 (2017)
Commission	Federal Energy Regulatory Commission
Dalton Certificate Order	*Transcontinental Gas Pipe Line Co., LLC*, 156 FERC ¶ 61,092 (2016)
Dalton Rehearing Order	*Transcontinental Gas Pipe Line Co., LLC*, 161 FERC ¶ 61,211 (2017)
FERC	Federal Energy Regulatory Commission
New York Commission	Intervenor Public Service Commission of the State of New York
North Carolina Commission	Petitioner North Carolina Utilities Commission
Oglethorpe	Oglethorpe Power Corp.

Recourse rates	cost-based rates available as an alternative to negotiated rates
State Commissions	Petitioner North Carolina Utilities Commission and Intervenor Public Service Commission of the State of New York
Transco	Transcontinental Gas Pipe Line Company, LLC
Virginia Power	Virginia Power Services Energy Corp., Inc.
Virginia Southside Certificate Order	*Transcontinental Gas Pipe Line Co., LLC*, 156 FERC ¶ 61,022 (2016)
Virginia Southside Rehearing Order	*Transcontinental Gas Pipe Line Co., LLC*, 161 FERC ¶ 61,212 (2017)

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ON PETITIONS FOR REVIEW OF ORDERS OF THE
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BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUE

In the proceedings below, the Federal Energy Regulatory Commission ("FERC" or "Commission") conditionally approved three applications by Transcontinental Gas Pipe Line Company, LLC ("Transco") to construct and operate interstate natural gas pipeline projects to meet growing demand for natural gas:

(1) the Atlantic Sunrise Project, *Transcontinental Gas Pipe Line Co., LLC*, 158 FERC ¶ 61,125 ("Atlantic Sunrise Certificate Order"), JA 284, *on*

reh'g, 161 FERC ¶ 61,250 (2017) ("Atlantic Sunrise Rehearing Order"), JA 418 (challenged in Docket No. 18-1018);

(2) the Virginia Southside Project, *Transcontinental Gas Pipe Line Co., LLC*, 156 FERC ¶ 61,022 (2016) ("Virginia Southside Certificate Order"), JA 184, *on reh'g*, 161 FERC ¶ 61,212 (2017) ("Virginia Southside Rehearing Order"), JA 213 (challenged in Docket No. 18-1019); and

(3) the Dalton Project, *Transcontinental Gas Pipe Line Co., LLC*, 156 FERC ¶ 61,092 (2016) ("Dalton Certificate Order"), JA 80, *on reh'g*, 161 FERC ¶ 61,211 (2017) ("Dalton Rehearing Order"), JA 150 (challenged in Docket No. 18-1020).

The issue on appeal in these consolidated proceedings is: Assuming jurisdiction, whether the Commission appropriately set the pipeline's initial "recourse" rates (i.e., cost-based rates that are available as an alternative to negotiated rates) in these certificate proceedings consistent with precedent and Commission policy.

COUNTERSTATEMENT OF JURISDICTION

To obtain judicial review of Commission orders issued under the Natural Gas Act, a petitioner and/or intervenor must satisfy the requirements of both Article III of the United States Constitution and section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b). *See, e.g.*, *PNGTS Shippers' Grp. v. FERC*, 592 F.3d

132, 136 (D.C. Cir. 2010) (party is not "aggrieved" within the meaning of Natural Gas Act section 19(b) unless it can establish constitutional and prudential standing); *Old Dominion Elec. Coop. v. FERC*, No. 16-1111, 2018 WL 2993205, at *7 (D.C. Cir. June 15, 2018) (intervenors, like petitioners, must demonstrate Article III standing).

The petitions for review here challenge the Commission's determination, in each of the three sets of orders, to deny the request of petitioner North Carolina Utilities Commission ("North Carolina Commission") and intervenor Public Service Commission of the State of New York ("New York Commission") (collectively "State Commissions") for a trial-type hearing to establish the initial Natural Gas Act section 7, 15 U.S.C. § 717f, recourse rates for the transportation service certificated in those orders. As discussed in Argument Section I, neither petitioner North Carolina Commission nor intervenor New York Commission has met its burden to show that it has standing regarding any of the petitions for review here.

STATUTES AND REGULATIONS

The pertinent statutory and regulatory provisions are contained in the Addendum to this Brief.

STATEMENT OF FACTS

I. Statutory And Regulatory Background

A. Natural Gas Act

The Natural Gas Act vests the Commission with jurisdiction over the transportation and wholesale sale of natural gas in interstate commerce. Natural Gas Act sections 1(b) and (c), 15 U.S.C. §§ 717(b), (c); *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1307 (D.C. Cir. 2015). The principal purpose of the Natural Gas Act is to "encourag[e] the orderly development of plentiful supplies of . . . natural gas at reasonable prices." *Myersville*, 783 F.3d at 1307 (quoting *NAACP v. FPC*, 425 U.S. 662, 669-70 (1976)).

Congress added the statutory provision at issue here, section 7, 15 U.S.C. § 717f, to the Natural Gas Act in 1942. *FPC v. Hunt*, 376 U.S. 515, 519-20 (1964). That provision requires a company to obtain a Natural Gas Act section 7 certificate of "public convenience and necessity" from the Commission before constructing or operating a facility that transports natural gas in interstate commerce. Natural Gas Act section 7(c), 15 U.S.C. § 717f(c); *Big Bend Conserv. Alliance v. FERC*, 896 F.3d 418, 420 (D.C. Cir. 2018). Natural Gas Act § 7(e), 15 U.S.C. § 717f(e), requires the Commission to issue a certificate to any qualified applicant if it finds that the proposed construction and operation of the pipeline facility "is or will be required by the present or future public convenience and

necessity." The Commission may attach reasonable terms and conditions to the certificate. Natural Gas Act § 7(e), 15 U.S.C. § 717f(e); *Myersville*, 783 F.3d at 1307-08.

Unlike rates set under Natural Gas Act sections 4 or 5, 15 U.S.C. §§ 717c, 717d (discussed immediately below), which must be found to be "just and reasonable," rates set under section 7 must simply be found to be in the "public interest." *Mo. Pub. Serv. Comm'n v. FERC*, 337 F.3d 1066, 1068 (D.C. Cir. 2003) (citing *Atlantic Ref. Co. v. Pub. Serv. Comm'n of N.Y.*, 360 U.S. 378, 391 (1959)). The "'public interest' standard of [Natural Gas Act] § 7 is less exacting than the 'just and reasonable' requirement of § 4." *Id.* at 1070 (citing *Atlantic Refining*, 360 U.S. at 390-91). The initial tariff rates set in section 7 certificate proceedings "offer a temporary mechanism to protect the public interest until the regular rate setting provisions of the [Natural Gas Act (sections 4 and 5, 15 U.S.C. §§ 717c, 717d)] come into play." *Mo. Pub. Serv. Comm'n*, 601 F.3d 581, 583 (D.C. Cir. 2010) (internal quotation omitted).

Natural Gas Act sections 4 and 5, 15 U.S.C. §§ 717c and 717d, come into play after certificated projects are already moving natural gas in interstate commerce. *Hunt*, 376 U.S. at 525. Under section 4, pipelines propose new rates and have the burden to show that those proposed rates are just and reasonable. *See, e.g.*, *Transcontinental Gas Pipe Line Corp. v. FERC*, 518 F.3d 916, 918, 923 (D.C.

Cir. 2008). Under Natural Gas Act section 5, the Commission, upon its own initiative or complaint by others, may change a pipeline's existing rates if the proponent establishes that the pipeline's existing rates are not just and reasonable and the new proposed rates are just and reasonable. *See, e.g.*, *id.* at 918, 920-21.

B. Commission's Policy For Setting Section 7 Initial Recourse Rates

As the State Commissions acknowledge (North Carolina Commission Br. 16; New York Commission Br. 12), under a long-standing Commission policy, in section 7 certificate proceedings a pipeline's initial recourse rate for new capacity must be designed using the rate of return established in the pipeline's most recent Natural Gas Act general section 4 rate case in which a rate of return was specified. *See* Atlantic Sunrise Certificate Order P 38 & n.60 (citing cases), JA 300.

C. The Commission's Negotiated Rates Policy

Originally, the Commission set pipeline rates based only on traditional cost-of-service ratemaking. In 1996, however, the Commission issued a policy statement,[1] which it modified in 2003,[2] permitting the use of alternative ratemaking

[1] *Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines*, 74 FERC ¶ 61,076, *clarified*, 74 FERC ¶ 61,194, *on reh'g*, 75 FERC ¶ 61,024 (1996) ("1996 Policy Statement").

[2] *Modification of Negotiated Rate Policy*, 104 FERC ¶ 61,134 (2003) ("2003 Policy Modification"), *on reh'g*, 114 FERC ¶ 61,042 (2006) ("2003 Policy Modification Rehearing Order").

methods including negotiated rates, which are at issue in this case. The Commission determined that a pipeline could negotiate rates with shippers that vary from its otherwise applicable cost-of-service tariff as long as the shippers have the option to take service at the tariff's traditional cost-of-service "recourse" rate. 2003 Policy Modification, 104 FERC ¶ 61,134 P 2; 1996 Policy Statement, 74 FERC at 61,224, 61,240. Because shippers could choose to take service under the tariff's recourse rate rather than under a negotiated rate, pipelines would not be able to exercise market power in negotiating a rate. 2003 Policy Modification, 104 FERC ¶ 61,134 P 2; 1996 Policy Statement, 74 FERC at 61,240.

The Commission requires pipelines to file either the negotiated agreement itself or a tariff sheet reflecting the terms of the agreement, including the negotiated rate, for Commission approval. 2003 Policy Modification, 104 FERC ¶ 61,134 PP 25-27, 32. Negotiated rate filings are noticed for public comment, and "all interested parties [have] an opportunity to raise whatever concerns they have with the agreement." 2003 Policy Modification Rehearing Order, 114 FERC ¶ 61,042 P 10.

II. The Transco Pipeline Projects

A. The Virginia Southside Expansion Project

On March 23, 2015, Transco filed an application under Natural Gas Act section 7(c), 15 U.S.C. § 717f(c), for a certificate of public convenience and

necessity to construct and operate the Virginia Southside project, to provide 250,000 dekatherms per day of incremental firm transportation service to Virginia Power Services Energy Corp., Inc. ("Virginia Power"). Virginia Southside Application, R. 3, Transmittal Letter at 2-4, JA 158-60; *see also* Virginia Southside Certificate Order P 4, JA 185 (same). Transco's targeted in-service date for the project was December 1, 2017. Virginia Southside Application, R. 3, Transmittal Letter at 7, JA 163.

The application explained that Transco had executed a binding precedent agreement with Virginia Power for all of the project capacity for an initial 20-year term. *Id.* at 5, 7, JA 161, 163; *see also* Virginia Southside Certificate Order P 6, JA 185 (same). Virginia Power chose to pay a negotiated rate, rather than the tariff recourse rate, for its firm service. Virginia Southside Application, Transmittal Letter at 8, JA 164; *see also* Virginia Southside Certificate Order n.5, JA 186 (same).

After executing the precedent agreement with Virginia Power, Transco held an open season from January 2-30, 2015, but received no additional bids for firm service. Virginia Southside Application, Transmittal Letter at 7, JA 163; *see also* Virginia Southside Certificate Order P 6, JA 186 (same).

Transco proposed an incremental cost-of-service initial recourse rate for the project, which was based, in pertinent part, on a pre-tax return on equity of 15.34

percent, the return underlying Transco's most recent general section 4 rate case in which there was a specified return. Virginia Southside Application, Transmittal Letter at 7, JA 163; Virginia Southside Certificate Order PP 20, 23, JA 190, 192.

B. The Dalton Expansion Project

On March 19, 2015, Transco filed an application under Natural Gas Act section 7(c), 15 U.S.C. § 717f(c), for a certificate of public convenience and necessity to construct and operate the Dalton project, which would provide 448,000 dekatherms per day of incremental firm transportation service to Atlanta Gas Light Co. ("Atlanta Gas") and Oglethorpe Power Corp. ("Oglethorpe") in Georgia. Dalton Application, R. 154, Transmittal Letter at 1-4, JA 4-7. *See also* Dalton Certificate Order P 4, JA 82 (same). Transco's targeted in-service date for the project was May 1, 2017. Dalton Application, Transmittal Letter at 5, JA 8.

The application explained that, after holding an open season from May 30 through June 28, 2012, Transco executed binding precedent agreements with Atlanta Gas and Oglethorpe Power for all of the project capacity for a term of 25 years. *Id.* at 4, 9-10, JA 7, 12-13; *see also* Dalton Certificate Order P 5, JA 82 (same). The shippers were given the option to pay either the project recourse rate or a negotiated rate for their firm service; both chose to pay a negotiated rate. *See*

Dalton Application, Transmittal Letter at 10, JA 7; Dalton Certificate Order PP 6, 22, JA 82, 87.

Transco proposed an incremental cost-of-service initial recourse rate for the project, which was based, in pertinent part, on a pre-tax return on equity of 15.34 percent, the return underlying Transco's most recent general section 4 rate case in which there was a specified return. Dalton Application, Transmittal Letter at 11, JA 14; Dalton Certificate Order PP 23, 26, JA 87, 90.

C. The Atlantic Sunrise Project

On March 31, 2015, Transco filed an application under Natural Gas Act section 7(c), 15 U.S.C. § 717f(c), for a certificate of public convenience and necessity to construct and operate the Atlantic Sunrise project, which would provide 1,700,002 dekatherms per day of incremental firm transportation service to nine shippers.[3] Atlantic Sunrise Application, R. 1, Transmittal Letter at 3-4, JA 221-22; *see also* Atlantic Sunrise Certificate Order P 4, JA 285. Transco's targeted in-service date for the project was July 1, 2017. Atlantic Sunrise Application, Transmittal Letter at 21, JA 239.

[3] The nine shippers are: Anadarko Energy Servs. Co.; Cabot Oil & Gas Corp.; Chief Oil Gas LLC; Inflection Energy LLC; MMGS, Inc.; Seneca Resources Corp.; Southern Co. Servs., Inc.; Southwestern Energy Servs. Co.; and WGL Midstream, Inc. Atlantic Sunrise Application, R. 1, Transmittal Letter at 10-11, JA 228-29.

The application explained that, after holding an open season from August 8 through September 27, 2013, Transco executed binding precedent agreements with the nine shippers for firm service on all of the project capacity for a primary term of 20 years. *Id.* at 4, 9-11, JA 222, 227-29; *see also* Atlantic Sunrise Certificate Order P 11, JA 288 (same). The shippers were given the option to pay either the project recourse rate or a negotiated rate for their firm service; all nine chose to pay a negotiated rate. *See* Atlantic Sunrise Application, Transmittal Letter at 11, JA 229; Atlantic Sunrise Certificate Order P 12, JA 289. Transco held a supplemental open season in February 2014, but received no additional bids for service. Atlantic Sunrise Application, Transmittal Letter at 10, JA 228; *see also* Atlantic Sunrise Certificate Order P 10, JA 288 (same).

Transco proposed an incremental cost-of-service recourse rate for the project, which was based, in pertinent part, on a pre-tax return on equity of 15.34 percent, the return underlying Transco's most recent general section 4 rate case in which there was a specified return. Atlantic Sunrise Application, Transmittal Letter at 12, JA 230; Virginia Southside Certificate Order PP 34, 38, JA 298, 300.

III. The State Commissions' Protest And The Filings In Response

The State Commissions filed one joint protest to all three applications. Virginia Southside R. 27, JA 31-57. The State Commissions acknowledged that the new natural gas pipeline infrastructure the projects would provide was needed,

but argued that the Commission should hold a trial-type hearing regarding the proposed initial recourse rates because they believed Transco's use of a 15.34 percent return raised a material issue of fact as to whether the proposed recourse rates were "just and reasonable." *Id.* at 1, 10-13, 20, JA 31, 40-43, 50.

The State Commissions recognized that using this return complied with the Commission's policy for setting Natural Gas Act section 7 initial recourse rates, but asserted that applying that policy here "appear[ed] to conflict with the unambiguous statutory requirement that a filing entity demonstrate that the rates proposed are just and reasonable." *Id.* at 10, JA 40; *see also*, *e.g.*, *id.* at 13, JA 43 ("Absent an analysis of Transco's actual capital structure and the debt and equity costs underlying the project, the record lacks the necessary factual basis to support a finding that the proposed recourse rates are just and reasonable. Accordingly, the Commission should set this issue for an evidentiary hearing for each of the Applications.").

Transco's answer to the protest pointed out that the just and reasonable standard does not apply to the initial rates set in Natural Gas Act section 7 certificate proceedings, and again noted that Transco acted consistently with Commission policy by designing its incremental expansion recourse rates based on the approved return in its most recent general rate case that specified a return.

Virginia Southside R. 35 at 2-4, 9-10, JA 59-61, 66-67 (citing, *e.g.*, *Equitrans, L.P.*, 117 FERC ¶ 61,184 (2006)).

The State Commissions argued in response that, "[u]nless recourse rates are based on a reasonable estimate of the actual costs to construct projects, they will not provide the necessary check on the pipeline's market power during the time frame that actually matters – the period during which the parties agreed to the negotiated rates." State Commissions Answer, Virginia Southside R. 36 at 3, JA 72.

IV. The Commission's Orders

The challenged orders found the predicate for Transco to be able to charge negotiated rates satisfied here, since all the shippers had the option to take capacity at the tariff recourse rate. *See* Virginia Southside Certificate Order n.5 and P 23, JA 186, 192; Virginia Southside Application, Transmittal Letter at 8, JA 164; Dalton Certificate Order PP 6, 22, 26, JA 82, 87, 89; Dalton Application, Transmittal Letter at 10, JA 13; Atlantic Sunrise Certificate Order PP 12, 38, JA 289, 300; Atlantic Sunrise Application, Transmittal Letter at 11, JA 229.

Moreover, the orders found that the proposed recourse rates were designed in compliance with the Commission's long-standing section 7 certificate policy, as they were designed using the approved rate of return from Transco's most recent general Natural Gas Act section 4 rate case in which a return was specified.

Virginia Southside Certificate Order P 23, JA 192; Dalton Certificate Order P 26, JA 89; Atlantic Sunrise Certificate Order P 38, JA 300.

The Commission explained that Natural Gas Act section 7 initial recourse rates for service on new pipeline capacity are not reviewed under the Natural Gas Act sections 4 and 5 just and reasonable standard, but under the less rigorous section 7 public convenience and necessity standard, and are developed based on the pipeline's estimated, rather than actual, cost of service. Virginia Southside Certificate Order P 24, JA 193 (citing *Atlantic Ref.*, 360 U.S. 378); Dalton Certificate Order P 27, JA 91 (same); Atlantic Sunrise Certificate Order P 39, JA 301 (same). The Commission carefully reviewed the proposed initial recourse rates under that standard, and required the proposed rates to be recalculated to ensure that they were in the public interest. Virginia Southside Certificate Order PP 27-31, JA 195-97; Dalton Certificate Order PP 30-34, JA 93-94; Atlantic Sunrise Certificate Order PP 42-46, JA 303-04.

The Commission found it unnecessary and inappropriate in the section 7 certificate proceedings here to hold a trial-type evidentiary hearing to litigate return on equity "discounted cash flow analysis" issues (i.e., composition of the proxy group, growth rates, and Transco's risk position within the resulting zone of reasonableness). Virginia Southside Certificate Order P 24, JA 194; Dalton Certificate Order P 27, JA 92; Atlantic Sunrise Certificate Order P 39, JA 302.

Instead, the Commission determined that it was appropriate and consistent with *Atlantic Refining*, 360 U.S. 378, to approve an initial recourse rate developed, in part, based on Transco's last approved return on equity, since parties will have the opportunity in Transco's next general Natural Gas Act section 4 rate case, which Transco must file in August 2018, to submit and examine testimony regarding discounted cash flow analysis issues. Virginia Southside Certificate Order PP 24, 25, JA 193-94; Dalton Certificate Order PP 27, 28, JA 91-92; Atlantic Sunrise Certificate Order PP 39, 40, JA 301-02.

As the Commission explained, it would be difficult, if not impossible, to timely complete the extensive discounted cash flow analysis in the section 7 certificate proceedings, and attempting to do so would unnecessarily delay the time-sensitive projects here. Virginia Southside Certificate Order P 24, JA 194; Dalton Certificate Order P 27, JA 92; Atlantic Sunrise Certificate Order P 39, JA 302. *See also* Virginia Southside Certificate Order n.28, JA 193 (citing *Atlantic Refining*, 360 U.S. at 390) (noting that, because of the "inordinate delay" associated with full evidentiary rate hearings, Natural Gas Act section 7, unlike sections 4 and 5, does not require that initial rates be just and reasonable); Virginia Southside Rehearing Order P 6, JA 215 (same); Dalton Certificate Order n.30, JA 91 (same); Atlantic Sunrise Certificate Order n.64, JA 301 (same).

In these circumstances, the Commission concluded that it was appropriate to apply its section 7 certificate policy (requiring the projects' recourse rates to be designed using the approved rate of return from the pipeline's most recent general section 4 rate case in which there was a specified rate of return) here. Virginia Southside Certificate Order P 26, JA 195; Dalton Certificate Order P 29, JA 92; Atlantic Sunrise Certificate Order P 41, JA 302. As the Commission explained, this was a proper exercise of the Commission's discretion to protect the public interest while preventing the delays that accompany full evidentiary hearings. Virginia Southside Rehearing Order P 6, JA 215; Dalton Rehearing Order P 7, JA 153; Atlantic Sunrise Rehearing Order P 19, JA 425.

Since Transco's August 2018 general section 4 rate case might result in a settlement, the Commission recommended that parties in that proceeding raise any issues there regarding the rate of return that should be used in calculating Transco's tariff recourse rates in subsequent certificate proceedings. Virginia Southside Certificate Order P 25, JA 194; Dalton Certificate Order P 29, JA 92; Atlantic Sunrise Certificate Order P 41, JA 302.

In addition, the Commission directed Transco to file either the negotiated rate agreements or tariff records setting forth the essential terms of the agreements at least 30 days, but not more than 60 days, before the proposed effective date for those rates. Virginia Southside Certificate Order P 32 & n.42, Ordering P (I),

JA 197, 203; Dalton Certificate Order P 35 & n.40, Ordering P (G), JA 94, 119; Atlantic Sunrise Certificate Order P 47 & n.78, JA 304-05; *see also* 18 C.F.R. § 154.112 (b) (agreements "that deviate in any material aspect from the form of service agreement must be filed" with the Commission and "referenced in the open access transmission tariff"). The Commission cited to its 2003 Policy Modification Rehearing Order, 114 FERC ¶ 61,042, which (at P 10) states that negotiated rate filings will be noticed for public comment, and that all interested parties will have an opportunity to raise whatever concerns they have regarding the agreement. Atlantic Sunrise Certificate Order n.78, JA 305.

SUMMARY OF ARGUMENT

Standing

Neither petitioner North Carolina Commission nor intervenor New York Commission has established standing to challenge the orders here. Specifically, neither has shown: (1) how North Carolina or New York natural gas customers are immediately and definitively affected by the Commission's setting of a particular recourse rate for service on new incremental pipeline capacity; (2) how rates negotiated years before the orders on review would have been affected by the Commission's later choice of a different recourse rate; or (3) how this Court's review can now make any difference.

Petitioner North Carolina Commission first asserts that it has standing because some project facilities will be constructed in North Carolina and some project services will be provided over facilities located in North Carolina. But North Carolina Commission has not shown that construction of and service over facilities in North Carolina, in and of themselves, will affect North Carolina consumers' rates, the matter North Carolina Commission states is within its purview. North Carolina Commission's general interest in the proper application of the Natural Gas Act does not establish the concrete and particularized injury required for standing.

North Carolina Commission's second standing claim, which relates only to the Atlantic Sunrise project, fares no better. North Carolina Commission theorizes that it has standing to challenge the Atlantic Sunrise orders because much of that project's capacity has been contracted by marketers, who "presumably" will seek to sell their gas to the highest value market available and, therefore, it can be "assumed" that ratepayers from New York to Florida will pay the rates approved in the Atlantic Sunrise proceeding. This claim, which depends on presumptions and assumptions about future events and the actions of third parties, is conjectural and hypothetical, not the concrete and particularized injury necessary to establish standing.

North Carolina Commission correctly points out that states are entitled to "special solicitude" in the standing analysis. But, as this Court has explained, this solicitude does not eliminate the state's obligation to establish that it has suffered a concrete injury.

New York Commission's injury claim is premised on the notion that the projects' capacity will be used to ship gas to New York for sale and consumption. The record shows, however, that this notion is wholly speculative. All Virginia Southside project capacity will be used to transport gas from New Jersey and Virginia for delivery to Virginia Power in Virginia. All Dalton project capacity will be used to transport gas from New Jersey for delivery to interconnections in Mississippi and Georgia for ultimate delivery to Atlanta Gas and Oglethorpe in Georgia. And, all Atlantic Sunrise project capacity was contracted for by nine shippers to transport gas from Pennsylvania for delivery to Alabama or to Pennsylvania and Virginia. While it is possible that some gas transported on the projects could be delivered to other markets on a secondary basis if capacity were available, New York Commission's injury claim depends on conjecture and hypotheticals regarding future events and the actions of third parties and, therefore, does not show the concrete and particularized injury necessary for standing.

Even assuming the State Commissions could establish an injury in fact, they have not, and cannot, show either that the injury is fairly traceable to the

challenged orders or that it likely would be redressed by a favorable decision on appeal. The State Commissions' fundamental contention on appeal is that the challenged orders, which issued in 2016 and 2017, set the recourse rates at too high a level to ensure that Transco did not have market power in 2014-2015, when Transco and the shippers negotiated the rates for service on the projects. But, those negotiations all pre-dated the underlying FERC certificate proceedings, in which the specific recourse rates were set. Regardless of their level, therefore, the specific recourse rates set in the challenged orders could not affect the already-concluded negotiations.

The Merits

The Commission's primary obligation under the Natural Gas Act is to encourage the development of plentiful supplies of natural gas at reasonable prices. The Commission satisfied that obligation, and acted consistently with precedent and Commission policy in the orders challenged here.

The recourse rates set here comply with the Commission's section 7 certificate initial recourse rates policy, since they were designed using the approved rate of return from Transco's most recent general Natural Gas Act section 4 rate case in which a return was specified.

They also satisfy the negotiated rates policy, as the necessary check on potential market power was provided here. Project shippers knew, when they

chose to take service under negotiated rates, that they could opt instead to take service under Transco's tariff recourse rates, which would initially be set in section 7 certificate proceedings. Those rates would then be subject to Natural Gas Act section 4 justness and reasonableness review in Transco's August 2018 general section 4 rate proceeding.

State Commissions are correct that the August 2018 section 4 proceeding will not change the negotiated rates, which are set by contract. Parties affected by the negotiated rates, however, are not left without redress, as they can challenge those rates under the complaint procedures of Natural Gas Act section 5, 15 U.S.C. § 717d.

The Commission is permitted to consider non-cost factors, including the need for project capacity, in setting rates. Thus, the Commission appropriately considered the fact that it would be difficult, if not impossible, to timely complete a cost-of-service evidentiary hearing in these section 7 certificate proceedings, and that attempting to do so would unnecessarily delay the needed project capacity here. Applying the section 7 initial recourse rates policy here was a proper exercise of the Commission's discretion to protect the public interest while preventing delays that can accompany full evidentiary hearings. Nonetheless, the Commission carefully scrutinized the proposed initial recourse rates, and required

Transco to recalculate the proposed rates in each proceeding where necessary to ensure that the rates set are in the public interest.

ARGUMENT

I. The State Commissions Have Not Established Standing

Under Natural Gas Act section 19(b), 15 U.S.C. § 717r(b), only parties aggrieved by an order issued by the Commission may obtain judicial review of that order. *PNGTS Shippers Grp.*, 592 F.3d at 136. Additionally, to obtain judicial review, a party must meet constitutional standing requirements by establishing: (1) that it has suffered an injury in fact, (2) that is fairly traceable to the challenged agency action, and (3) that likely will be redressed by a favorable decision. *Kan. Corp. Comm'n v. FERC*, 881 F.3d 924, 929 (D.C. Cir. 2018) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992), and *Sierra Club v. EPA*, 292 F.3d 895, 899-900 (D.C. Cir. 2002)). Where, as here, the parties challenging the government action are not the object of that action, standing is "substantially more difficult" to establish. *Lujan*, 504 U.S. at 562 (citations omitted).

As shown below, neither petitioner North Carolina Commission nor intervenor New York Commission has satisfied its burden to establish standing to challenge the orders at issue here.

A. The State Commissions Have Not Shown An Injury In Fact

An "injury in fact" is an invasion of a legally protected interest that is concrete and particularized, and actual or imminent, not conjectural or hypothetical. *N.Y. Reg'l Interconnect, Inc. v. FERC*, 634 F.3d 581, 586 (D.C. Cir. 2011) (citing *Lujan*, 504 U.S. at 560). "An injury is particularized if it 'affect[s] the [petitioner or intervenor] in a personal, individualized way.'" *Id.* (citing *Lujan*, 504 U.S. at 560 n.1).

Petitioner North Carolina Commission explains that "[i]ts sphere of interest includes the rates that North Carolina public utilities, including local distribution companies, pay to interstate natural gas pipelines because those costs are passed on to North Carolina consumers." Br. 27 (citing N.C. Gen. Stat. §§ 62-32, 62-36.01, 62-133.4). North Carolina Commission argues that it has suffered an injury in fact from the challenged orders on two bases, neither of which stands.

First, North Carolina Commission asserts that it has standing because some project facilities will be constructed in North Carolina and some project services will be provided over facilities located in North Carolina. Br. 30-31. North Carolina Commission does not claim, and cannot show, that construction of and service over facilities in North Carolina, in and of themselves, will affect North Carolina consumers' rates, the matter North Carolina Commission states is within its sphere of interest (Br. 27). Without that showing, North Carolina

Commission's interest in the challenged orders is merely a general interest in the proper application of the laws that cannot establish the concrete and particularized injury required for standing. *See, e.g.*, *Kan. Corp. Comm'n*, 881 F.3d at 929-30 (citing *Lujan*, 504 U.S. 573-74); *United Airlines, Inc. v. FERC*, No. 16-1245, slip op. at 3 (D.C. Cir. July 17, 2018) (unpublished).

Perhaps recognizing this infirmity, North Carolina Commission attempts to connect its second standing claim -- which relates only to the Atlantic Sunrise project -- to North Carolina consumer rates. North Carolina Commission theorizes that it has standing to challenge the Atlantic Sunrise orders because: "the vast majority of Atlantic Sunrise Project's capacity has been contracted by marketers and exploration and production companies, who will **presumably** market their gas to the highest value available market;" "the Atlantic Sunrise Project will serve markets from Zone 6 (which, *inter alia*, serves New York) to interconnections with pipelines serving Florida markets;" and "[t]hus, it can only be **assumed** that ratepayers from New York to Florida will either directly or indirectly use the facilities certificated in, and thus pay the rates approved in [the Atlantic Sunrise proceeding]." Br. 31 (emphases added). This claim, which depends on presumptions and assumptions about future events and the actions of third parties, is conjectural and hypothetical, not the concrete and particularized injury necessary to establish standing. *See, e.g.*, *Kan. Corp. Comm'n*, 881 F.3d at 930 ("We are

usual[ly] reluctan[t] to endorse standing theories that rest on speculation about the decisions of independent actors") (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 (2013)) (alterations by Court); *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 913 (D.C. Cir. 2015) ("when considering any chain of allegations for standing purposes, we may reject as overly speculative those links which are predictions of future events (especially future actions taken by third parties")) (internal quotation omitted); *United Airlines*, No. 16-1245, slip op. at 3 ("'allegations of *possible* future injury are not sufficient'") (quoting *Clapper*, 568 U.S. at 409).

North Carolina Commission points out that states are entitled to special solicitude in the standing analysis. Br. 32 (citing *Mass. v. EPA*, 549 U.S. 497, 520 (2007)). As this Court has explained, however, "[t]his special solicitude does not eliminate the state petitioner's obligation to establish a concrete injury, as [*Massachusetts*] amply indicates." *Del. Dep't of Nat. Res. & Envtl. Control v. FERC*, 558 F.3d 575, 579 n.6 (D.C. Cir. 2009) (citing *Mass.*, 549 U.S. at 521). *See also Kan. Corp. Comm'n*, 881 F.3d at 929 (finding that state agency did "not have standing because it lacks the necessary injury in fact").

North Carolina Commission also cites to Judge Brown's concurring opinion in *Arpaio v. Obama*, 797 F.3d 11, 27 (D.C. Cir. 2015), in support of its claim for special solicitude. N.C. Br. 32-33 n.119. That opinion, however, also recognizes

that *Massachusetts* found standing only after the state established that it had suffered an injury in fact. *Arpaio*, 797 F.3d at 27 (citing *Mass.*, 549 U.S. at 526).

Intervenor New York Commission explains that it "is charged with ensuring that retail gas rates charged by gas utilities under its jurisdiction are just and reasonable." Br. 17 (citing N.Y Pub. Serv. Law §§ 65(1) and (2), 66(5)). The New York Commission contends that it has standing to challenge the orders here because the projects will provide transportation from Transco's rate Zone 6 (which has interconnections to lines providing service to New York City) to Transco's Station 85 in Alabama, and will provide for new or replacement facilities in Pennsylvania, Maryland, Virginia, North Carolina, and South Carolina. Br. 20. New York Commission argues that "the service provided by Transco, including its expansion projects, has a direct impact on New York State and its end users [because]: (1) recourse rates used by the expansion project influenced the negotiated rate accepted by shippers to the New York market, or (2) shippers to New York accepted the recourse rate accepted by FERC." *Id.*

New York Commission's injury claim is premised on the notion that the projects' capacity will be used to ship gas to New York for sale and consumption. The record shows, however, that this notion is purely speculative:

- All Virginia Southside project capacity will be used to transport gas from Transco's Zone 6 in Mercer County, New Jersey and Zone 5 in Pittsylvania County, Virginia, for delivery to Virginia Power in Greensville County, Virginia. Virginia Southside Application,

Transmittal Letter at 2-4, JA 158-60; Virginia Southside Certificate Order P 4, JA 185.

- All Dalton project capacity will be used to transport gas from Transco's Zone 6 in Mercer County, New Jersey, for delivery to an interconnection with Gulf South Pipeline Company, LP, in Pike County, Mississippi, and to interconnections in northwest Georgia for ultimate delivery to Atlanta Gas and Oglethorpe in Georgia. Dalton Application, Transmittal Letter at 1-4, JA 4-7; Dalton Certificate Order P 4, JA 82.

- All Atlantic Sunrise project capacity was contracted for by nine shippers (*see supra* n.3, listing the shippers). Eight shippers contracted for capacity to transport gas from Transco's rate Zone 6 in northern Pennsylvania for delivery to its Station 85 in Alabama. The other shipper contracted for capacity to transport gas from Transco's rate Zone 6 in northern Pennsylvania for delivery in Pennsylvania and Virginia. Atlantic Sunrise Application, Transmittal Letter at 3, 9-10, JA 221, 227-28; Atlantic Sunrise Certificate Order PP 10-11, JA 288.

While it is possible that some gas transported on the projects could be delivered to other markets on a secondary basis if capacity were available, New York Commission's claim that project capacity will be used to ship gas for sale and consumption in New York depends on conjecture and hypotheticals regarding future events and the actions of third parties and, therefore, does not show the concrete and particularized injury necessary for standing. *See, e.g., Kan. Corp. Comm'n*, 881 F.3d at 930; *Food & Water Watch*, 808 F.3d at 913.

B. The State Commissions Have Not Shown That Their Alleged Injury Is Fairly Traceable To The Challenged Orders Or That It Likely Will Be Redressed By A Favorable Decision

Even assuming the State Commissions have established an injury in fact, they have not, and cannot, show either that the injury is fairly traceable to the

challenged orders or that it likely would be redressed by a favorable decision on appeal. The traceability prong requires "a causal connection between the injury and the agency action complained of . . . ." *New England Power Generators Ass'n v. FERC*, 707 F.3d 364, 368 (D.C. Cir. 2013). The redressability prong "examines whether the relief sought, assuming that the court chooses to grant it, will likely alleviate the particularized injury alleged by the [petitioner or intervenor]." *Orangeburg, S.C. v. FERC*, 862 F.3d 1071, 1083 (D.C. Cir. 2017).

The State Commissions' fundamental contention on appeal is that the challenged orders, which issued in 2016 and 2017, set the recourse rates at too high a level to ensure that Transco did not have market power in 2014-2015, when Transco and the shippers negotiated the rates for service on the projects. *See* North Carolina Commission Br. 7, 8, 9, 17, 26, 30, 34, 35, 37, 42-43, 48-50, 52, 53, 55, 57; New York Commission Br. 3-4, 7, 11, 12, 23, 27. But, those negotiations all pre-dated the underlying FERC certificate proceedings, in which the specific recourse rates were set. *See* Virginia Southside Application, Transmittal Letter at 5, 7, 8, JA 161, 163, 164 (explaining that the negotiated rates already had been agreed to in binding precedent agreements); Dalton Application, Transmittal Letter at 4, 9-10, JA 7, 12-13 (same); Atlantic Sunrise Application, Transmittal Letter at 4, 9-11, JA 222, 227-29 (same). Regardless of their level, the specific recourse

rates set in the challenged orders could not affect the already-concluded negotiations.

Thus, the negotiated rates agreed to in the precedent agreements are not traceable to the specific recourse rates set in the challenged orders. Likewise, even if the Court were to grant State Commissions the relief they seek, i.e., a resetting of the recourse rates set in the challenged orders, doing so would not change the previously agreed to negotiated rates. *See, e.g.*, *United Airlines*, No. 16-1245, slip op. at 3 (breach of settlement agreement could not be redressed by a favorable decision because petitioners sought specific performance of settlement agreement that had expired).

C. The Challenged Orders Did Not Approve The Negotiated Rates

As part of its standing claim, North Carolina Commission asserts that the challenged orders approved not only the initial recourse rates, but also the negotiated rates. Br. 32. The challenged orders, however, did not approve the negotiated rates.

Rather, the challenged orders simply noted that project shippers had elected to enter into negotiated rate agreements for their capacity, and directed Transco to file either the negotiated rate agreements or tariff sheets setting forth their essential terms at least 30 days, but not more than 60 days, before their proposed effective dates. Atlantic Sunrise Certificate Order P 47 & n.78, JA 304; Virginia Southside

Certificate Order P 32 & n.42, JA 197; Dalton Certificate Order P 35 & n.40, JA 94; *see also* 18 C.F.R. § 154.112 (b) (agreements "that deviate in any material aspect from the form of service agreement must be filed" with the Commission and "referenced in the open access transmission tariff"). The Commission also cited to its 2003 Policy Modification Rehearing Order, 114 FERC ¶ 61,042, which (at P 10) states that negotiated rate filings will be noticed for public comment, and that all interested parties will have an opportunity to raise whatever concerns they have regarding the agreement. Atlantic Sunrise Certificate Order n.78, JA 305.

II. Standard Of Review

Assuming jurisdiction, the Commission's determinations are reviewed under the Administrative Procedure Act's "arbitrary and capricious" standard. 5 U.S.C. § 706(2)(A). Review under this standard is narrow. *FERC v. Elec. Power Supply Ass'n*, 136 S.Ct. 760, 782 (2016). "A court is not to ask whether a regulatory decision is the best one possible or even whether it is better than the alternatives." *Id.* Rather, the court must uphold the Commission's determination "if the agency has examine[d] the relevant [considerations] and articulated a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made." *Id.* (internal quotation omitted; alterations by Court); *see also Aera Energy LLC v. FERC*, 789 F.3d 184, 190 (D.C. Cir. 2015).

The Court's review of the Commission's rate determinations "is particularly deferential because such matters are either fairly technical or involve policy judgments that lie at the core of the regulatory mission." *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 54-55 (D.C. Cir. 2014) (internal quotation omitted). Moreover, since the grant or denial of a certificate of public convenience and necessity is "peculiarly within the discretion of the Commission," the Court does not "substitute its judgment for that of the Commission." *Myersville*, 783 F.3d at 1308 (internal quotation omitted). Likewise, the Court gives "substantial deference" to the Commission's interpretation of its own precedent. *NRG Power Mktg., LLC v. FERC*, 718 F.3d 947, 953, 957 (D.C. Cir. 2013).

The Commission's factual findings are conclusive if supported by substantial evidence. *Minisink Residents for Envtl. Pres. & Safety v. FERC*, 762 F.3d 97, 108 (D.C. Cir. 2014). Substantial evidence "requires more than a scintilla, but can be satisfied by something less than a preponderance of evidence." *Id.* (internal quotation omitted).

III. The Challenged Orders Appropriately Set The Initial Recourse Rates Here Consistent With Precedent And Commission Policy

The Commission appropriately set the initial recourse tariff rates here. They comply with the Commission's section 7 certificate initial recourse rates policy, since they were designed using the approved rate of return from Transco's most recent general Natural Gas Act section 4 rate case in which a return was specified.

Virginia Southside Certificate Order P 23, JA 192-93; Dalton Certificate Order P 26, JA 89-91; Atlantic Sunrise Certificate Order P 38, JA 300-01. The State Commissions do not contest this.

The negotiated rates policy was satisfied as well, since all shippers had the option to instead take capacity at the tariff recourse rate. *See* Virginia Southside Certificate Order n.5 and P 23, JA 186, 192; Virginia Southside Application, Transmittal Letter at 8, JA 164; Dalton Certificate Order PP 6, 22, 26, JA 82, 87, 89-91; Dalton Application, Transmittal Letter at 10, JA 13; Atlantic Sunrise Certificate Order PP 12, 38, JA 289, 300; Atlantic Sunrise Application, Transmittal Letter at 11, JA 229. The State Commissions do not contest that all shippers had this tariff rate alternative to negotiated rates.

The State Commissions contend, however, that the challenged orders did not comply with the negotiated rates policy because the specific initial recourse rates set in the 2016 and 2017 challenged orders are too high to serve as a necessary check on potential Transco market power two years earlier -- in 2014 and 2015-- when Transco and project shippers negotiated their rates. N.C. Comm'n Br. 34, 35, 37, 42-43, 48, 49, 50, 52, 53, 55, 57; N.Y. Comm'n Br. 23, 27. But the necessary check on potential market power was provided here. Project shippers knew, when they chose to take service under negotiated rates, that they could opt instead to take service under Transco's tariff recourse rates, which initially would

be set in Natural Gas Act section 7 certificate proceedings and would then be subject to Natural Gas Act section 4 justness and reasonableness review in Transco's August 2018 general section 4 rate proceeding. *See* Virginia Southside Certificate Order n.5 and PP 23-25, JA 186, 192-94; Virginia Southside Application, Transmittal Letter at 8, JA 164; Dalton Certificate Order PP 6, 22, 26-28, JA 82, 87, 89-92; Dalton Application, Transmittal Letter at 10, JA 13; Atlantic Sunrise Certificate Order PP 12, 38-40, JA 289, 300-02; Atlantic Sunrise Application, Transmittal Letter at 11, JA 229. *See also* Virginia Southside Certificate Order P 25, JA 194 (citing *Transcontinental Gas Pipe Line Co., LLC*, 144 FERC ¶ 63,029 P 18 (2013) (settlement order explaining that Transco is required to file a general Natural Gas Act section 4 rate case in August 2018)); Dalton Certificate Order P 28, JA 92 (same); Atlantic Sunrise Certificate Order P 40, JA 302 (same).

The State Commissions assert that the Commission cannot rely on *Atlantic Ref. Co. v. Pub. Serv. Comm'n of N.Y.*, 360 U.S. 378 (1959), because it issued before the Commission permitted negotiated rates, and Transco's August 2018 section 4 proceeding will not affect the negotiated rates here. N.C. Comm'n Br. 49-53; N.Y. Comm'n Br. 26-32. As this Court has explained, however, those affected by negotiated rates "are not left without redress if they think the rate has become unjust over time. They can always challenge an established rate under

section 5 of the [Natural Gas Act, 15 U.S.C. § 717d] on the ground that the rate is unjust, unreasonable, unduly discriminatory, or preferential." *Iberdrola Renewables, Inc. v. FERC*, 597 F.3d 1299, 1301 (D.C. Cir. 2010). Thus, the State Commissions are able to challenge any negotiated rates the Commission accepts that affect rates paid by consumers in their states under Natural Gas Act section 5. *See also supra* p. 5 (citing cases explaining that Natural Gas Act section 7 initial tariff rates temporarily protect the public interest until the Natural Gas Act's regular rate setting mechanisms, sections 4 and 5, which apply a more exacting just and reasonable standard, come into play after a project is certificated and moving natural gas in interstate commerce).[4]

State Commissions also claim that "ratepayer protection is FERC's primary obligation under the [Natural Gas Act]." N.C. Comm'n Br. 55; *see also id.* at 35, 42, 54; N.Y. Comm'n Br. 21, 29-36. In fact, however, the Commission's primary obligation under the Natural Gas Act is to "encourag[e] the orderly development of plentiful supplies of . . . natural gas at reasonable prices." *Myersville*, 783 F.3d at

[4] New York Commission expresses concern that addressing Transco's recourse rates in the upcoming Natural Gas Act section 4 rate proceeding "will be a purely academic exercise" because all project capacity here is contracted for at negotiated rates. Br. 27. That is not correct. As the Commission explained, the rate of return established in the section 4 proceeding will be used in calculating initial recourse rates in subsequent Transco section 7 certificate proceedings. Virginia Southside Certificate Order PP 25-26, JA 194-95; Dalton Certificate Order PP 28-29, JA 92-93; Atlantic Sunrise Certificate Order PP 40-41, JA 302-03.

1307 (quoting *NAACP*, 425 U.S. at 669-70); *see also United Distrib. Cos. v. FERC*, 88 F.3d 1105, 1144 (D.C. Cir. 1996) ("implicit in th[e] consumer protection mandate [of Natural Gas Act §§ 4 and 7(e)] is a duty to assure that consumers . . . have continuous access to needed supplies of natural gas;" "This duty arises because [n]o single factor in the Commission's duty to protect the public can be more important to the public than the continuity of service provided.") (internal quotation omitted; bracketed alterations by Court)); *Tejas Power Corp. v. FERC*, 908 F.2d 998, 1003 (D.C. Cir. 1990) ("the public interest that the Commission must protect always includes the interest of consumers in having access to an adequate supply of gas at a reasonable price"). To accomplish this, in setting rates the Commission may consider non-cost factors, including the need for project capacity, as well as cost factors. *Pub. Utils. Comm'n of Cal. v. FERC*, 367 F.3d 925, 929 (D.C. Cir. 2004) (citing *Permian Basin Area Rate Cases*, 390 U.S. 747, 791 (1968)); *see also Consol. Edison Co. of N.Y. v. FERC*, 315 F.3d 316, 325 (D.C. Cir. 2003) (FERC appropriately may consider administrative convenience in determining whether to apply policy in Natural Gas Act proceeding).

Accordingly, the Commission appropriately considered the fact that it would be difficult, if not impossible, to timely complete a discounted cash flow analysis evidentiary hearing, as requested by the State Commissions, in these section 7 certificate proceedings, and that attempting to do so would unnecessarily delay the

needed project capacity here.[5] Virginia Southside Certificate Order P 24, JA 193-94; Dalton Certificate Order P 27, JA 91-92; Atlantic Sunrise Certificate Order P 39, JA 301-02. *See also* Virginia Southside Certificate Order n.28, JA 193 (citing *Atlantic Ref.*, 360 U.S. at 390) (noting the "inordinate delay" associated with full evidentiary rate hearings); Virginia Southside Rehearing Order P 6, JA 215 (same); Dalton Certificate Order n.30, JA 91 (same); Atlantic Sunrise Certificate Order n.64, JA 301-02 (same). As the Commission explained, applying its initial recourse rates policy here was a proper exercise of the Commission's discretion to protect the public interest while preventing delays that can accompany full evidentiary hearings. Virginia Southside Certificate Order P 25, JA 194; Virginia Southside Rehearing Order P 6, JA 215; Dalton Certificate Order P 29, JA 92; Dalton Rehearing Order P 7, JA 152-53; Atlantic Sunrise Certificate Order P 41, JA 302-03; Atlantic Sunrise Rehearing Order 19, JA 425.

Next, State Commissions assert that the challenged orders are contrary to court precedent they say requires returns on equity to be based on current capital market conditions. N.C. Comm'n Br. 35-36, 56-57; N.Y. Comm'n Br. 23-26, 30. None of the cited precedent, however, involved the circumstances here -- setting

[5] *See, e.g., Boston Edison Co. v. FERC*, 885 F.2d 962, 965 (1st Cir. 1989) (Breyer, J.) (explaining the complicated discounted cash flow method of establishing cost-based rates).

initial recourse rates in Natural Gas Act section 7 proceedings, and the Commission's discretion in those proceedings to protect the public interest while preventing the delays that can accompany full evidentiary rate proceedings. *See FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944) (involving a Natural Gas Act section 5 proceeding); *Bluefield Waterworks & Improvement Co. v. Pub. Serv. Comm'n of W. Va.*, 262 U.S. 679 (1923) (involving state agency rate setting); *Farmers Union Cent. Exch.v. FERC*, 584 F.2d 408 (D.C. Cir. 1978) (involving an Interstate Commerce Act proceeding); *Midwest Indep. Transmission Sys. Operator*, 141 FERC ¶ 63,021 (2012), *aff'd in part*, 156 FERC ¶ 61,202 (2016) (involving a Natural Gas Act section 5 proceeding); *Cranberry Pipeline Corp.*, 112 FERC ¶ 61,268 (2005) (involving a Natural Gas Act Policy Act of 1978 section 311, 15 U.S.C. § 3371, proceeding).

North Carolina Commission argues that the Commission should have conducted a full discounted cash flow evidentiary hearing here because it did so in *WestGas InterState, Inc.*, 59 FERC ¶ 61,029, 61,065 (1992). In that case, however, unlike here, the project proponent was not yet a natural gas company and did not have a previously-approved rate of return to use in the Natural Gas Act section 7 certificate proceeding. *See WestGas*, 59 FERC at 61,063.

North Carolina Commission also argues, for the first time, that the Commission could have used means other than a full discounted cash flow analysis

to determine a rate of return here, as it purportedly did in a recent notice of proposed rulemaking, *Interstate and Intrastate Natural Gas Pipelines; Rate Changes Relating to Federal Income Tax Rate*, 162 FERC ¶ 61,226 (2018) ("Notice"). Br. 54. That Notice, however, did not determine rates of return. Rather, it proposed a procedure to obtain informational filings to allow the Commission and interested parties to decide whether to initiate Natural Gas Act section 5 proceedings to decrease pipelines' rates in light of recent income tax law and policy changes. Notice, 162 FERC ¶ 61,226 PP 1-3, 32-34.[6] North Carolina Commission does not explain how a procedure like that proposed in the Notice could have been used to set initial recourse rates here.

New York Commission claims that the Commission did not carefully scrutinize the proposed initial recourse rates. N.Y. Comm'n Br. 35-36. To the contrary, the record shows that the Commission carefully scrutinized the proposed initial recourse rates, and required Transco to recalculate the proposed rates in each proceeding to ensure that the levels at which they were set are in the public interest. *See* Virginia Southside Certificate Order PP 27-31, JA 195-97; Dalton

[6] The Commission has since issued a final rule on this matter, *Interstate and Intrastate Natural Gas Pipelines; Rate Changes Relating to Federal Income Tax Rate*, 164 FERC ¶ 61,031 (2018).

Certificate Order PP 30-34, JA 93-94; Atlantic Sunrise Certificate Order PP 42-46, JA 303-04.

CONCLUSION

For the foregoing reasons, if not dismissed for lack of jurisdiction, the petitions for review should be denied.

Respectfully submitted,

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September 4, 2018

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g) and Circuit Rule 32(e), I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 8,787 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

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

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September 4, 2018

ADDENDUM

STATUTES
AND
REGULATIONS

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STATUTES: **PAGE**

REGULATION:

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

AMENDMENTS

1976—Pub. L. 94–574 provided that if no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer as defendant.

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(c).	June 11, 1946, ch. 324, §10(c), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

§ 705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(d).	June 11, 1946, ch. 324, §10(d), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(e).	June 11, 1946, ch. 324, §10(e), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

ABBREVIATION OF RECORD

Pub. L. 85–791, Aug. 28, 1958, 72 Stat. 941, which authorized abbreviation of record on review or enforcement of orders of administrative agencies and review on the original papers, provided, in section 35 thereof, that: ''This Act [see Tables for classification] shall not be construed to repeal or modify any provision of the Administrative Procedure Act [see Short Title note set out preceding section 551 of this title].''

CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

§ 801. Congressional review

(a)(1)(A) Before a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report containing—

(i) a copy of the rule;

(ii) a concise general statement relating to the rule, including whether it is a major rule; and

(iii) the proposed effective date of the rule.

(B) On the date of the submission of the report under subparagraph (A), the Federal agency pro-

§ 715*l*. Repealed. June 22, 1942, ch. 436, 56 Stat. 381

Section, acts Feb. 22, 1935, ch. 18, § 13, 49 Stat. 33; June 14, 1937, ch. 335, 50 Stat. 257; June 29, 1939, ch. 250, 53 Stat. 927, provided for expiration of this chapter on June 30, 1942.

§ 715m. Cooperation between Secretary of the Interior and Federal and State authorities

The Secretary of the Interior, in carrying out this chapter, is authorized to cooperate with Federal and State authorities.

(June 25, 1946, ch. 472, § 3, 60 Stat. 307.)

CODIFICATION

Section was not enacted as a part act Feb. 22, 1935, which comprises this chapter.

DELEGATION OF FUNCTIONS

Delegation of President's authority to Secretary of the Interior, see note set out under section 715j of this title.

CHAPTER 15B—NATURAL GAS

Sec.

§ 717. Regulation of natural gas companies

(a) Necessity of regulation in public interest

As disclosed in reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) Transactions to which provisions of chapter applicable

The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, and to the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

(c) Intrastate transactions exempt from provisions of chapter; certification from State commission as conclusive evidence

The provisions of this chapter shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this chapter by this subsection are declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction.

(d) Vehicular natural gas jurisdiction

The provisions of this chapter shall not apply to any person solely by reason of, or with respect to, any sale or transportation of vehicular natural gas if such person is—

(1) not otherwise a natural-gas company; or

(2) subject primarily to regulation by a State commission, whether or not such State commission has, or is exercising, jurisdiction over the sale, sale for resale, or transportation of vehicular natural gas.

(June 21, 1938, ch. 556, § 1, 52 Stat. 821; Mar. 27, 1954, ch. 115, 68 Stat. 36; Pub. L. 102–486, title IV, § 404(a)(1), Oct. 24, 1992, 106 Stat. 2879; Pub. L. 109–58, title III, § 311(a), Aug. 8, 2005, 119 Stat. 685.)

AMENDMENTS

2005—Subsec. (b). Pub. L. 109–58 inserted ''and to the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation,'' after ''such transportation or sale,''.

1992—Subsec. (d). Pub. L. 102–486 added subsec. (d).

(6) the need to encourage remote siting.

(c) Advisory report

The State agency may furnish an advisory report on State and local safety considerations to the Commission with respect to an application no later than 30 days after the application was filed with the Commission. Before issuing an order authorizing an applicant to site, construct, expand, or operate an LNG terminal, the Commission shall review and respond specifically to the issues raised by the State agency described in subsection (b) in the advisory report. This subsection shall apply to any application filed after August 8, 2005. A State agency has 30 days after August 8, 2005 to file an advisory report related to any applications pending at the Commission as of August 8, 2005.

(d) Inspections

The State commission of the State in which an LNG terminal is located may, after the terminal is operational, conduct safety inspections in conformance with Federal regulations and guidelines with respect to the LNG terminal upon written notice to the Commission. The State commission may notify the Commission of any alleged safety violations. The Commission shall transmit information regarding such allegations to the appropriate Federal agency, which shall take appropriate action and notify the State commission.

(e) Emergency Response Plan

(1) In any order authorizing an LNG terminal the Commission shall require the LNG terminal operator to develop an Emergency Response Plan. The Emergency Response Plan shall be prepared in consultation with the United States Coast Guard and State and local agencies and be approved by the Commission prior to any final approval to begin construction. The Plan shall include a cost-sharing plan.

(2) A cost-sharing plan developed under paragraph (1) shall include a description of any direct cost reimbursements that the applicant agrees to provide to any State and local agencies with responsibility for security and safety—

(A) at the LNG terminal; and

(B) in proximity to vessels that serve the facility.

(June 21, 1938, ch. 556, §3A, as added Pub. L. 109–58, title III, §311(d), Aug. 8, 2005, 119 Stat. 687.)

REFERENCES IN TEXT

The National Environmental Policy Act of 1969, referred to in subsec. (a), is Pub. L. 91–190, Jan. 1, 1970, 83 Stat. 852, as amended, which is classified generally to chapter 55 (§4321 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 4321 of Title 42 and Tables.

§ 717c. Rates and charges

(a) Just and reasonable rates and charges

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

(b) Undue preferences and unreasonable rates and charges prohibited

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

(c) Filing of rates and charges with Commission; public inspection of schedules

Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from June 21, 1938) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Changes in rates and charges; notice to Commission

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

(e) Authority of Commission to hold hearings concerning new schedule of rates

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such

schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

(f) Storage services

(1) In exercising its authority under this chapter or the Natural Gas Policy Act of 1978 (15 U.S.C. 3301 et seq.), the Commission may authorize a natural gas company (or any person that will be a natural gas company on completion of any proposed construction) to provide storage and storage-related services at market-based rates for new storage capacity related to a specific facility placed in service after August 8, 2005, notwithstanding the fact that the company is unable to demonstrate that the company lacks market power, if the Commission determines that—

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

(B) customers are adequately protected.

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

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

(June 21, 1938, ch. 556, § 4, 52 Stat. 822; Pub. L. 87–454, May 21, 1962, 76 Stat. 72; Pub. L. 109–58, title III, § 312, Aug. 8, 2005, 119 Stat. 688.)

REFERENCES IN TEXT

The Natural Gas Policy Act of 1978, referred to in subsec. (f)(1), is Pub. L. 95–621, Nov. 9, 1978, 92 Stat. 3350, as amended, which is classified generally to chapter 60 (§ 3301 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 3301 of this title and Tables.

AMENDMENTS

2005—Subsec. (f). Pub. L. 109–58 added subsec. (f).

1962—Subsec. (e). Pub. L. 87–454 inserted ''or gas distributing company'' after ''State commission'', and struck out proviso which denied authority to the Commission to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only.

ADVANCE RECOVERY OF EXPENSES INCURRED BY NATURAL GAS COMPANIES FOR NATURAL GAS RESEARCH, DEVELOPMENT, AND DEMONSTRATION PROJECTS

Pub. L. 102–104, title III, Aug. 17, 1991, 105 Stat. 531, authorized Federal Energy Regulatory Commission, pursuant to this section, to allow recovery, in advance, of expenses by natural-gas companies for research, development and demonstration activities by Gas Research Institute for projects on use of natural gas in motor vehicles and on use of natural gas to control emissions from combustion of other fuels, subject to Commission finding that benefits, including environmental benefits, to both existing and future ratepayers resulting from such activities exceed all direct costs to both existing and future ratepayers, prior to repeal by Pub. L. 102–486, title IV, § 408(c), Oct. 24, 1992, 106 Stat. 2882.

§ 717c–1. Prohibition on market manipulation

It shall be unlawful for any entity, directly or indirectly, to use or employ, in connection with the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance (as those terms are used in section 78j(b) of this title) in contravention of such rules and regulations as the Commission may prescribe as necessary in the public interest or for the protection of natural gas ratepayers. Nothing in this section shall be construed to create a private right of action.

(June 21, 1938, ch. 556, § 4A, as added Pub. L. 109–58, title III, § 315, Aug. 8, 2005, 119 Stat. 691.)

§ 717d. Fixing rates and charges; determination of cost of production or transportation

(a) Decreases in rates

Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however*, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance

with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) Costs of production and transportation

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

(June 21, 1938, ch. 556, § 5, 52 Stat. 823.)

§ 717e. Ascertainment of cost of property

(a) Cost of property

The Commission may investigate and ascertain the actual legitimate cost of the property of every natural-gas company, the depreciation therein, and, when found necessary for rate-making purposes, other facts which bear on the determination of such cost or depreciation and the fair value of such property.

(b) Inventory of property; statements of costs

Every natural-gas company upon request shall file with the Commission an inventory of all or any part of its property and a statement of the original cost thereof, and shall keep the Commission informed regarding the cost of all additions, betterments, extensions, and new construction.

(June 21, 1938, ch. 556, § 6, 52 Stat. 824.)

§ 717f. Construction, extension, or abandonment of facilities

(a) Extension or improvement of facilities on order of court; notice and hearing

Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) Abandonment of facilities or services; approval of Commission

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

(c) Certificate of public convenience and necessity

(1)(A) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however*, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

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

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

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

(B) natural gas produced by such person.

(d) Application for certificate of public convenience and necessity

Application for certificates shall be made in writing to the Commission, be verified under

oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require.

(e) Granting of certificate of public convenience and necessity

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

(f) Determination of service area; jurisdiction of transportation to ultimate consumers

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

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

(g) Certificate of public convenience and necessity for service of area already being served

Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company.

(h) Right of eminent domain for construction of pipelines, etc.

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

(June 21, 1938, ch. 556, §7, 52 Stat. 824; Feb. 7, 1942, ch. 49, 56 Stat. 83; July 25, 1947, ch. 333, 61 Stat. 459; Pub. L. 95–617, title VI, §608, Nov. 9, 1978, 92 Stat. 3173; Pub. L. 100–474, §2, Oct. 6, 1988, 102 Stat. 2302.)

AMENDMENTS

1988—Subsec. (f). Pub. L. 100–474 designated existing provisions as par. (1) and added par. (2).

1978—Subsec. (c). Pub. L. 95–617, §608(a), (b)(1), designated existing first paragraph as par. (1)(A) and existing second paragraph as par. (1)(B) and added par. (2).

Subsec. (e). Pub. L. 95–617, §608(b)(2), substituted ''subsection (c)(1)'' for ''subsection (c)''.

1947—Subsec. (h). Act July 25, 1947, added subsec. (h).

1942—Subsecs. (c) to (g). Act Feb. 7, 1942, struck out subsec. (c), and added new subsecs. (c) to (g).

EFFECTIVE DATE OF 1988 AMENDMENT

Pub. L. 100–474, §3, Oct. 6, 1988, 102 Stat. 2302, provided that: ''The provisions of this Act [amending this section and enacting provisions set out as a note under section 717w of this title] shall become effective one hundred and twenty days after the date of enactment [Oct. 6, 1988].''

TRANSFER OF FUNCTIONS

Enforcement functions of Secretary or other official in Department of Energy and Commission, Commissioners, or other official in Federal Energy Regulatory Commission related to compliance with certificates of public convenience and necessity issued under this section with respect to pre-construction, construction, and initial operation of transportation system for Canadian and Alaskan natural gas transferred to Federal Inspector, Office of Federal Inspector for Alaska Natural Gas Transportation System, until first anniversary of date of initial operation of Alaska Natural Gas Transportation System, see Reorg. Plan No. 1 of 1979, §§102(d), 203(a), 44 F.R. 33663, 33666, 93 Stat. 1373, 1376, effective July 1, 1979, set out under section 719e of this title. Office of Federal Inspector for the Alaska Natural Gas Transportation System abolished and functions and authority vested in Inspector transferred to Secretary of Energy by section 3012(b) of Pub. L. 102–486, set out as an Abolition of Office of Federal Inspector note under section 719e of this title. Functions and authority vested in Secretary of Energy subsequently transferred to Federal Coordinator for Alaska Natural Gas Transportation Projects by section 720d(f) of this title.

§ 717g. Accounts; records; memoranda

(a) Rules and regulations for keeping and preserving accounts, records, etc.

Every natural-gas company shall make, keep, and preserve for such periods, such accounts, records of cost-accounting procedures, correspondence, memoranda, papers, books, and

each of the States affected or to be affected by such matter. Any such board shall be vested with the same power and be subject to the same duties and liabilities as in the case of a member of the Commission when designated by the Commission to hold any hearings. The action of such board shall have such force and effect and its proceedings shall be conducted in such manner as the Commission shall by regulations prescribe. The Board shall be appointed by the Commission from persons nominated by the State commission of each State affected, or by the Governor of such State if there is no State commission. Each State affected shall be entitled to the same number of representatives on the board unless the nominating power of such State waives such right. The Commission shall have discretion to reject the nominee from any State, but shall thereupon invite a new nomination from that State. The members of a board shall receive such allowances for expenses as the Commission shall provide. The Commission may, when in its discretion sufficient reason exists therefor, revoke any reference to such a board.

(b) Conference with State commissions regarding rate structure, costs, etc.

The Commission may confer with any State commission regarding rate structures, costs, accounts, charges, practices, classifications, and regulations of natural-gas companies; and the Commission is authorized, under such rules and regulations as it shall prescribe, to hold joint hearings with any State commission in connection with any matter with respect to which the Commission is authorized to act. The Commission is authorized in the administration of this chapter to avail itself of such cooperation, services, records, and facilities as may be afforded by any State commission.

(c) Information and reports available to State commissions

The Commission shall make available to the several State commissions such information and reports as may be of assistance in State regulation of natural-gas companies. Whenever the Commission can do so without prejudice to the efficient and proper conduct of its affairs, it may, upon request from a State commission, make available to such State commission as witnesses any of its trained rate, valuation, or other experts, subject to reimbursement of the compensation and traveling expenses of such witnesses. All sums collected hereunder shall be credited to the appropriation from which the amounts were expended in carrying out the provisions of this subsection.

(June 21, 1938, ch. 556, §17, 52 Stat. 830.)

§ 717q. Appointment of officers and employees

The Commission is authorized to appoint and fix the compensation of such officers, attorneys, examiners, and experts as may be necessary for carrying out its functions under this chapter; and the Commission may, subject to civil-service laws, appoint such other officers and employees as are necessary for carrying out such functions and fix their salaries in accordance with chapter 51 and subchapter III of chapter 53 of title 5.

(June 21, 1938, ch. 556, §18, 52 Stat. 831; Oct. 28, 1949, ch. 782, title XI, §1106(a), 63 Stat. 972.)

CODIFICATION

Provisions that authorized the Commission to appoint and fix the compensation of such officers, attorneys, examiners, and experts as may be necessary for carrying out its functions under this chapter ''without regard to the provisions of other laws applicable to the employment and compensation of officers and employees of the United States'' are omitted as obsolete and superseded.

As to the compensation of such personnel, sections 1202 and 1204 of the Classification Act of 1949, 63 Stat. 972, 973, repealed the Classification Act of 1923 and all other laws or parts of laws inconsistent with the 1949 Act. The Classification Act of 1949 was repealed by Pub. L. 89–554, Sept. 6, 1966, §8(a), 80 Stat. 632, and reenacted as chapter 51 and subchapter III of chapter 53 of Title 5, Government Organization and Employees. Section 5102 of Title 5 contains the applicability provisions of the 1949 Act, and section 5103 of Title 5 authorizes the Office of Personnel Management to determine the applicability to specific positions and employees.

Such appointments are now subject to the civil service laws unless specifically excepted by those laws or by laws enacted subsequent to Executive Order 8743, Apr. 23, 1941, issued by the President pursuant to the Act of Nov. 26, 1940, ch. 919, title I, §1, 54 Stat. 1211, which covered most excepted positions into the classified (competitive) civil service. The Order is set out as a note under section 3301 of Title 5.

''Chapter 51 and subchapter III of chapter 53 of title 5'' substituted in text for ''the Classification Act of 1949, as amended'' on authority of Pub. L. 89–554, §7(b), Sept. 6, 1966, 80 Stat. 631, the first section of which enacted Title 5.

AMENDMENTS

1949—Act Oct. 28, 1949, substituted ''Classification Act of 1949'' for ''Classification Act of 1923''.

REPEALS

Act Oct. 28, 1949, ch. 782, cited as a credit to this section, was repealed (subject to a savings clause) by Pub. L. 89–554, Sept. 6, 1966, §8, 80 Stat. 632, 655.

§ 717r. Rehearing and review

(a) Application for rehearing; time

Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Review of Commission order

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which is supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(c) Stay of Commission order

The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(d) Judicial review

(1) In general

The United States Court of Appeals for the circuit in which a facility subject to section 717b of this title or section 717f of this title is proposed to be constructed, expanded, or operated shall have original and exclusive jurisdiction over any civil action for the review of an order or action of a Federal agency (other than the Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit, license, concurrence, or approval (hereinafter collectively referred to as ''permit'') required under Federal law, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.).

(2) Agency delay

The United States Court of Appeals for the District of Columbia shall have original and exclusive jurisdiction over any civil action for the review of an alleged failure to act by a Federal agency (other than the Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit required under Federal law, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.), for a facility subject to section 717b of this title or section 717f of this title. The failure of an agency to take action on a permit required under Federal law, other than the Coastal Zone Management Act of 1972, in accordance with the Commission schedule established pursuant to section 717n(c) of this title shall be considered inconsistent with Federal law for the purposes of paragraph (3).

(3) Court action

If the Court finds that such order or action is inconsistent with the Federal law governing such permit and would prevent the construction, expansion, or operation of the facility subject to section 717b of this title or section 717f of this title, the Court shall remand the proceeding to the agency to take appropriate action consistent with the order of the Court. If the Court remands the order or action to the Federal or State agency, the Court shall set a reasonable schedule and deadline for the agency to act on remand.

(4) Commission action

For any action described in this subsection, the Commission shall file with the Court the consolidated record of such order or action to which the appeal hereunder relates.

(5) Expedited review

The Court shall set any action brought under this subsection for expedited consideration.

(June 21, 1938, ch. 556, § 19, 52 Stat. 831; June 25, 1948, ch. 646, § 32(a), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107; Pub. L. 85–791, § 19, Aug. 28, 1958, 72 Stat. 947; Pub. L. 109–58, title III, § 313(b), Aug. 8, 2005, 119 Stat. 689.)

REFERENCES IN TEXT

The Coastal Zone Management Act of 1972, referred to in subsec. (d)(1), (2), is title III of Pub. L. 89–454, as added by Pub. L. 92–583, Oct. 27, 1972, 86 Stat. 1280, as amended, which is classified generally to chapter 33 (§ 1451 et seq.) of Title 16, Conservation. For complete classification of this Act to the Code, see Short Title note set out under section 1451 of Title 16 and Tables.

CODIFICATION

In subsec. (b), ''section 1254 of title 28'' substituted for ''sections 239 and 240 of the Judicial Code, as amend-

egated to the Secretary of Energy; except for the authority to declare, extend, and terminate a natural gas supply emergency pursuant to Section 301 thereof (15 U.S.C. 3361).

1–102. The functions vested in the President by Section 607 of the Public Utility Regulatory Policies Act of 1978 (92 Stat. 3171; 15 U.S.C. 717z) are delegated to the Secretary of Energy; except for the authority to declare, extend, and terminate a natural gas supply emergency pursuant to Section 607(a) and (b) thereof (15 U.S.C. 717z(a) and (b)).

1–103. The Secretary shall consult with the Administrator of the Environmental Protection Agency, the Director [now Administrator] of the Federal Emergency Management Agency, and the heads of other executive agencies in exercising the functions delegated to him by this Order.

1–104. All functions delegated to the Secretary by this Order may be redelegated, in whole or in part, to the head of any other agency.

1–105. All Executive agencies shall, to the extent permitted by law, cooperate with and assist the Secretary in carrying out the functions delegated to him by this Order.

JIMMY CARTER.

PART B—OTHER AUTHORITIES AND REQUIREMENTS

§ 3371. Authorization of certain sales and transportation

(a) Commission approval of transportation

(1) Interstate pipelines

(A) In general

The Commission may, by rule or order, authorize any interstate pipeline to transport natural gas on behalf of—

(i) any intrastate pipeline; and

(ii) any local distribution company.

(B) Just and reasonable rates

The rates and charges of any interstate pipeline with respect to any transportation authorized under subparagraph (A) shall be just and reasonable (within the meaning of the Natural Gas Act [15 U.S.C. 717 et seq.]).

(2) Intrastate pipelines

(A) In general

The Commission may, by rule or order, authorize any intrastate pipeline to transport natural gas on behalf of—

(i) any interstate pipeline; and

(ii) any local distribution company served by any interstate pipeline.

(B) Rates and charges

(i) Maximum fair and equitable price

The rates and charges of any intrastate pipeline with respect to any transportation authorized under subparagraph (A), including any amount computed in accordance with the rule prescribed under clause (ii), shall be fair and equitable and may not exceed an amount which is reasonably comparable to the rates and charges which interstate pipelines would be permitted to charge for providing similar transportation service.

(ii) Commission rule

The Commission shall, by rule, establish the method for calculating an amount necessary to—

(I) reasonably compensate any intrastate pipeline for expenses incurred by the pipeline and associated with the providing of any gathering, treatment, processing, transportation, delivery, or similar service provided by such pipeline in connection with any transportation of natural gas authorized under subparagraph (A); and

(II) provide an opportunity for such pipeline to earn a reasonable profit on such services.

(b) Commission approval of sales

(1) In general

The Commission may, by rule or order, authorize any intrastate pipeline to sell natural gas to—

(A) any interstate pipeline; and

(B) any local distribution company served by any interstate pipeline.

(2) Rates and charges

(A) Maximum fair and equitable price

The rates and charges of any intrastate pipeline with respect to any sale of natural gas authorized under paragraph (1) shall be fair and equitable and may not exceed the sum of—

(i) such intrastate pipeline's weighted average acquisition cost of natural gas;

(ii) an amount, computed in accordance with the rule prescribed under subparagraph (B); and

(iii) any adjustment permitted under subparagraph (C).

(B) Commission rule

The Commission shall, by rule, establish the method for calculating an amount necessary to—

(i) reasonably compensate any intrastate pipeline for expenses incurred by the pipeline and associated with the providing of any gathering, treatment, processing, transportation, or delivery service provided by such pipeline in connection with any sale of natural gas authorized under paragraph (1); and

(ii) provide an opportunity for such pipeline to earn a reasonable profit on such services.

(C) Adjustment

(i) Application

This subparagraph shall apply in any case in which, in order to deliver any volume of natural gas pursuant to any sale authorized under paragraph (1), any intrastate pipeline acquires quantities of natural gas under any existing contract, if—

(I) such intrastate pipeline acquires any volume of natural gas under such contract in excess of that which such pipeline would otherwise have acquired; and

(II) the price paid for such additional volume of natural gas acquired under such contract is greater than such pipeline's weighted average acquisition cost of natural gas, computed without regard

to the acquisition of such additional volume of natural gas.

(ii) Commission adjustment

In any case to which this subparagraph applies, the Commission shall permit an adjustment to the maximum fair and equitable price provided under subparagraph (A) to increase the revenue to the intrastate pipeline under such sale by an amount determined by the Commission to be adequate to offset the additional cost incurred by such pipeline due to any increase in such pipeline's weighted average acquisition cost of natural gas.

(3) Limitation

(A) Two-year duration

No authorization of any sale (or any extension thereof) under paragraph (1) may be for a period exceeding two years.

(B) Extension

Any authorization of any sale under paragraph (1), and any extension of any such authorization under this subparagraph, may be extended by the Commission if such extension satisfies the requirements of this subsection.

(4) Adequacy of service to intrastate customers

Any sale authorized under paragraph (1) shall be subject to interruption to the extent that natural gas subject to such sale is required to enable the intrastate pipeline involved to provide adequate service to such pipeline's customers at the time of such sale.

(5) Procedural requirements

(A) Affidavit

Any application for authorization of any sale under paragraph (1) shall be accompanied by an affidavit filed by the intrastate pipeline involved and setting forth—

(i) the identity of the interstate pipeline or local distribution company involved;

(ii) each point of delivery of the natural gas from the intrastate pipeline;

(iii) the estimated total and daily volumes of natural gas subject to such sale;

(iv) the price or prices of such volumes; and

(v) such other information as the Commission may, by rule, require.

(B) Verification of compliance

Any application for authorization of any sale under paragraph (1) shall be accompanied by a statement by the intrastate pipeline involved verifying by oath or affirmation that such sale, if authorized, would comply with all requirements applicable to such sale under this subsection and all terms and conditions established, by rule or order, by the Commission and applicable to such sale.

(6) Termination of sales

(A) Hearing

Upon complaint of any interested person, or upon the Commission's own motion, the Commission shall, after affording an opportunity for oral presentation of views and arguments, terminate any sale authorized under paragraph (1) if the Commission determines—

(i) such termination is required to enable the intrastate pipeline involved to provide adequate service to the customers of such pipeline at the time of such sale;

(ii) such sale involves the sale of natural gas acquired by the intrastate pipeline involved solely or primarily for the purpose of resale of such natural gas pursuant to a sale authorized under paragraph (1);

(iii) such sale violates any requirement of this subsection or any term or condition established, by rule or order, by the Commission and applicable to such sale; or

(iv) such sale circumvents or violates any provision of this chapter.

(B) Suspension pending hearing

Prior to any hearing or determination required under subparagraph (A), upon complaint of any interested person or upon the Commission's own motion, the Commission may suspend any sale authorized under paragraph (1) if the Commission finds that it is likely that the determinations described in subparagraph (A) will be made following the hearing required under subparagraph (A).

(C) Determination

The determination of whether any interruption of any sale authorized under paragraph (1) is required under subparagraph (A)(i) shall be made by the Commission without regard to the character of the use of natural gas by any customer of the intrastate pipeline involved.

(D) State intervention

Any interested State may intervene as a matter of right in any proceeding before the Commission relating to any determination under this section.

(7) Disapproval of application

The Commission shall disapprove any application for authorization of any sale under paragraph (1) if the Commission determines—

(A) such sale would impair the ability of the intrastate pipeline involved to provide adequate service to its customers at the time of such sale (without regard to the character of the use of natural gas by such customer);

(B) such sale would involve the sale of natural gas acquired by the intrastate pipeline involved solely or primarily for the purpose of resale of such natural gas pursuant to a sale authorized under paragraph (1);

(C) such sale would violate any requirement of this subsection or any term or condition established, by rule or order, by the Commission and applicable to such sale; or

(D) such sale would circumvent or violate any provision of this chapter.

(c) Terms and conditions

Any authorization granted under this section shall be under such terms and conditions as the Commission may prescribe.

(Pub. L. 95–621, title III, § 311, Nov. 9, 1978, 92 Stat. 3388.)

REFERENCES IN TEXT

The Natural Gas Act, referred to in subsec. (a)(1)(B), is act June 21, 1938, ch. 556, 52 Stat. 821, as amended, which is classified generally to chapter 15B (§ 717 et seq.) of this title. For complete classification of this act to the Code, see section 717w of this title and Tables.

§ 3372. Assignment of contractual rights to receive surplus natural gas

(a) Authorization of assignments

The Commission may, by rule or order, authorize any intrastate pipeline to assign, without compensation, to any interstate pipeline or local distribution company all or any portion of such intrastate pipeline's right to receive surplus natural gas at any first sale, upon such terms and conditions as the Commission determines appropriate.

(b) Effect of authorization under subsection (a)

For the effect of an authorization under subsection (a), see section 3431 of this title (relating to the coordination of this chapter with the Natural Gas Act [15 U.S.C. 717 et seq.]).

(c) Surplus natural gas

For purposes of this section, the term ''surplus natural gas'' means any natural gas which is determined, by the State agency having regulatory jurisdiction over the intrastate pipeline which would be entitled to receive such natural gas in the absence of any assignment to exceed the then current demands on such pipeline for natural gas.

(Pub. L. 95–621, title III, § 312, Nov. 9, 1978, 92 Stat. 3392; Pub. L. 101–60, § 3(b)(2), July 26, 1989, 103 Stat. 158.)

REFERENCES IN TEXT

The Natural Gas Act, referred to in subsec. (b), is act June 21, 1938, ch. 556, 52 Stat. 821, as amended, which is classified generally to chapter 15B (§ 717 et seq.) of this title. For complete classification of this act to the Code, see section 717w of this title and Tables.

AMENDMENTS

1989—Subsec. (c). Pub. L. 101–60 substituted ''any natural gas'' for ''any natural gas—

''(1) which is not committed or dedicated to interstate commerce on November 8, 1978;

''(2) the first sale of which is subject to a maximum lawful price established under subchapter I of this chapter; and

''(3)''.

EFFECTIVE DATE OF 1989 AMENDMENT

Section 3(b) of Pub. L. 101–60 provided in part that the amendment by section 3(b)(2) of Pub. L. 101–60 is effective Jan. 1, 1993.

§ 3373. Effect of certain natural gas prices on indefinite price escalator clauses

(a) High-cost natural gas

No price paid in any first sale of high-cost natural gas (as defined in section 3317(c)[1] of this title, as such section was in effect on January 1, 1989) may be taken into account in applying any indefinite price escalator clause (as defined in section 3315(b)(3)(B)[1] of this title, as such section was in effect on January 1, 1989) with respect to any first sale of any natural gas other than high-cost natural gas (as defined in section 3317(c)[1] of this title, as such section was in effect on January 1, 1989).

(b) Other transactions

No price paid—

(1) in any sale authorized under section 3362(a) of this title, or

(2) pursuant to any order issued under section 3363(b), (c), (d), or (g) of this title,

may be taken into account in applying any indefinite price escalator clause (as defined in section 3315(b)(3)(B)[1] of this title, as such section was in effect on January 1, 1989).

(Pub. L. 95–621, title III, § 313, Nov. 9, 1978, 92 Stat. 3392; Pub. L. 101–60, § 3(b)(3), July 26, 1989, 103 Stat. 159.)

REFERENCES IN TEXT

Sections 3315 and 3317 of this title, referred to in text, were repealed effective Jan. 1, 1993, by Pub. L. 101–60, § 2(b), July 26, 1989, 103 Stat. 158.

AMENDMENTS

1989—Pub. L. 101–60 inserted '', as such section was in effect on January 1, 1989'' in four places.

EFFECTIVE DATE OF 1989 AMENDMENT

Amendment by Pub. L. 101–60 effective Jan. 1, 1993, see section 3(b) of Pub. L. 101–60, set out as a note under section 3372 of this title.

§ 3374. Clauses prohibiting certain sales, transportation, and commingling

(a) General rule

Any provision of any contract for the first sale of natural gas is hereby declared against public policy and unenforceable with respect to any natural gas covered by this chapter if such provision—

(1) prohibits the commingling of natural gas subject to such contract with natural gas subject to the jurisdiction of the Commission under the provisions of the Natural Gas Act [15 U.S.C. 717 et seq.];

(2) prohibits the sale of any natural gas subject to such contract to, or transportation of any such natural gas by, any person subject to the jurisdiction of the Commission under the Natural Gas Act [15 U.S.C. 717 et seq.], or otherwise prohibits the sale or transportation in interstate commerce (within the meaning of the Natural Gas Act) of natural gas subject to such contract; or

(3) terminates, or grants any party the option to terminate, any obligation under any such contract as a result of such commingling, sale, or transportation.

(b) Natural gas covered by this chapter

For purposes of subsection (a), the term ''natural gas covered by this chapter'' means—

(1) natural gas which is not committed or dedicated to interstate commerce as of November 8, 1978;

(2) natural gas, the sale in interstate commerce of which—

(A) is authorized under section 3362(a) or 3371(b) of this title; or

[1] See References in Text note below.

§ 154.109 General terms and conditions.

(a) This section of the tariff contains terms and conditions of service applicable to all or any of the rate schedules. Subsections and paragraphs must be numbered for convenient reference.

(b) The general terms and conditions of the tariff must contain a statement of the company's policy with respect to the financing or construction of laterals including when the pipeline will pay for or contribute to the construction cost. The term ''lateral'' means any pipeline extension (other than a mainline extension) built from an existing pipeline facility to deliver gas to one or more customers, including new delivery points and enlargements or replacements of existing laterals.

(c) The general terms and conditions of the tariff must contain a statement of the order in which the company discounts its rates and charges. The statement, specifying the order in which each rate component will be discounted, must be in accordance with Commission policy.

§ 154.110 Form of service agreement.

The tariff must contain an unexecuted pro forma copy of each form of service agreement. The form for each service must refer to the service to be rendered and the applicable rate schedule of the tariff; and, provide spaces for insertion of the name of the customer, effective date, expiration date, and term. Spaces may be provided for the insertion of receipt and delivery points, contract quantity, and other specifics of each transaction as appropriate.

§ 154.111 Index of customers.

(a) If a pipeline is in compliance with the reporting requirements of § 284.13(c) of this chapter, then an index of customers need not be provided in the tariff.

(b) If all of a pipeline's jurisdictional transportation and sales are pursuant to part 157 of this chapter, then an index of customers must be provided that contains: a list of the pipeline's firm transportation, storage, and sales customers, and the rate schedule number for the services for which the shippers are contracting; the effective date of the contract; the expiration date of the contract; if the service is transportation or sales, the maximum daily contract demand under the contract; and, if the service is storage, the maximum storage quantity. Specify units of measurement when reporting contract quantities.

(c) The index of customers must be kept current by filing new or revised sheets or sections, semi-annually. One filing must coincide with the filing of the natural gas company's FERC Form No. 2 or 2–A with a proposed effective date of June 1. The other filing must be made six months later with a proposed effective date of December 1. The Index of Customers must contain a list of the contracts in effect as of the filing date.

[Order 582, 60 FR 52996, Oct. 11, 1995, as amended by Order 637, 65 FR 10219, Feb. 25, 2000; Order 714, 73 FR 57535, Oct. 3, 2008]

§ 154.112 Exception to form and composition of tariff.

(a) The Commission may permit a special rate schedule to be filed in the form of an agreement in the case of a special operating arrangement, previously certificated pursuant to part 157 of this chapter, such as for the exchange of natural gas. The special rate schedule must contain a title page showing the parties to the agreement, the date of the agreement, a brief description of services to be rendered, and the designation: ''Rate Schedule X-[number].'' Special rate schedules may not contain any supplements. Modifications must be made by inserting revised sheets, sections or the entire document as appropriate. Special rate schedules must be included in a separate volume of the tariff. Each such separate volume must contain a table of contents which is incorporated as a sheet or section in the open access transmission tariff.

(b) Contracts for service pursuant to part 284 of this chapter that deviate in any material aspect from the form of service agreement must be filed. Such non-conforming agreements must be referenced in the open access transmission tariff.

[Order 582, 60 FR 52996, Oct. 11, 1995, as amended by Order 714, 73 FR 57534, Oct. 3, 2008; 81 FR 51100, Aug. 3, 2016]

North Carolina Utilities Commission v. FERC **Docket No. CP15-138*, et al*.**
D.C. Cir. No. 18-1018*, et al.*

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 4th day of September 2018, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system.

/s/ Beth G. Pacella
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