

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

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

**REPLY OF RESPONDENT FEDERAL ENERGY REGULATORY  
COMMISSION IN SUPPORT OF MOTION TO DISMISS**

Pursuant to Rule 27 of the Federal Rules of Appellate Procedure and Circuit Rule 27, Respondent Federal Energy Regulatory Commission replies to Petitioner SFPP, L.P. and Petitioners Enable Mississippi River Transmission, LLC and Enable Gas Transmission, LLC, in support of the Commission’s October 24, 2018 motion to dismiss. Alternatively, if this Court does not dismiss the petitions, the

Commission agrees with SFPP that the case should be held in abeyance until the Commission's income tax allowance policy is applied in future pipeline-specific rate proceedings.

Petitioners miss the mark when responding to the ripeness issue raised in the Commission's motion to dismiss. Petitioners mistakenly assert that the Commission has applied the Policy Statement as a binding rule. But Petitioners have not rebutted the key point that the challenged orders from the generic proceeding do not change any rates and are therefore not ripe because they do not have "a sufficiently immediate and significant impact upon petitioners and because the record in this case is inadequate to permit meaningful judicial review." *Pac. Gas & Elec. Co. v. FPC*, 506 F.2d 33, 35 (D.C. Cir. 1974). *See* SFPP October 17, 2018 Motion to Hold in Abeyance at 7 (seeking to hold these proceedings in abeyance until there is a "concrete controversy").

Each of the three factors discussed in the Commission's motion to dismiss weighs in favor of dismissal: (1) the Policy Statement has no legal effect on Petitioners or their rates; (2) the Commission has repeatedly characterized the Policy Statement as non-binding; and (3) the Commission has not applied the Policy Statement as if it were binding on regulated entities. *See Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 252-53 (D.C. Cir. 2014).

**I. The Policy Statement does not have an immediate and significant impact upon Petitioners.**

“The most important factor concerns the actual legal effect (or lack thereof) of the agency action in question on regulated entities.” *Id.* at 252. Petitioners cannot escape from the key fact that there is not immediate and significant impact. The Policy Statement did not change Petitioners’ rates. Only further orders in other pipeline-specific proceedings can result in changed rates. *See* SFPP October 17, 2018 Motion to Hold in Abeyance at 7 (reasoning that only in a “concrete controversy” such as a pipeline-specific rate proceeding can this Court “determine whether the Commission has properly interpreted the Court’s various rulings” in *United Airlines, Inc. v. FERC*, 827 F.3d 122 (D.C. Cir. 2016)).

An agency’s issuance of a policy statement that “merely explains how the agency will enforce a statute or regulation” is not subject to judicial review. *Nat’l Mining Ass’n*, 758 F.3d at 252. The orders issued in these generic proceedings have classic attributes of a non-binding policy announcement: The Policy Statement merely signaled to regulated entities, interested parties, and Commission staff a policy direction, allowing subsequent application of those principles in pipeline-specific proceedings. Moreover, the Policy Statement hardly presents a concrete controversy, given that the Commission “will consider the issues and arguments raised in the rehearing requests in the context of specific cases in which

they apply.” *Inquiry Regarding the Commission’s Policy for Recovery of Income Tax Costs*, “Order on Rehearing,” 164 FERC ¶ 61,030, at P 8 (July 18, 2018).

If the Commission finally applies the principles discussed in the Policy Statement to Petitioners in a future rate proceeding, there could be substantial consequences. But potential aggrievement resulting from a future application of the Policy Statement is not the relevant inquiry here, and it does not render the generic Policy Statement ripe for immediate review. *Nat’l Mining Ass’n*, 758 F.3d at 252 (finding no final agency action subject to review, despite guidance that “may signal likely future permit denials by EPA”). “The question is not whether judicial review will be available but rather whether judicial review is available *now*.” *Id.* at 253 (emphasis in original).

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

The Commission explicitly characterized the Policy Statement as non-binding and explained that it is not “finally determinative of the issues or rights to which it is addressed, but rather, only announces the agency’s tentative intentions for the future.” Order on Rehearing, 164 FERC ¶ 61,030 at P 7 (*quoting Pac. Gas & Elec.*, 506 F.2d at 38) (internal quotations omitted). The Commission then declined to address the merits of the rehearing requests until future rate proceedings where these issues could be addressed “in the context of specific cases in which they apply.” *Id.* at P 8.

SFPP states multiple times that it was “ordered” to participate in the generic inquiry proceedings following remand from *United Airlines*. SFPP November 5, 2018 Response in Opposition to Motion to Dismiss at 5-6. This distorts the nature of the generic inquiry proceeding. SFPP, like all other parties, participated voluntarily. *See* Notice of Inquiry, 157 FERC ¶ 61,210 at P 21 (Dec. 15, 2016) (“invit[ing] interested persons to submit written comments”). And the distinction is relevant because voluntary participation is consistent with the key point that the Commission did not intend for the generic proceeding to have an immediate and significant impact on regulated entities.

The Commission is mindful of the consequences that flow from labeling the generic orders as non-binding: Subsequent orders in pipeline-specific rate proceedings where a concrete controversy might arise must stand on their own two feet. This Court similarly observed that where the Commission characterizes an action as non-binding, “[s]uch a characterization comes at a price to the Commission; in applying the policy, it will not be able simply to stand on its duty to follow its rules.” *Interstate Nat. Gas Ass’n of Am. v. FERC*, 285 F.3d 18, 60 (D.C. Cir. 2002).

### **III. The Policy Statement is not binding in future rate proceedings.**

“The language employed by the agency may play an important role in this analysis: a document that reads like an edict is likely to be binding, while one

riddled with caveats is not.” *Ass’n of Flight Attendants-CWA v. Huerta*, 785 F.3d 710, 717 (D.C. Cir. 2015). In the order dismissing rehearing requests, the Commission included an expansive caveat—the antithesis of an edict—when it announced that regulated entities “will not be precluded in a future proceeding from arguing and providing evidentiary support that it is entitled to an income tax allowance and demonstrating that its recovery of an income tax allowance does not result in a double-recovery of investors’ income tax costs.” Order on Rehearing, 164 FERC 61,030 at P 8.

In the case of SFPP, the case-specific record in FERC Docket No. IS08-390 is extensive. Following remand from *United Airlines*, (1) SFPP filed comments; (2) its shippers filed comments; and (3) SFPP filed supplemental comments. Following issuance of the SFPP-specific order, SFPP sought rehearing.

In the case of Enable Mississippi River Transmission, the extensive record in FERC Docket No. RP18-923 similarly belies Petitioners’ assertion that they have been denied the ability to advocate their view of the income tax allowance. In its Natural Gas Act section 4, 15 U.S.C. § 717c, rate filing, Enable Mississippi River Transmission included written testimony in support of the inclusion of an income tax allowance. Further, Enable Mississippi River Transmission filed a rehearing request along with three appendices that address the income tax allowance issue.

In short, if there is anything missing from these pipeline-specific records, the Petitioners are responsible. Subsequent Commission action will address the income tax allowance issues raised in Petitioners' pipeline-specific proceedings, potentially giving rise to a concrete controversy ripe for this Court's review.

The extensive records in these pipeline-specific proceedings also belie the point advanced by SFPP (*see* SFPP November 5, 2018 Response in Opposition to Motion to Dismiss at 16-17), that the income tax allowance issue is purely legal. Nevertheless, contrary to SFPP's assertion, the presentation of a purely legal question does not necessarily render the Policy Statement immediately reviewable. *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 417 F.3d 1272, 1282 (D.C. Cir. 2005).

**IV. This Court's earlier dismissal (as moot) of an income tax allowance policy case favors delaying judicial review until a concrete controversy arises.**

Determining whether the Policy Statement is ripe for judicial review is not just an academic exercise or an instance of "gotcha" legal maneuvering. The interests at stake for this Court to consider are pragmatic, and involve (1) preventing judicial intervention in "abstract or remote controversies" in favor of "conserve[ing] judicial resources for cases in which those resources are truly needed and may be efficiently employed;" and (2) allowing agencies to "deliberate and craft policy free of judicial interference until administrative action has a direct

and immediate impact.” *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 434 (D.C. Cir. 1986). See *FTC v. Standard Oil Co. of California*, 449 U.S. 232, 242 (1980); *Toilet Goods Ass’n v. Gardner*, 387 U.S. 158, 166 (1967).

SFPP’s suggestion (see SFPP November 5, 2018 Response in Opposition to Motion to Dismiss at 18-19) that the Policy Statement be treated similar to the 2005 statement—i.e., continue with briefing and oral argument, leaving this Court with the future option of dismissing as moot the petitions in light of resolution of a separate, pipeline-specific case that may or may not actually materialize—is contrary to the efficiency policy rationale underlying the ripeness doctrine, and is not a suggestion informed by the lesson of *Canadian Ass’n of Petroleum Producers v. FERC*, 487 F.3d 973 (D.C. Cir. 2007) (dismissing similar petition for review of previous income tax allowance policy as moot, but “acknowledge[ing] ... facial challenge to the Policy Statement raises substantial issues of both standing and ripeness”). Instead, the path that is efficient, the path that is fair to Petitioners, and the path that is consistent with this Court’s ripeness doctrine would be to dismiss the challenges to the generic proceeding, and leave for another day review should a concrete controversy arise in a pipeline-specific proceeding.

## CONCLUSION

For the foregoing reasons, the petitions for review in Case Nos. 18-1252 and 18-1254 of the Commission’s generic policy statement should be dismissed. In the



alternative, if this Court does not dismiss the petitions seeking review of orders in the generic proceeding, the Commission agrees that the case should be held in abeyance until the Commission's policy is applied in future case-specific proceedings as requested by Petitioner SFPP. *See* SFPP October 17, 2018 Motion to Hold in Abeyance.

Respectfully submitted,

Robert H. Solomon  
Solicitor

*/s/ Scott Ediger* \_\_\_\_\_

Scott Ediger  
Attorney

Federal Energy Regulatory Commission  
Washington, D.C. 20426  
Tel: (202) 502-8509  
Fax: (202) 273-0901  
scott.ediger@ferc.gov

November 13, 2018

## CERTIFICATE OF COMPLIANCE

I certify that the foregoing complies with Fed. R. App. P. 27(d)(2) because it contains 1807 words, excluding the parts exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1). I further certify that the foregoing complies with the requirements of Fed. R. App. P. 27(d)(1)(D)-(E) because it has been prepared in Times New Roman 14-point font using Microsoft Word 2013.

*/s/ Scott Ediger* \_\_\_\_\_

Scott Ediger  
Attorney

Federal Energy Regulatory Commission  
Washington, D.C. 20426  
Tel: (202) 502-8509  
Fax: (202) 273-0901  
scott.ediger@ferc.gov

## **CERTIFICATE OF SERVICE**

I hereby certify that, on November 13, 2018, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of this filing will be sent by first class mail to parties that have not consented to electronic service as indicated below:

Steven Andrew Adducci Venable LLP 600 Massachusetts Avenue, NW Washington, DC 20001 Email: saadducci@venable.com	Email
--	-------

Michelle Theresa Boudreaux Caldwell Boudreaux Lefler, PLLC 1800 West Loop South Suite 1680 Houston, TX 77027 Email: mboudreaux@cblpipeline.com	Email
---	-------

Steven H Brose Steptoe & Johnson LLP 1330 Connecticut Avenue, NW Washington, DC 20036-1795 Email: sbrose@steptoe.com	Email
--	-------

James H. Byrd McCarter & English, LLP Twelfth Floor 1301 K Street, NW Suite 1000 West Washington, DC 20005 Email: jbyrd@mbolaw.com	Email
--	-------

Charles F. Caldwell  
Caldwell Boudreaux Lefler, PLLC  
1800 West Loop South  
Suite 1680  
Houston, TX 77027  
Email: ccaldwell@cblpipelinelaw.com

Email

Thomas James Eastment  
Baker Botts LLP  
1299 Pennsylvania Avenue, NW  
The Warner, Suite 1300 West  
Washington, DC 20004-2400  
Email: tom.eastment@bakerbotts.com

Email

R. Gordon Gooch  
Travis & Gooch  
1111 North 19th Street  
Suite 2504  
Arlington, VA 22209  
Email: travisgooch1@earthlink.net

Email

John P Gregg  
McCarter & English, LLP  
1301 K Street, NW  
Suite 1000 West  
Washington, DC 20005  
Email: jgregg@mccarter.com

Email

James Harrison Holt  
Betts & Holt LLP  
1100 17th Street, NW  
Suite 901  
Washington, DC 20036  
Email: jhh@bettsandholt.com

Email

Jeffrey Kenneth Janicke  
McCarter & English, LLP  
1301 K Street, NW  
Suite 1000 West  
Washington, DC 20005  
Email: [jjanicke@mccarter.com](mailto:jjanicke@mccarter.com)

Email

Steven Mark Kramer  
Association of Oil Pipe Lines  
1808 Eye Street, NW  
Suite 300  
Washington, DC 20006  
Email: [skramer@aopl.org](mailto:skramer@aopl.org)

Email

Robert B. Nicholson  
U.S. Department of Justice  
(DOJ) Antitrust Division, Appellate Section  
Room 3228  
950 Pennsylvania Avenue, NW  
Washington, DC 20530-0001  
Email: [robert.nicholson@usdoj.gov](mailto:robert.nicholson@usdoj.gov)

Email

Richard E. Powers Jr.  
Venable LLP  
600 Massachusetts Avenue, NW  
Washington, DC 20001  
Email: [repowers@venable.com](mailto:repowers@venable.com)

Email

Daniel James Poynor  
Steptoe & Johnson LLP  
1330 Connecticut Avenue, NW  
Washington, DC 20036-1795  
Email: [dpoynor@steptoe.com](mailto:dpoynor@steptoe.com)

Email

William Michael Rappolt  
Sheppard Mullin Richter & Hampton LLP  
2099 Pennsylvania Avenue, NW  
Suite 100  
Washington, DC 20006  
Email: wrappolt@sheppardmullin.com

Email

Steven G. Thomson Reed  
Steptoe & Johnson LLP  
1330 Connecticut Avenue, NW  
Washington, DC 20036-1795  
Email: sreed@steptoe.com

Email

Mary-Kaitlin Eileen Rigney  
Betts & Holt LLP  
1100 17th Street, NW  
Suite 901  
Washington, DC 20036  
Email: mkrigney@bettsandholt.com

Email

Mark Charles Schroeder  
CenterPoint Energy  
1111 Louisiana  
Houston, TX 77002-0000  
Email: mark.schroeder@centerpointenergy.com

US Mail

Robert Harris Solomon  
Federal Energy Regulatory Commission  
(FERC) Office of the Solicitor  
Room 9A-01  
888 First Street, NE  
Washington, DC 20426  
Email: robert.solomon@ferc.gov

Email

Mark F. Sundback  
Sheppard Mullin Richter & Hampton LLP  
2099 Pennsylvania Avenue, NW  
Suite 100  
Washington, DC 20006  
Email: msundback@sheppardmullin.com

Gregory S. Wagner  
Baker Botts LLP  
1299 Pennsylvania Avenue, NW  
The Warner, Suite 1300 West  
Washington, DC 20004-2400  
Email: gregory.wagner@bakerbotts.com

Sabina Dugal Walia  
Caldwell Boudreaux Lefler, PLLC  
1800 West Loop South  
Suite 1680  
Houston, TX 77027  
Email: swalia@cblpipelinelaw.com

Robert J. Wiggers  
U.S. Department of Justice  
(DOJ) Antitrust Division, Appellate Section  
Room 3224  
950 Pennsylvania Avenue, NW  
Washington, DC 20530-0001  
Email: robert.wiggers@usdoj.gov

Kenneth L. Wiseman  
Sheppard Mullin Richter & Hampton LLP  
2099 Pennsylvania Avenue, NW  
Suite 100  
Washington, DC 20006  
Email: kwiseman@sheppardmullin.com

*/s/ Scott Ediger* \_\_\_\_\_

Scott Ediger

Attorney

Federal Energy Regulatory Commission

Washington, D.C. 20426

Tel: (202) 502-8509

Fax: (202) 273-0901

[scott.ediger@ferc.gov](mailto:scott.ediger@ferc.gov)