ORAL ARGUMENT NOT YET SCHEDULED

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

No. 15-1323

EL PASO NATURAL GAS COMPANY, L.L.C.,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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Final Brief: June 17, 2016

CIRCUIT RULE 28(A)(1) CERTIFICATE

A. Parties and Amici

To counsel's knowledge, the parties and intervenors before this Court and before the Federal Energy Regulatory Commission in the underlying docket are as stated in the Brief of Petitioner.

B. Rulings Under Review

1. Order on Initial Decision, *El Paso Natural Gas Company*, Opinion No. 517, 139 FERC ¶ 61,095 (May 4, 2012), R. 1155, JA 1; and

2. Order on Rehearing and Compliance, *El Paso Natural Gas Company*, Opinion No. 517-A, 152 FERC ¶ 61,039 (July 16, 2015), R. 1229, JA 130.

C. Related Cases

This case has not previously been before this Court or any other court. Two other cases pending before this Court, *Southwest Gas Corp. v. FERC*, Case No. 06-1119 (D.C. Cir. filed Apr. 18, 2016), and *Southern California Gas Co. v. FERC*, Case No. 16-1122 (D.C. Cir. filed Apr. 18, 2016), seek review of other orders that established pipeline rates of Petitioner El Paso Natural Gas Company in a related rate case, applying findings that are at issue in this appeal.

/s/ *Carol J. Banta*
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GLOSSARY

2008 Rate Case	Underlying FERC proceeding in FERC Docket No. RP08-426, regarding El Paso's rates from January 2009
2010 Rate Settlement	Settlement in the 2008 Rate Case that established El Paso's rates from January 1, 2009 through March 31, 2011, and preserved certain issues for hearing to set precedent for El Paso's subsequent rate cases
2011 Rate Case	Ongoing FERC proceeding (separate from, but related to, the 2008 Rate Case) in FERC Docket No. RP10-1398, regarding El Paso's rates from April 1, 2011
ALJ	Administrative law judge
ALJ Decision	Initial Decision, *El Paso Natural Gas Company*, FERC Docket No. RP08-426, 134 FERC ¶ 63,002 (Jan. 14, 2011), R. 1091, JA 352
Commission or FERC	Respondent Federal Energy Regulatory Commission
El Paso	Petitioner El Paso Natural Gas Company, L.L.C.
Initial Order (also called Opinion No. 517)	Order on Initial Decision, *El Paso Natural Gas Company*, Opinion No. 517, FERC Docket No. RP08-426, 139 FERC ¶ 61,095 (May 4, 2012), R. 1155, JA 1
JA	Joint Appendix
NGA	Natural Gas Act
P	Paragraph in a FERC order

GLOSSARY

R.	Record item
Rehearing Order (also called Opinion No. 517-A)	Order on Rehearing and Compliance, *El Paso Natural Gas Company*, Opinion No. 517-A, FERC Docket No. RP08-426, 152 FERC ¶ 61,039 (July 16, 2015), R. 1229, JA 130

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BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION

COUNTER-STATEMENT OF JURISDICTION

To obtain judicial review of orders of the Federal Energy Regulatory Commission ("Commission" or "FERC"), Petitioner El Paso Natural Gas Company, L.L.C. ("El Paso") must satisfy the requirements of Article III of the United States Constitution and must be "aggrieved" by the challenged orders, as required by Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b). *See*, *e.g.*, *Interstate Nat. Gas Ass'n v. FERC*, 285 F.3d 18, 45 (D.C. Cir. 2002); *El Paso Nat. Gas Co. v. FERC*, 50 F.3d 23, 26 (D.C. Cir. 1995); *see also Shell Oil Co. v. FERC*,

47 F.3d 1186, 1200 (D.C. Cir. 1995) ("Common to both these thresholds is the requirement that petitioners establish, at a minimum, 'injury in fact' to a protected interest."); *N.Y. Reg'l Interconnect, Inc. v. FERC*, 634 F.3d 581, 586 (D.C. Cir. 2011) (party is not "aggrieved" unless it can establish constitutional and prudential standing).

El Paso concedes that the issues raised in this appeal have no effect on its rates for the locked-in period of the underlying rate case, because the rates were set by a settlement. *See* Br. 3, 14. Rather, the Commission's ruling challenged here has only a precedential effect in subsequent rate cases — including a proceeding that is currently pending before both the Commission and this Court. *See* pp. 9-10, *infra*. For that reason, as set forth more fully in the Argument, Part I, El Paso cannot show a cognizable injury for purposes of standing, and its challenge to the Commission's findings is not yet ripe.

STATEMENT OF THE ISSUE

This appeal involves a natural gas pipeline rate case that was resolved by an uncontested settlement establishing rates for a locked-in period (until the filing of a subsequent rate case). That settlement reserved four issues for hearing and merits determination, to have precedential effect in subsequent rate cases. The Commission affirmed the decision of an administrative law judge on most of the

reserved issues, including the only one challenged in this appeal. The issue presented for review is:

Assuming jurisdiction, whether the Commission reasonably, and consistent with precedent, affirmed the administrative law judge's ruling that El Paso's proposed capital structure should be adjusted to remove from its equity capitalization, for ratemaking purposes: (1) a loan to its parent corporation; and (2) undistributed subsidiary earnings.

STATUTORY AND REGULATORY PROVISIONS

Pertinent statutes and regulations are contained in the attached Addendum.

STATEMENT OF FACTS

I. STATUTORY AND REGULATORY BACKGROUND

A. The Natural Gas Act

The Natural Gas Act ("NGA") confers upon the Commission jurisdiction to regulate (1) the transportation and sale for resale "of natural gas in interstate commerce" and (2) "natural-gas companies engaged in such transportation or sale." NGA § 1(b), 15 U.S.C. § 717(b). It also gives the Commission rate authority over natural gas companies. Section 4, 15 U.S.C. § 717c, governs rates proposed by pipelines. Under section 4, the Commission may suspend the effectiveness of proposed rates for a five-month period and make those rates subject to refund if the pipeline fails to sustain its burden of proof that the proposed rates are just and reasonable. *See, e.g.*, *E. Tenn. Nat. Gas Co. v. FERC*, 863 F.2d

932, 942 (D.C. Cir. 1988). Section 5(a), 15 U.S.C. § 717d(a), governs rate changes sought by the Commission on its own initiative or by third-party complaint.

The complex rate and regulatory issues arising from pipeline rate filings are frequently resolved by settlements. *Cf.*, *e.g.*, *Mobil Oil Corp. v. FPC*, 417 U.S. 283, 312-14, 321-25 (1974) (discussing natural gas rate settlements); *see also* Order on Initial Decision, *El Paso Nat. Gas Co.*, Opinion No. 517, 139 FERC ¶ 61,095 at PP 6-12 (2012) ("Initial Order"), R. 1155, JA 6-10 (summarizing previous El Paso rate settlements in 1990, 1996, and 2006).

B. Cost-of-Service Ratemaking

Under traditional cost-of-service ratemaking, the regulator determines the utility's total revenue requirement by adding together the operating costs, taxes, and depreciation for a selected test year, plus a reasonable profit. *See Distrigas of Mass. Corp. v. FERC*, 737 F.2d 1208, 1211 (1st Cir. 1984). That profit is determined by multiplying a reasonable rate of return times the rate base, which represents "capital allocated to public use." *See Pub. Serv. Co. of N.M. v. FERC*, 653 F.2d 681, 683 (D.C. Cir. 1981). "The rate of return allowed on that rate base varies according to the capital structure of the utility." *Id.* That is, the rate of return on capital derived from debt normally reflects a fixed interest rate, while the rate of return on capital derived from equity is generally set higher to reflect the greater risk in equity investments. *See id.*; *see also Distrigas*, 737 F.2d at 1211

("[t]he rate of return reflects the coupon rate for long-term debt plus a 'fair' return to shareholder equity"); *Mo. Pub. Serv. Comm'n v. FERC*, 215 F.3d 1, 3 (D.C. Cir. 2000) (explaining how the Commission sets the equity rate of return for a utility that has a sole shareholding parent).

The overall rate of return blends the rates of return on debt and equity, weighted in proportion to the amounts of each type of capital present in the rate base. *Pub. Serv. Co.*, 653 F.2d at 683; *see also Williston Basin Interstate Pipeline Co. v. FERC*, 165 F.3d 54, 57 (D.C. Cir. 1999).[1] The greater the proportion of equity to overall capitalization, the higher the combined rate of return, and the higher the profit included in the revenue requirement to be collected from ratepayers. *Cf. N.C. Utils. Comm'n v. FERC*, 42 F.3d 659, 661 (D.C. Cir. 1994) ("Since the returns attributable to the . . . components comprising the overall return differ markedly, the capital structure used by the regulated entity to finance its investment can greatly affect the overall return allowed."). Only the capital structure is at issue in this case.

[1] The blended rate of return may also include a third type of capital: preferred stock (in contrast to common equity), for which the formula uses "the rate of return fixed in the stock certificate." *Pub. Serv. Co.*, 653 F.2d at 683. Because El Paso's capital structure in the 2008 Rate Case included no preferred stock, the Commission orders and this Brief address only debt and (common) equity.

II. THE COMMISSION PROCEEDINGS AND ORDERS

A. The 2008 Rate Case And The 2010 Settlement

The underlying FERC proceeding began in June 2008, when El Paso filed for a system-wide rate increase under section 4 of the Natural Gas Act, 15 U.S.C. § 717c. R. 1-17. The Commission accepted and suspended the new rates to become effective on January 1, 2009, subject to refund and conditions, and set the matter for a technical conference and evidentiary hearing. *El Paso Nat. Gas Co.*, 124 FERC ¶ 61,124 (2008), *reh'g denied*, 133 FERC ¶ 61,129 (2010), *clarification & reh'g dismissed as moot*, 134 FERC ¶ 61,170 (2011).

In March 2010, El Paso and its customers entered into a settlement (R. 402, JA 257) that established rates and resolved most of the contested issues, reserving four specific issues for hearing: (1) capital structure; (2) Line 1903[2]; (3) rates for short-term firm and certain interruptible services; and (4) Article 11.2.[3] R. 402 at 6, JA 262. The settlement provided that the capital structure and Line 1903 issues "will not affect the settlement rates or revenues during the term of the settlement."

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[2] Line 1903 is the name of a pipeline segment; this issue refers to a dispute over El Paso's recovery of purchase cost for that facility. *See* Initial Order PP 17-18, JA 12-13.

[3] Article 11.2 refers to a section of an earlier rate settlement in 1996 that established rate caps for certain shippers; the dispute concerned whether the Commission should abrogate those settlement terms. *See* Initial Order PP 187-93, JA 80-83.

R. 402 at 7, JA 263; *see also* Initial Order P 15, JA 11. The Commission's resolution of those issues — including the capital structure determination challenged here — would, however, establish precedent for subsequent cases, including El Paso's next rate case. *See* R. 402, Sec. 5.2, JA 289-90. The settlement included a rate moratorium that would end no earlier than March 31, 2011. R. 402 at 6, JA 262.

B. ALJ Decision

An administrative law judge held a hearing on the four preserved issues in May-June 2010, and issued her Initial Decision on January 14, 2011. *El Paso Nat. Gas Co.*, 134 FERC ¶ 63,002 (2011) ("ALJ Decision"), R. 1091, JA 352. The judge determined that El Paso's proposed capital structure (of 39.2 percent debt and 60.8 percent equity) was not just and reasonable because the equity component included $145,307,340 of undistributed subsidiary earnings in FERC Account No. 216.1 and a loan balance of $615,456,458 in FERC Account No. 123.[4] The judge found that El Paso "does not use those monies, which artificially inflate its rates, to provide jurisdictional service to [its] customers." ALJ Decision P 182, JA 405-06. Specifically, the judge found that undistributed subsidiary earnings do not

[4] These Accounts refer to reporting categories set forth in the Commission's Uniform System of Accounts. *See* 18 C.F.R. § 367.2161 ("Account 216.1, Unappropriated undistributed subsidiary earnings"); *id.* § 367.1230 ("Account 123, Investment in associate companies").

represent, and are not available for, investment in rate base, and that the loan balance cross-subsidizes non-jurisdictional operations of El Paso's parent and affiliates. *Id.* PP 184-85, JA 406-07.

C. Initial Order (Opinion No. 517)

Several parties, including El Paso, filed exceptions to the ALJ Decision. The Commission ruled on all disputed issues in its Initial Order, affirming and adopting the ALJ Decision on all but one issue, not relevant here. Initial Order PP 2-3, JA 5-6. As discussed more fully in the Argument, Part III, *infra*, the Commission agreed with the presiding judge that El Paso's proposed capital structure was not just and reasonable and should be adjusted to remove the loan and undistributed subsidiary earnings. Initial Order PP 86-117, JA 39-52.

D. Rehearing Order (Opinion No. 517-A)

El Paso requested rehearing as to the rulings on all four reserved issues, while numerous other parties sought rehearing only as to the Article 11.2 issue (not relevant here). The Commission largely denied rehearing on all issues. Order on Rehearing and Compliance, *El Paso Nat. Gas Co.*, Opinion No. 517-A, 152 FERC ¶ 61,039 (2015) ("Rehearing Order"), R. 1229, JA 130. As to capital structure, the Commission addressed numerous arguments raised by El Paso. *Id.* PP 13-139, JA 136-87. Though the Commission again affirmed the direction to remove the loan and undistributed subsidiary earnings from El Paso's capital structure, it

granted El Paso's request to remove $50 million from debt rather than equity, as El Paso had shown that a $50 million debt issuance had funded part of the loan to its parent. *Id.* P 26, JA 143.

This appeal followed.

E. Ongoing Proceeding: The 2011 Rate Case

In September 2010, El Paso filed another system-wide rate case, in FERC Docket No. RP10-1398, which the Commission accepted subject to refund, hearing, and the outcomes of related proceedings (including the 2008 Rate Case), with an effective date of April 1, 2011 (the earliest date allowed under the rate moratorium in the 2010 Settlement). *See El Paso Nat. Gas Co.*, Opinion No. 528, 145 FERC ¶ 61,040 at P 20 (2013). Following an administrative law judge hearing and decision on numerous issues, El Paso and other parties filed exceptions to the Commission. On October 17, 2013, the Commission issued Opinion No. 528, in which it noted its findings in Opinion No. 517 (the Initial Order in the 2008 Rate Case), then still pending on rehearing, and stated that "the determination of capital structure in this proceeding will be subject to" the findings on rehearing in the 2008 Rate Case. Opinion No. 528, 145 FERC ¶ 61,040 at P 588; *see also id.* at PP 589-90 (applying capital structure adjustment, subject to the Commission's ruling on rehearing in the 2008 Rate Case).

In its request for rehearing of Opinion No. 528 in the 2011 Rate Case, El Paso renewed its objections to the Commission's capital structure determination. Request for Rehearing of El Paso Natural Gas Company, L.L.C. at 113, *El Paso Nat. Gas Co.*, FERC Docket No. RP10-1398 (filed Nov. 18, 2013) ("To the extent the Commission affirmed Opinion No. 517 on this issue and applies that holding to [El Paso]'s capital structure in this case, [El Paso] requests rehearing of such determination and application for the same reasons advanced in [its] request for rehearing of Opinion No. 517," which El Paso attached and incorporated by reference). On rehearing, the Commission "affirm[ed] the decision . . . to apply the Opinion No. 517 approach to the outstanding dollar amounts derived at hearing subject to the outcome of the [2008 Rate Case] on the controlling issue of whether the loan and undistributed subsidiary earnings should be removed from the pipeline's capital structure." *El Paso Nat. Gas Co.*, Opinion No. 528-A, 154 FERC ¶ 61,120 at P 19 (2016).

El Paso and other parties have sought further rehearing of Opinion No. 528-A, raising issues not relevant here, so the 2011 Rate Case remains pending before the Commission. Other parties, however, have filed petitions for review of Opinion Nos. 528 and 528-A before this Court. *See Sw. Gas Corp. v. FERC*, Case No. 16-1119 (D.C. Cir. filed Apr. 18, 2016); *S. Cal. Gas Co. v. FERC*, Case No. 16-1122 (D.C. Cir. filed Apr. 18, 2016). Southwest Gas Corporation has filed a

motion to hold its appeal in abeyance pending completion of the ongoing FERC proceeding.

SUMMARY OF ARGUMENT

First, the Court lacks Article III jurisdiction because El Paso cannot demonstrate a cognizable injury to support standing, nor sufficient hardship to support ripeness. El Paso admits that the outcome of this appeal will have no rate effect in the rate proceeding that is before the Court. Rather, the challenged orders have only a "precedential effect" for subsequent rate cases, including a separate proceeding that is currently pending before the Commission. This Court, however, has repeatedly held that precedential effect alone — no matter how certain the subsequent litigation — is not sufficient to sustain jurisdiction.

Assuming jurisdiction, El Paso's arguments fail on the merits. The Commission, affirming the findings of an administrative law judge, reasonably determined that two non-rate base assets must be removed from El Paso's equity capitalization for purposes of calculating its return on equity. Applying its longstanding policies and precedents, the Commission found that both (1) undistributed earnings from El Paso's subsidiary and (2) a loan to its parent could be attributed to equity, based on substantial evidence.

The Commission further determined that both assets must be excluded from equity so El Paso's capital structure would properly reflect investments in El

Paso's jurisdictional rate base, to produce a just and reasonable rate of return. Specifically, the Commission invoked its long-held view that undistributed subsidiary earnings are neither debt nor equity, and therefore not representative of the mix of investments in rate base. In addition, the Commission concluded that the loan to El Paso's sole shareholder made those funds (equal in size to one-third of El Paso's entire rate base) unavailable for use in jurisdictional activities and effectively offset the parent company's stake in the regulated business; therefore, including the loan in the equity capitalization would distort the capital structure and subject ratepayers to unnecessarily high capital costs. In so doing, and in refuting El Paso's alternative interpretations of Commission policy, the Commission appropriately maintained a flexible, case-by-case analysis with its focus on ensuring just and reasonable rates.

ARGUMENT

I. THIS COURT LACKS JURISDICTION TO CONSIDER MERELY PRECEDENTIAL FINDINGS THAT DO NOT AFFECT ANY RATES IN THE UNDERLYING RATE CASE

El Paso seeks judicial review of the 2008 Rate Case, on an issue that it concedes has no rate effect in the 2008 Rate Case. For that reason, El Paso cannot demonstrate a cognizable injury to provide standing, and its challenges to the Commission's findings regarding its capital structure are not ripe for review. *See Ala. Mun. Distribs. Grp. v. FERC*, 312 F.3d 470, 472 (D.C. Cir. 2002)

("*Alabama*") (ripeness and standing "overlap significantly"); *see also N.Y. State Elec. & Gas Corp. v. FERC*, 177 F.3d 1037, 1040 n.4 (D.C. Cir. 1999) ("The hardship inquiry under ripeness review . . . overlaps with the injury in fact facet of standing doctrine.") (internal quotation marks and citation omitted).

El Paso's only claimed basis for justiciability is that "the orders set precedent" that has been "applied in El Paso's subsequent rate case" — that is, the 2011 Rate Case — and that "will set the precedent" for future rate cases. Br. 14; *see also* Br. 3 (the 2010 Settlement provided that reserved issues in the 2008 Rate Case "would establish precedent to be applied in subsequent cases"). This Court, however, has soundly rejected both standing and ripeness based on mere "precedential effect." *See, e.g.*, *Alabama*, 312 F.3d at 473 ("precedential effect . . . [is] a type of 'injury' that is clearly insufficient to satisfy . . . Article III jurisdictional requirements"); *Wis. Pub. Power Inc. v. FERC*, 493 F.3d 239, 268 (D.C. Cir. 2007) ("*Wisconsin*") ("'[M]ere precedential effect within an agency is not, alone, enough to create Article III standing, no matter how foreseeable the future litigation.'") (citation omitted); *Exxon Mobil Corp. v. FERC*, 571 F.3d 1208, 1219 (D.C. Cir. 2009) ("a mere interest in FERC's legal reasoning and the possibility of a 'collateral estoppel effect' are insufficient to confer a cognizable injury in fact").

For example, in *Alabama*, a pipeline's customers challenged orders that certificated new facilities to serve other customers at discount rates. Any effect on the challengers' rates, however, would be decided in the pipeline's next rate case. *See id.* 312 F.3d at 473. Though the customers argued that the Commission's ruling would be binding in that next case, this Court found neither injury (for standing) nor issue preclusion (for ripeness). *See id.* at 474 ("[N]either standing nor ripeness could properly grow out of a harm predicated on a potential collateral estoppel effect. . . . To create standing out of the preclusive effect that *would* flow from granting standing is to create it ex nihilo.").

The certainty of the subsequent rate case does not cure the lack of justiciability. This Court has held that precedential effect does not constitute a present injury even if future rate litigation is certain. *See, e.g.*, *N.Y. State Elec. & Gas*, 177 F.3d at 1041-42 ("[E]ven if it [was] virtually inevitable" that a utility would file a future rate case, and the Commission had, in the challenged orders, "indicated its predisposition" to approve a particular rate treatment at that time, the petitioner had "not demonstrated that it suffered current hardship as a result of the orders under appeal.")[5]; *cf. Truckers United for Safety v. Mead*, 251 F.3d 183, 192 (D.C. Cir. 2001) ("the burden of pursuing future litigation is not enough, by itself,

[5] The Court noted the petitioner's argument "that rate cases, like 'death and taxes,' are an inevitable fact of life." *Id.* at 1040.

to demonstrate hardship justifying premature judicial decision-making"); *Miss. Valley Gas Co. v. FERC*, 68 F.3d 503, 509 (D.C. Cir. 1995) (rejecting as unripe a challenge to FERC orders regarding rates for a past rate period because ongoing FERC proceedings could provide relief; the effect of the Commission's legal holding would likely be more clear when actual rates were finalized).

Indeed, the fact that the Commission has now applied its findings to determine El Paso's capital structure in the 2011 Rate Case does not support jurisdiction in *this* case. This Court has rejected standing even where the subsequent rate proceeding has already concluded. In *Wisconsin*, customers of transmission providers challenged orders that approved certain charges to those providers, but the Court found the customers lacked standing because they would not suffer any injury unless and until the providers sought to pass through those charges. *See* 493 F.3d at 267-68. By the time of the appeal, the transmission providers had, in fact, sought and obtained approval to pass through the disputed charges in a separate FERC proceeding (which came to a conclusion before the Court decided *Wisconsin*). *Id.* at 268-69. Nevertheless, the Court held that the petitioners did not have standing for purposes of the existing appeal: "The fact that the Commission approved a pass-through of [the] charges . . . in orders not currently before us does not alter our standing analysis." *Id.* at 269.

El Paso has raised its objections to the Commission's capital structure findings in the 2011 Rate Case. *See supra* pp. 9-10; *see also supra* p. 10 (noting that other parties have already petitioned this Court, in Case Nos. 16-1119 and 16-1122, for review of orders in the 2011 Rate Case). If El Paso elects to seek judicial review at the conclusion of that proceeding, the 2011 Rate Case may (unless those rates, too, are set in a settlement) present the actual, justiciable controversy that is absent here, and allow El Paso to raise all issues to this Court at one time. *See, e.g.*, *Tenn. Gas Pipeline Co. v. FERC*, 9 F.3d 980, 981 (D.C. Cir. 1993) (holding that, once the Commission issued a final order, the petitioner could also challenge earlier, non-final orders); *cf. Alabama*, 312 F.3d at 474 ("Whatever weight the present orders may have in the Commission, in court petitioners will be able to point to any errors in the present agency action that prove to affect their interests adversely in the rate case."). Accordingly, the Court should dismiss this appeal for lack of jurisdiction.

II. STANDARD OF REVIEW

The Court reviews FERC orders under the Administrative Procedure Act's arbitrary and capricious standard. *See, e.g.*, *Mo. Pub. Serv. Comm'n v. FERC*, 783 F.3d 310, 316 (D.C. Cir. 2015) (citing *Rio Grande Pipeline Co.*, 178 F.3d 533, 541 (D.C. Cir. 1999)). The "scope of review under [that] standard is narrow." *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016) (citation omitted). The

relevant inquiry is whether the agency has "articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)); *see also Missouri*, 783 F.3d at 316 ("[the Court's] role is limited to assuring that the Commission's decisionmaking is reasoned, principled, and based upon the record") (internal quotation marks and citation omitted).

In particular, the Commission's ratemaking decisions are subject to a "'zone of reasonableness.'" *Permian Basin Area Rate Cases*, 390 U.S. 747, 767 (1968) (quoting *FPC v. Nat. Gas Pipeline Co.*, 315 U.S. 575, 585 (1942)); *accord Farmers Union Cent. Exch., Inc. v. FERC*, 734 F.2d 1486, 1502 (D.C. Cir. 1984) (reasonableness is a "zone," not a precise point); *see also Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 532 (2008) ("The statutory requirement that rates be 'just and reasonable' is obviously incapable of precise judicial definition, and we afford great deference to the Commission in its rate decisions."); *ExxonMobil Oil Corp. v. FERC*, 487 F.3d 945, 951 (D.C. Cir. 2007) ("In reviewing FERC's orders, we are 'particularly deferential to the Commission's expertise' with respect to ratemaking issues.") (citation omitted); *Missouri*, 215 F.3d at 3 ("On the technical aspects of ratemaking FERC's decisions

necessarily enjoy considerable deference.") (citation omitted); *cf. Elec. Power Supply Ass'n*, 136 S. Ct. at 784 (rate issue "involves both technical understanding and policy judgment"; Court's "limited role" is to ensure that Commission "weighed competing views, selected a compensation formula with adequate support in the record, and intelligibly explained the reasons for making that choice"). This Court also "defer[s] to the Commission's interpretation of its own precedent." *Missouri*, 783 F.3d at 316 (citing *Columbia Gas Transmission Corp. v. FERC*, 477 F.3d 739, 743 (D.C. Cir. 2007)).

The Commission's factual findings are conclusive if supported by substantial evidence. Natural Gas Act § 19(b), 15 U.S.C. § 717r(b). The substantial evidence standard "requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence." *FPL Energy Me. Hydro LLC v. FERC*, 287 F.3d 1151, 1160 (D.C. Cir. 2002). If the evidence is susceptible of more than one rational interpretation, the Court must uphold the agency's findings. *See Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966); *accord Fla. Gas Transmission Co. v. FERC*, 604 F.3d 636, 645 (D.C. Cir. 2010) ("[W]e do not ask whether record evidence could support the petitioner's view of the issue, but whether it supports the Commission's ultimate decision.").

III. ASSUMING JURISDICTION, THE COMMISSION APPROPRIATELY DIRECTED EL PASO TO ADJUST ITS CAPITAL STRUCTURE

If the Court reaches the merits, it should uphold the Commission's precedential findings that two non-rate base assets, a loan to El Paso's parent and undistributed earnings from El Paso's subsidiary, must be removed from El Paso's equity capitalization for purposes of calculating El Paso's return on equity. El Paso objects to the Commission's case-specific analysis, claiming that the Commission ignored its precedents and reversed its policies. The Commission, however, fully explained its reasoning, demonstrated its consistency with the Natural Gas Act and with longstanding policy and precedent, and responded at considerable length to El Paso's various objections. *See* Initial Order PP 86-117, JA 39-52; Rehearing Order PP 13-139, JA 136-87.

A. The Commission Properly Applied Its Longstanding Policies And Precedents Regarding Adjustments to Equity Capitalization

The Commission's findings in this case (affirming the decision of the administrative law judge) center on the "fundamental ratemaking principle . . . that a pipeline's capitalization should as closely as possible represent its investment in rate base." ALJ Decision P 185, JA 407; *see also* Initial Order P 87, JA 39 ("In setting just and reasonable rates the Commission must determine that the rates are based on a reasonably balanced capital structure that reflects the risk of the regulated entity."). In particular, "[b]ecause equity costs more than debt, the aim is

to protect the ratepayer from excessive rates resulting from a capital structure with an unduly high equity ratio." Initial Order P 87, JA 39.

The Commission articulated this essential premise in a 1970 order concerning El Paso's pipeline rates. *See El Paso Nat. Gas Co.*, 44 FPC 73 (1970), *aff'd*, *El Paso Nat. Gas Co. v. FPC*, 449 F.2d 1245 (5th Cir. 1971), *cited in* Initial Order P 107, JA 48. In that case, the Federal Power Commission (FERC's predecessor agency) removed from El Paso's common equity the amount it spent to acquire two non-utility subsidiaries. The Commission stated the principle that "a fair rate of return should be based upon the capitalization that is associated with the utility business where a separation is feasible . . . ." *El Paso*, 44 FPC at 77. The Commission further explained that including non-regulated investments in the capital structure could distort the rate of return: "Where the capitalization reflects investment in properties not related to the jurisdictional business which we are regulating, a distortion of the rate of return determination may result unless capitalization is adjusted to exclude these investments." *Id.*

The Fifth Circuit upheld that principle, agreeing "that the intent of the Natural Gas Act is to require that the rate of return developed by the Commission be based only upon the capitalization which a regulated company devotes to public service, where non-public segments of such capital can be distinctly identified and surely isolated." *El Paso*, 449 F.2d at 1251; *see also Distrigas*, 737 F.2d at 1218

("Only if [funds] are related to . . . regulated activities is it fair to count them as a 'regulatory' balance sheet asset for purposes of apportioning regulation-related assets among equity, long term debt, and other liabilities.") (citing *El Paso*).

El Paso contends that, instead, the Commission must defer to the pipeline's proposed capital structure without adjustments, absent precise tracing of the source of an asset to a specific issuance of equity or debt to finance it. Br. 11-13, 25-20, 34-35. But the Commission reasonably rejected such a perfunctory approach to determining whether rates are just and reasonable, and explained why its precedents do not require it.

1. The Commission Does Not Require That Every Type Of Asset Be Traced To A Specific Financing Source

To remove an asset that is not devoted to regulated service from the pipeline's equity capitalization, the Commission must have "a basis to attribute that asset to equity." Initial Order P 93, JA 42; Rehearing Order P 122, JA 180. That does not necessarily mean, however, that the asset must be traced to a specific equity issuance, as El Paso contends (Br. 11, 20). Indeed, the Commission historically has not required tracing to exclude the types of assets at issue here: undistributed subsidiary earnings or long-term loans. *See* Initial Order P 93, JA 42 (citing cases); Rehearing Order PP 37, 40, JA 147, 148-49; *see also infra* pp. 22-23 (discussing cases on earnings); p. 23 (discussing loan cases).

The Commission has required specific asset-tracing in considering whether to exclude a different type of asset: a pipeline's investment in a subsidiary. *See* Initial Order P 94, JA 43; *see, e.g.*, *Phila. Elec. Co.*, 13 FERC ¶ 61,057, at p. 61,117 (1980); *Ind. & Mich. Elec. Co.*, 4 FERC ¶ 63,039, at p. 65,312 (1978), *aff'd*, 10 FERC ¶ 61,238 (1980). The rationale for tracing such investment is the Commission's reasonable assumption that a company invests in the subsidiary using available funds in the same equity-debt ratio as its overall capitalization, absent a showing tracing the funds. Initial Order P 94, JA 43; *see also* Rehearing Order P 40, JA 148 ("Investments are typically either made using capital raised through debt and/or equity financing and may possibly be traced to a particular debt or equity issue. If an investment cannot be traced . . . and is made from general company funds, the Commission assumes that the investments were made in the same proportion of the pipeline's outstanding capitalization.").

El Paso argues that the Commission must make the same assumption here. *See* Br. 11, 19-20. But the Commission explained that, in contrast to investments, earnings "are derived from operations and not from debt or equity financing." Rehearing Order P 37, JA 147; *see also id.* PP 118-19, JA 178-79. Therefore, the Commission declined to change its policy to extend the assumption of proportional financing for investments to all non-rate base assets. *Id.* P 35, JA 147.

The Commission has long excluded undistributed subsidiary earnings, in particular, from equity capitalization without tracing, even in cases where it did not exclude the original investment in the subsidiary that generated those earnings. *See* Rehearing Order P 37 & n.57, JA 147; *see, e.g.*, *S. Cal. Edison Co.*, 3 FERC ¶ 63,033, at p. 65,203 (1978), *aff'd*, 8 FERC ¶ 61,198 (1979); *Ind. & Mich. Elec. Co.*, 4 FERC at p. 65,312, *aff'd*, 10 FERC ¶ 61,238; *Phila. Elec. Co.*, 10 FERC ¶ 63,034, at p. 65,359, *order on initial decision*, 13 FERC ¶ 61,057, at p. 61,117-18 (1980); *Ark.-La. Gas Co.*, 19 FERC ¶ 63,008, at p. 65,056-57 (1982), *order on initial decision*, 22 FERC ¶ 61,125 (1983).

The Commission also has treated loans differently than investments. *See, e.g.*, *S. Nat. Gas Co.*, 44 FPC 567, 573 (1970) (tracing an investment in a subsidiary to a specific stock issue, but also attributing an advance to another subsidiary without such tracing), *discussed in* Rehearing Order PP 114-17, JA 176-78; *cf.* Rehearing Order P 119, JA 178 (distinguishing investment in a subsidiary from a loan to a shareholding parent, "because an investment would not generally change the pipeline investor's underlying risks and rewards in the way that a return of capital to a shareholding parent does"); *infra* pp. 32-36. Though El Paso argues (Br. 22) that *Mountain Fuel Resources, Inc.*, 27 FERC ¶ 61,171 (1984), applied a tracing requirement to an affiliate loan, the Commission reasonably interpreted that case (a terse opinion that faulted the "flawed" evidentiary presentations by all

parties) as lacking any record evidence by which to attribute the disputed amount to any equity source (whether a specific financing issuance or revenue from operations) to support a capitalization adjustment. *See* 27 FERC at p. 61,316-17; Rehearing Order PP 121-26, JA 179-81 (addressing El Paso's arguments).

In choosing not to adopt a blanket policy for all non-rate base assets, the Commission maintained a flexible, case-by-case approach. *See* Rehearing Order P 102, JA 172 (rejecting "a one-size-fits-all template for tracing the source of an investment or asset to equity financing"); *see also* Initial Order P 95, JA 44 (asset tracing is only "one of many factors to be considered depending upon the nature of the asset at issue, with the focus being on whether the end result is just and reasonable") (discussing various cases); *cf. infra* p. 29 (flexibility serves statutory purpose of ensuring just and reasonable rates). That policy judgment on a technical ratemaking matter is entitled to deference. *E.g.*, *Elec. Power Supply Ass'n*, 136 S. Ct. at 784.

Nor did the Commission impose a "new burden" on El Paso. Br. 27-29. As in any rate case, the pipeline bore "the ultimate burden of persuasion to demonstrate the justness and reasonableness of its proposed capital structure . . . ." Initial Order P 93, JA 42; *see* 15 U.S.C. § 717c(e); *cf. FPC v. Tenn. Gas Transmission Co.*, 371 U.S. 145, 152 (1962) (pipeline "bears the burden of

establishing its rate schedule as being 'just and reasonable'"). Once the Commission found that the protesting parties "have provided sufficient evidence to raise a legitimate question as to the reasonableness" of El Paso's proposed capital structure, "the burden properly shifts to El Paso to demonstrate that its proposed equity ratio is just and reasonable." Initial Order P 99, JA 45; *see also* Rehearing Order PP 62-63, JA 157; *cf. City of Winnfield v. FERC*, 744 F.2d 871, 877 (D.C. Cir. 1984) ("[t]he burden of proof requirement . . . relates to burden of persuasion (or, more accurately, risk of non-persuasion)"). Ultimately, the Commission found substantial evidence and supporting precedent to attribute both the undistributed subsidiary earnings and the loan to El Paso's parent to equity, and determined that both must be excluded from equity capitalization so the capital structure would properly reflect the mix of funds in El Paso's rate base, producing a just and reasonable ratio. *See* Part B, *infra*.

2. The Commission Does Not Have A Policy Mandating Automatic Approval Of A Pipeline's Actual Capital Structure Without Adjustment

El Paso further argues (Br. 33-40) that the Commission was required to accept El Paso's actual capital structure, without adjustments, under a test set forth in a series of *Transco* orders in 1997-98. *See Transcontinental Gas Pipe Line Corp.*, Opinion No. 414, 80 FERC ¶ 61,157 (1997) ("*Transco I*"), *order on reh'g*, Opinion No. 414-A, 84 FERC ¶ 61,084 ("*Transco II*"), *order on reh'g*, Opinion

No. 414-B, 85 FERC ¶ 61,323 (1998) ("*Transco III*"), *discussed in* Rehearing Order PP 103-113, JA 172-76; *see also* Initial Order PP 88-91, JA 39-41. El Paso claims that, by adopting that policy, the Commission effectively overturned its earlier rulings on capital structure. *See* Br. 39, 43. That argument is entirely without merit.

First, the *Transco* orders are not even relevant to El Paso's capital structure. *See* Rehearing Order P 106, JA 173. Those orders involved the long-recurring question of how to derive a capital structure for a utility whose financing is controlled by a parent company, such that its actual capital structure does not reasonably reflect its operating risk. *See Transco II*, 84 FERC at pp. 61,411-12. In such cases, the Commission sometimes used a hypothetical structure derived from the regulated utility's parent's or another entity's structure. *See id.* at p. 61,412. On rehearing in *Transco II*, the Commission held that it would no longer examine the parent company's underlying motivations in increasing a regulated entity's equity ratio, preferring "objective, concrete considerations." *Id*. at p. 61,414. The Commission made clear that it would favor using the regulated utility's own capital structure (i.e., the actual, rather than hypothetical or imputed, structure). *Id.*

Here, use of actual versus hypothetical capital structure was never in question. No party proposed a hypothetical structure for El Paso based on its parent's capitalization. *See* Rehearing Order P 106, JA 173; Initial Order P 89,

JA 40 ("All parties (and the Commission) agree that El Paso's own capital structure should be used as the starting point . . . ."). Nor did the Commission consider any motivation of El Paso or its parent in maintaining the loan. *See* Rehearing Order PP 111-13, JA 175-76 (distinguishing question of manipulation in *Transco*). Rather, the only disputes concerned adjustments to El Paso's own, actual capitalization. *See* Initial Order PP 88-89, JA 39-40.

Neither did the *Transco* orders (having rejected, in *Transco II* and *III*, the mechanistic test adopted in *Transco I*) promise that the Commission would rubber-stamp a pipeline's capitalization without adjustment, as El Paso effectively contends (*see* Br. 33-40). Indeed, in an order issued on the same day as *Transco II*, the Commission applied its newly-modified *Transco* analysis to use a pipeline's own capital structure (reversing an administrative law judge's decision to impute a hypothetical structure), but still directed adjustments to that capital structure. *See Iroquois Gas Transmission Sys., L.P.*, 84 FERC ¶ 61,086, at p. 61,448 (1998), *discussed in* Rehearing Order PP 108-09, JA 174-75. Though El Paso tries (at Br. 38 n.39) to distinguish *Iroquois* because the adjustment was to exclude cash reserves that were held for distribution after the test period, rather than a loan or undistributed earnings as in this case, the distinction is spurious: "In both cases, the adjustment appropriately corrects the capital structure to more accurately

reflect the funds invested in jurisdictional activities." Rehearing Order P 109, JA 175.

El Paso makes much of the Commission's treatment, in the *Transco* orders, of an inter-company loan, which protestors in that case alleged was intended to manipulate the pipeline's equity. *See* Br. 33-35 (discussing *Transco II*, 84 FERC at pp. 61,419-20). El Paso argues that, by declining to examine the company's choices and actions in that case, the Commission effectively overturned its *Distrigas* precedent,[6] and thus should not have excluded El Paso's loan to its parent in this case. *See* Br. 39. The Commission refuted El Paso's interpretation of *Transco* at length. *See* Rehearing Order PP 103-113, JA 172-76. In particular, the relatively small amounts disputed in *Transco* had "only a minor effect" on the equity ratio,[7] and were presented by protestors only as evidence of the parent's manipulation; here, by contrast, the Commission found, without any reference to motivation, that El Paso's significant, long-term removal of funds available for investment in rate base made its capital structure unrepresentative of "the mix of financing supporting jurisdictional activities." Rehearing Order P 111, JA 175-76;

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[6] *Distrigas of Massachusetts Corp.*, 18 FERC ¶ 63,036 (1982), *order on initial decision*, 23 FERC ¶ 61,416 (1983), *aff'd in pertinent part*, 737 F.2d 1208. *See infra* pp. 33-35.

[7] The proposed adjustment affected the equity ratio by only two percent. *Transco I*, 80 FERC at p. 61,666.

see also id. P 113, JA 176 (interpreting *Distrigas* and *Transco* and finding them consistent); *cf. Transco III*, 85 FERC at 62,265 (noting that "many important cases were decided long before [*Transco II*] . . . but that does not diminish their value as precedent"). *See generally Missouri*, 783 F.3d at 316 (Court defers to the Commission's interpretation of its own precedents).

Moreover, in *Transco II* the Commission emphasized the basic principles that apply in all cases — and that support its determinations in this case. The Commission vacated, as "overly mechanistic," an analysis it had adopted in *Transco I* because that approach "would limit the Commission in its consideration of all the relevant factors in a particular case . . . ." 84 FERC at p. 61,415; *see also id.* (vacated policy "would constrain the Commission in balancing its consumer protection obligation with its obligation to ensure that a pipeline has a reasonable opportunity to attract capital and earn a fair return on its investment"); *id.* at 61,414 (policy "limits the Commission's flexibility in evaluating individual pipeline circumstances").

Of course, with such flexibility, the appropriate capital structure "can fall within a very broad range, depending on the record in a particular case." *Id.* at 61,419. As always, "[t]he standard to be applied remains whether the capital structure will produce just and reasonable rates." *Id.* at 61,415; *Transco III*, 85 FERC at 62,266 ("the focus of the Commission's analysis in all cases continues to

be the reasonableness of the pipeline's equity ratio"), *quoted in* Initial Order P 89 n.138, JA 40; *id.* at 62,265 ("It is important to remember that the basic standard of the Natural Gas Act . . . has remained the same, which is that rates authorized by the Commission must be just and reasonable."); *see also Iroquois*, 84 FERC ¶ 61,086 at p. 61,448 ("Most importantly, the Commission is satisfied that Iroquois' own adjusted capital structure will produce just and reasonable rates.").

B. The Commission's Findings In This Case Are Consistent With Precedent And Supported By Substantial Evidence

Applying these policies and precedents, the Commission analyzed the disputed assets in this 2008 Rate Case and found substantial evidence to attribute both the undistributed subsidiary earnings and the loan to El Paso's parent to equity.

1. Undistributed Subsidiary Earnings

The Commission upheld the presiding judge's finding that $145 million in undistributed subsidiary earnings held by Mojave Pipeline Company (a subsidiary of El Paso) should be excluded from El Paso's capital structure. The administrative law judge based her finding on El Paso's own accounting: "retained earnings in [FERC] Account No. 216.1 . . . are equity, regardless of how [El Paso] financed the investment in its subsidiary Mojave." ALJ Decision P 184, JA 406; Initial Order P 96, JA 44 ("As these funds are booked to Account No. 216.1, a Proprietary Capital/equity account under our Uniform System of Accounts, it is

appropriate to reflect the exclusion from the equity component of El Paso's capitalization, rather than apply the exclusion proportionately to debt and equity as El Paso advocates."); *id.* P 97, JA 44-45 ("as our accounting reflects, the undistributed subsidiary earnings represent unrealized equity in the subsidiary, generated from pipeline operations").

That finding is consistent with longstanding Commission precedent excluding undistributed earnings from equity capitalization. In addition to the difficulty of tracing earnings to a specific source of financing (*see* Rehearing Order P 39, JA 148 (explaining why a tracing requirement "would be futile")), the Commission "considers earnings to be a distinct source of capital" — neither debt nor equity, and therefore not "representative of the types and relative amounts of capital invested" in the rate base. Rehearing Order P 41, JA 149. "Since undistributed subsidiary earnings are not available to the pipeline for purposes of rate base investment and since the rate base therefore does not include investments which can be attributed to undistributed subsidiary earnings, those earnings must be excluded from the capitalization." *United Gas Pipe Line Co.*, 13 FERC ¶ 61,044, at p. 61,096 (1980); *see also, e.g.*, *Holyoke Water Power Co.*, 28 FERC ¶ 61,361, at pp. 61,650-51 (1984) (excluding undistributed subsidiary earnings from capital structure: "Amounts recorded in Account 216.1 . . . do[] not represent cash received or generated by the company, [and thus] cannot be a source of

financing for the rate base."); *Ind. & Mich. Elec. Co.*, 4 FERC at p. 65,312 (citing Commission's "policy . . . to exclude undistributed subsidiary earnings from the stockholder's equity in determining a rate of return"), *aff'd*, 10 FERC ¶ 61,238; *Ark.-La. Gas Co.*, 19 FERC ¶ 63,008, at p. 65,056 (1982) (citing "long-standing policy"), *aff'd*, 22 FERC ¶ 61,125 (1983). *See generally* Rehearing Order PP 38-40, JA 148-49.

In a more recent case, the Commission ruled that retained earnings from a subsidiary, in contrast to undistributed earnings, are available for investment and thus should be included in capitalization. *See Golden Spread Elec. Coop., Inc.*, 123 FERC ¶ 61,047 at P 124 (2008) (citing *United Gas*). Contrary to El Paso's claim that the Commission had abandoned its longstanding policy (*see* Br. 43), the Commission based its finding in *Golden Spread* on the *United* principle that inclusion in capital structure depends on availability for investment. *Golden Spread* applied the same principle to opposite facts — i.e., earnings that had been distributed and were available for investment. *See* Rehearing Order P 35 n.56, JA 147 (*Golden Spread* "applied [*United*] in the negative").

2. Loan To Parent Corporation

The Commission also reasonably affirmed the administrative law judge's decision to exclude the balance of the loan to El Paso's corporate parent, El Paso Corporation. The $615 million balance in the Cash Management Program was

equal in size to one-third of the entire $1.86 billion rate base, and appeared to be a long-term investment (booked as such in FERC Account No. 123), having spanned several years before the 2008 test period with no significant draw down. *See* Initial Order PP 99, 104, 106, 110 & n.176, 112, JA 45, 47-50; ALJ Decision P 185, JA 406-07. Thus, the Commission found that it "represent[ed] "a significant long-term outlay" to the shareholder parent. Initial Order P 99, JA 45.

Moreover, the Commission reasonably found the loan attributable to equity: "El Paso has taken funds generated from general revenue and operations. Once earned, no debt issuance has any claim on these funds, but instead they represent additional equity available to the pipeline to dispose of at its discretion." Initial Order P 106, JA 48; Rehearing Order P 44, JA 151. This is consistent with *Distrigas*, where the Commission excluded from equity a pipeline's loan to its parent because the pipeline had issued no debt or preferred stock in the test period — in other words, by process of elimination, "there was no basis to attribute the asset to any debt or preferred stock issuance." Initial Order P 93, JA 42 (discussing *Distrigas*, 18 FERC at p. 65,121); *see also* Rehearing Order P 53, JA 154 ("the Commission did trace the origins of the funds used to make the loan in *Distrigas* — to internally generated funds, rather than externally generated debt or equity capital"). (As noted above, when El Paso demonstrated, on rehearing,

that a $50 million debt issuance had funded part of the loan to its parent, the Commission allowed that amount to be deducted from the debt component of El Paso's capital structure, rather than from equity. *See* Rehearing Order PP 26, 44 n.67, JA 143,151.) Even El Paso's own claim (*see* Initial Order P 105, JA 47) that the funds likely came from depreciation expense and deferred income tax meant that the loan funds came from internally-generated funds, "namely revenues from customer rates over and above El Paso's costs." Rehearing Order P 44, JA 150-51.

Furthermore, because El Paso delivered those funds from equity to its sole shareholder, "they represent an asset that offsets the liability that [El Paso] owes its shareholder parent by way of common stock." Initial Order P 106, JA 48; *accord* Rehearing Order P 131, JA 183. Indeed, the Commission found this factor "more important than simple accounting." Rehearing Order P 46, JA 151. The sole shareholder parent is considered to have an investment in El Paso equal to the outstanding stock. But delivering a substantial amount of cash back to the parent "has changed the underlying financial realities": the parent has the funds for use in other business activities, while the pipeline has made the funds unavailable for its use in jurisdictional service. Rehearing Order P 46, JA 151-52; *see also id.* n.70, JA 152 (noting El Paso's disclosure to the Securities Exchange Commission regarding the transfer of cash to its parent and the resulting potential unavailability

of funds); *cf. Distrigas*, 737 F.2d at 1218 (agreeing with the Commission that a utility's loan to its sole shareholder was not available to the utility to use in regulated activities).

Though El Paso contends (Br. 26) that the Commission failed to explain its meaning, the repeated, and consistent, references to those realities underscore the Commission's appropriate focus on facts over form — i.e., that the loan took a substantial portion of El Paso's capital out of jurisdictional use, "as a practical matter" (*Distrigas*, 737 F.2d at 1218). *See* Initial Order P 104, JA 47 (finding the loan balance unavailable to El Paso "based on the underlying practical realities") (citing *Distrigas*, 737 F.2d at 1218); *accord* Rehearing Order P 32, JA 145-46; *id.* P 132, JA 184 ("El Paso's financial realities caused its stated capital structure to differ from the mix of funds that were invested in rate base").

As a result, the parent "cannot, as the equity investor, expect to receive a regulated return on those funds," and El Paso's stated equity figure is no longer representative of the amount the parent has at stake in El Paso. Rehearing Order P 46, JA 151-52; *accord id.* P 119, JA 178-79. Including the loan in El Paso's equity capitalization would distort the capital structure, "because in including capital not available for investment in rate base, it subjected the ratepayers to higher capital costs over and above the cost of the capital needed to provide

jurisdictional services." *Id.* P 132, JA 183-84 (finding the adjustment "consistent with the *SFPP* opinions"[8]).

Therefore, the Commission concluded, it would be unjust and unreasonable to ratepayers, and not representative of El Paso's risk, to include the loaned funds in its capital structure "as if they were earning returns that would support a return on equity based on investors' expectations." Rehearing Order P 47, JA 152; *see also id.* PP 49-51, JA 153-54. That judgment should be sustained. *Cf. Elec. Power Supply Ass'n*, 136 S. Ct. at 784 (upholding Commission orders that "weighed competing views, selected a compensation formula with adequate support in the record, and intelligibly explained the reasons for making that choice").

[8] *See SFPP, L.P.*, Opinion No. 511, 134 FERC ¶ 61,121 at P 168 (2011); *Texaco Refining & Mktg., Inc. v. SFPP, L.P.*, 117 FERC ¶ 61,285 at P 32 (2006); *SFPP, L.P.*, 113 FERC ¶ 61,277 at PP 64-65 (2005). In response to El Paso's untimely and inapposite argument based on the 2011 *SFPP* order (*cf.* Br. 23-26), the Commission noted that the order merely applied the earlier (2005 and 2006) precedents. Rehearing Order P 130, JA 183. Nevertheless, the Commission considered all three orders and found that the same basic principle applied here: that the pipeline's capital structure should be adjusted to exclude items that would distort the equity-debt ratio as compared to the mix of investment in the rate base. *See id.* PP 130-33, JA 183-84.

CONCLUSION

For the reasons stated, the petition should be dismissed for lack of jurisdiction. In the alternative, the petition should be denied and the challenged FERC Orders should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I certify that the Brief for Respondent has been prepared in a proportionally spaced typeface (using Microsoft Word 2010, in 14-point Times New Roman) and contains 8,588 words, not including the tables of contents and authorities, the glossary, the certificates of counsel, and the addendum.

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June 17, 2016

ADDENDUM
STATUTES AND REGULATIONS

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STATUTES: **PAGE**

REGULATIONS:

clude, in addition to the President, any agency, officer, or employee who may be designated by the President for the execution of any of the powers and functions vested in the President under this chapter.

(Feb. 22, 1935, ch. 18, § 11, 49 Stat. 33.)

DELEGATION OF FUNCTIONS

Ex. Ord. No. 6979, Feb. 28, 1935, which designated and appointed Secretary of the Interior to execute powers and functions vested in President by this chapter except those vested in him by section 715c of this title, was superseded by Ex. Ord. No. 10752, set out below.

Ex. Ord. No. 7756, Dec. 1, 1937, 2 F.R. 2664, which delegated to Secretary of the Interior powers and functions vested in President under this chapter except those vested in him by section 715c of this title, and authorized Secretary to establish a Petroleum Conservation Division in Department of the Interior, the functions and duties of which shall be: (1) to assist, in such manner as may be prescribed by Secretary of the Interior, in administering said act, (2) to cooperate with oil and gas-producing States in prevention of waste in oil and gas production and in adoption of uniform oil- and gas-conservation laws and regulations, and (3) to keep informed currently as to facts which may be required for exercise of responsibility of President under section 715c of this title, was superseded by Ex. Ord. No. 10752, set out below.

EX. ORD. NO. 10752. DELEGATION OF FUNCTIONS TO THE SECRETARY OF THE INTERIOR

Ex. Ord. No. 10752, Feb. 12, 1958, 23 F.R. 973, provided:

SECTION 1. The Secretary of the Interior is hereby designated and appointed as the agent of the President for the execution of all the powers and functions vested in the President by the act of February 22, 1935, 49 Stat. 30, entitled ''An Act to regulate interstate and foreign commerce in petroleum and its products by prohibiting the shipment in such commerce of petroleum and its products produced in violation of State law, and for other purposes,'' as amended (15 U.S.C. 715 *et seq.*), except those vested in the President by section 4 of the act (15 U.S.C. 715c).

SEC. 2. The Secretary of the Interior may make such provisions in the Department of the Interior as he may deem appropriate to administer the said act.

SEC. 3. This Executive order supersedes Executive Order No. 6979 of February 28, 1935, Executive Order No. 7756 of December 1, 1937 (2 F.R. 2664), Executive Order No. 9732 of June 3, 1946 (11 F.R. 5985), and paragraph (q) of section 1 of Executive Order No. 10250 of June 5, 1951 (16 F.R. 5385).

DWIGHT D. EISENHOWER.

§ 715k. Saving clause

If any provision of this chapter, or the application thereof to any person or circumstance, shall be held invalid, the validity of the remainder of the chapter and the application of such provision to other persons or circumstances shall not be affected thereby.

(Feb. 22, 1935, ch. 18, § 12, 49 Stat. 33.)

§ 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).

1954—Subsec. (c). Act Mar. 27, 1954, added subsec. (c).

TERMINATION OF FEDERAL POWER COMMISSION; TRANSFER OF FUNCTIONS

Federal Power Commission terminated and functions, personnel, property, funds, etc., transferred to Secretary of Energy (except for certain functions transferred to Federal Energy Regulatory Commission) by sections 7151(b), 7171(a), 7172(a), 7291, and 7293 of Title 42, The Public Health and Welfare.

STATE LAWS AND REGULATIONS

Section 404(b) of Pub. L. 102–486 provided that: ''The transportation or sale of natural gas by any person who is not otherwise a public utility, within the meaning of State law—

''(1) in closed containers; or

''(2) otherwise to any person for use by such person as a fuel in a self-propelled vehicle,

shall not be considered to be a transportation or sale of natural gas within the meaning of any State law, regu-lation, or order in effect before January 1, 1989. This subsection shall not apply to any provision of any State law, regulation, or order to the extent that such provision has as its primary purpose the protection of public safety.''

EMERGENCY NATURAL GAS ACT OF 1977

Pub. L. 95–2, Feb. 2, 1977, 91 Stat. 4, authorized President to declare a natural gas emergency and to require emergency deliveries and transportation of natural gas until the earlier of Apr. 30, 1977, or termination of emergency by President and provided for antitrust protection, emergency purchases, adjustment in charges for local distribution companies, relationship to Natural Gas Act, effect of certain contractual obligations, administrative procedure and judicial review, enforcement, reporting to Congress, delegation of authorities, and preemption of inconsistent State or local action.

EXECUTIVE ORDER NO. 11969

Ex. Ord. No. 11969, Feb. 2, 1977, 42 F.R. 6791, as amended by Ex. Ord. No. 12038, Feb. 3, 1978, 43 F.R. 4957, which delegated to the Secretary of Energy the authority vested in the President by the Emergency Natural Gas Act of 1977 except the authority to declare and terminate a natural gas emergency, was revoked by Ex. Ord. No. 12553, Feb. 25, 1986, 51 F.R. 7237.

PROCLAMATION NO. 4485

Proc. No. 4485, Feb. 2, 1977, 42 F.R. 6789, declared that a natural gas emergency existed within the meaning of section 3 of the Emergency Natural Gas Act of 1977, set out as a note above, which emergency was terminated by Proc. No. 4495, Apr. 1, 1977, 42 F.R. 18053, formerly set out below.

PROCLAMATION NO. 4495

Proc. No. 4495, Apr. 1, 1977, 42 F.R. 18053, terminated the natural gas emergency declared to exist by Proc. No. 4485, Feb. 2, 1977, 42 F.R. 6789, formerly set out above.

§ 717a. Definitions

When used in this chapter, unless the context otherwise requires—

(1) ''Person'' includes an individual or a corporation.

(2) ''Corporation'' includes any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, receiver or receivers, trustee or trustees of any of the foregoing, but shall not include municipalities as hereinafter defined.

(3) ''Municipality'' means a city, county, or other political subdivision or agency of a State.

(4) ''State'' means a State admitted to the Union, the District of Columbia, and any organized Territory of the United States.

(5) ''Natural gas'' means either natural gas unmixed, or any mixture of natural and artificial gas.

(6) ''Natural-gas company'' means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.

(7) ''Interstate commerce'' means commerce between any point in a State and any point

the issuance of the permit and to the exercise of the rights granted thereunder such conditions as the public interest may in its judgment require.

(b) In any case wherein the Secretary of Energy, the Secretary of State, and the Secretary of Defense cannot agree as to whether or not a permit should be issued, the Secretary of Energy shall submit to the President for approval or disapproval the application for a permit with the respective views of the Secretary of Energy, the Secretary of State and the Secretary of Defense.

SEC. 2. [Deleted.]

SEC. 3. The Secretary of Energy is authorized to issue such rules and regulations, and to prescribe such proce-dures, as it may from time to time deem necessary or desirable for the exercise of the authority delegated to it by this order.

SEC. 4. All Presidential Permits heretofore issued pursuant to Executive Order No. 8202 of July 13, 1939, and in force at the time of the issuance of this order, and all permits issued hereunder, shall remain in full force and effect until modified or revoked by the President or by the Secretary of Energy.

SEC. 5. Executive Order No. 8202 of July 13, 1939, is hereby revoked.

§ 717b–1. State and local safety considerations

(a) Promulgation of regulations

The Commission shall promulgate regulations on the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) pre-filing process within 60 days after August 8, 2005. An applicant shall comply with pre-filing process required under the National Environmental Policy Act of 1969 prior to filing an application with the Commission. The regulations shall require that the pre-filing process commence at least 6 months prior to the filing of an application for authorization to construct an LNG terminal and encourage applicants to cooperate with State and local officials.

(b) State consultation

The Governor of a State in which an LNG terminal is proposed to be located shall designate the appropriate State agency for the purposes of consulting with the Commission regarding an application under section 717b of this title. The Commission shall consult with such State agency regarding State and local safety considerations prior to issuing an order pursuant to section 717b of this title. For the purposes of this section, State and local safety considerations include—

(1) the kind and use of the facility;

(2) the existing and projected population and demographic characteristics of the location;

(3) the existing and proposed land use near the location;

(4) the natural and physical aspects of the location;

(5) the emergency response capabilities near the facility location; and

(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) of this section 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.

neys, 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 ap-plicability to specific positions and employees. Such positions are 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) of this section, 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) of this section 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-ed [28 U.S.C. 346, 347]'' on authority of act June 25, 1948, ch. 646, 62 Stat. 869, the first section of which enacted Title 28, Judiciary and Judicial Procedure.

AMENDMENTS

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

1958—Subsec. (a). Pub. L. 85–791, §19(a), inserted sentence providing that until record in a proceeding has been filed in a court of appeals, Commission may modify or set aside any finding or order issued by it.

Subsec. (b). Pub. L. 85–791, §19(b), in second sentence, substituted ''transmitted by the clerk of the court to'' for ''served upon'', substituted ''file with the court'' for ''certify and file with the court a transcript of'', and inserted ''as provided in section 2112 of title 28'', and, in third sentence, substituted ''petition'' for ''transcript'', and ''jurisdiction, which upon the filing of the record with it shall be exclusive'' for ''exclusive jurisdiction''.

CHANGE OF NAME

Act June 25, 1948, eff. Sept. 1, 1948, as amended by act May 24, 1949, substituted ''court of appeals'' for ''circuit court of appeals'' wherever appearing.

§ 717s. Enforcement of chapter

(a) Action in district court for injunction

Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper district court of the United States, or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this chapter or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices or concerning apparent violations of the Federal antitrust laws to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings.

(b) Mandamus

Upon application of the Commission the district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction to issue writs of mandamus commanding any person to comply with the provisions of this chapter or any rule, regulation, or order of the Commission thereunder.

(c) Employment of attorneys by Commission

The Commission may employ such attorneys as it finds necessary for proper legal aid and service of the Commission or its members in the conduct of their work, or for proper representation of the public interest in investigations made by it, or cases or proceedings pending before it, whether at the Commission's own instance or upon complaint, or to appear for or represent the Commission in any case in court; and the expenses of such employment shall be paid out of the appropriation for the Commission.

(d) Violation of market manipulation provisions

In any proceedings under subsection (a) of this section, the court may prohibit, conditionally or unconditionally, and permanently or for such period of time as the court determines, any individual who is engaged or has engaged in practices constituting a violation of section 717c–1 of

earnings or make any other use of the amortization without authorization by the Commission.

OTHER PROPERTY AND INVESTMENTS

§ 367.1230 Account 123, Investment in associate companies.

(a) This account must include the book cost of investments in securities issued or assumed by associate companies and investment advances to the companies, including related accrued interest when the interest is not subject to current settlement, provided that the investment does not relate to a subsidiary company. (If the investment relates to a subsidiary company, it must be included in account 123.1, Investment in subsidiary companies (§ 367.1231).) Include in this account the offsetting entry to the recording of amortization of discount or premium on interest bearing investments. (*See* account 419, Interest and dividend income (§ 367.4190).)

(b) This account must be maintained in a manner so as to show the investment in securities of, and advances to, each associate company together with full particulars regarding any of the investments that are pledged.

(c) Securities and advances of associate companies owned and pledged must be included in this account, but the securities, if held in special deposits or in special funds, must be included in the appropriate deposit or fund account. A complete record of securities pledged must be maintained.

(d) Securities of associate companies held as temporary cash investments are includible in account 136, Temporary cash investments (§ 367.1360).

(e) Balances in open accounts with associate companies that are subject to current settlement are includible in account 146, Accounts receivable from associate companies (§ 367.1460).

(f) The service company must write down the cost of any security in recognition of a decline in the related value. Securities must be written off or written down to a nominal value if there is no reasonable prospect of substantial value. Fluctuations in market value must not be recorded but a permanent impairment in the value of securities must be recognized in the accounts. When securities are written off or written down, the amount of the adjustment must be charged to account 426.5, Other deductions (§ 367.4265), or to an appropriate account for accumulated provisions for loss in value established as a separate subdivision of this account.

§ 367.1240 Account 124, Other investments.

(a) This account must include the book cost of investments in securities issued or assumed by non-associate companies, investment advances to these companies, and any investments not accounted for elsewhere. This account must also include unrealized holding gains and losses on trading and available-for-sale types of security investments. Include also the offsetting entry to the recording of amortization of discount or premium on interest bearing investments. (*See* account 419, Interest and dividend income (§ 367.4190).)

(b) The records must be maintained in a manner so as to show the amount of each investment and the investment advances to each person.

§ 367.1280 Account 128, Other special funds.

(a) This account must include the amount of cash and book cost of investments that have been segregated in special funds for insurance, employee pensions, savings, relief, hospital, and other purposes not provided for elsewhere. This account must also include unrealized holding gains and losses on trading and available-for-sale types of security investments. A separate account with appropriate title, must be kept for each fund.

(b) Amounts deposited with a trustee under the terms of an irrevocable trust agreement for pensions or other employee benefits must not be included in this account.

CURRENT AND ACCRUED ASSETS

§ 367.1310 Account 131, Cash.

This account must include the amount of current cash funds except working funds.

§ 367.2150 Account 215, Appropriated retained earnings.

This account must include the amount of retained earnings that has been appropriated or set aside for special purposes. Separate subaccounts must be maintained under titles that will designate the purpose for which each appropriation was made.

§ 367.2160 Account 216, Unappropriated retained earnings.

This account must include the balances, either debit or credit, of unappropriated retained earnings arising from earnings of the service company. This account must not include any amounts representing the undistributed earnings of subsidiary companies.

§ 367.2161 Account 216.1, Unappropriated undistributed subsidiary earnings.

This account must include the balances, either debit or credit, of undistributed retained earnings of subsidiary companies since their acquisition. When dividends are received from subsidiary companies relating to amounts included in this account, this account must be debited and account 216, Unappropriated retained earnings (§ 367.2160), credited.

§ 367.2190 Account 219, Accumulated other comprehensive income.

(a) This account must include revenues, expenses, gains, and losses that are properly includable in other comprehensive income during the period. Examples of other comprehensive income include, but are not limited to, minimum pension liability adjustments, and unrealized gains and losses on certain investments in debt and equity securities. Records supporting the entries to this account must be maintained so that the service company can furnish the amount of other comprehensive income for each item included in this account.

(b) This account also must be debited or credited, as appropriate, with amounts of accumulated other comprehensive income that have been included in the determination of net income during the period and in accumulated other comprehensive income in prior periods. Separate records for each category of items must be maintained to identify the amount of the reclassification adjustments from accumulated other comprehensive income to earnings made during the period.

LONG-TERM DEBT

§ 367.2230 Account 223, Advances from associate companies.

(a) This account must include the face value of notes payable to associate companies and the amount of open book accounts representing advances from associate companies. It does not include notes and open accounts representing indebtedness subject to current settlement that are includible in account 233, Notes payable to associate companies (§ 367.2330), or account 234, Accounts payable to associate companies (§ 367.2340).

(b) The records supporting the entries to this account must be kept so that the service company can furnish complete information concerning each note and open account.

§ 367.2240 Account 224, Other long-term debt.

(a) This account must include, until maturity, all long-term debt not otherwise provided for. This covers items such as receivers' certificates, real estate mortgages executed or assumed, assessments for public improvements, notes and unsecured certificates of indebtedness not owned by associate companies, receipts outstanding for long-term debt, and other obligations maturing more than one year from date of issue or assumption.

(b) Separate accounts must be maintained for each class of obligation, and records must be maintained to show for each class all details as to date of obligation, date of maturity, interest dates and rates, security for the obligation, and other similar items.

§ 367.2250 Account 225, Unamortized premium on long-term debt.

(a) This account must include the excess of the cash value of consideration received over the face value upon the issuance or assumption of long-term debt securities.

(b) Amounts recorded in this account must be amortized over the life of each

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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 17th day of June 2016, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system or via U.S. Mail, as indicated below:

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