IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Delaware Riverkeeper Network, *et al.*,	)	
Plaintiffs,	)	
v.	)	Civil Action No.: 16-cv-416 (TSC)
Federal Energy Regulatory Commission, *et al.*,	)	
Defendants.	)	

DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION AND FAILURE TO STATE A CLAIM

Defendants, the Federal Energy Regulatory Commission ("Commission" or "FERC") and Commissioners of FERC sued in their official capacities, move to dismiss the Complaint filed by Plaintiffs on March 4, 2016, for lack of subject-matter jurisdiction and for failure to state a claim pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). First, dismissal is proper pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. Plaintiffs lack a concrete, particularized, and redressible injury necessary to establish standing. Second, dismissal is appropriate pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. Plaintiffs cannot demonstrate actual or structural bias, as the Commission's revenue does not increase by approving a natural gas pipeline application.

Finally, even if this Court had jurisdiction and Plaintiffs could state a claim, the Court should still decline to hear this declaratory judgement action.

Pursuant to Local Rule 7.1(a), the Defendants are separately filing a Statement of Points and Authorities in Support of this Motion to Dismiss, detailing why this suit must be dismissed with prejudice. A proposed order accompanies this request.

WHEREFORE, the Defendants respectfully request that its Motion to Dismiss be GRANTED and the Complaint be DISMISSED WITH PREJUDICE.

Dated: May 3, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF), and paper copies will be sent to those indicated as non-registered participants.

Dated: May 3, 2016

/s/ *Ross R. Fulton*
ROSS R. FULTON
Attorney

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[PROPOSED] ORDER

Upon consideration of Defendants' Motion to Dismiss Complaint for Lack of Subject Matter Jurisdiction and Failure To State a Claim, it is hereby ORDERED that the motion is GRANTED. Plaintiffs' complaint is hereby DISMISSED with prejudice.

_____
Hon. Tanya S. Chutkan
United States District Judge

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DEFENDANTS' STATEMENT IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION AND FAILURE TO STATE A CLAIM

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

COURT CASES: **PAGE**

****Cases chiefly relied upon are marked with an asterisk.***

TABLE OF AUTHORITIES

COURT CASES: **PAGE**

TABLE OF AUTHORITIES

COURT CASES: **PAGE**

TABLE OF AUTHORITIES

COURT CASES: **PAGE**

TABLE OF AUTHORITIES

COURT CASES: **PAGE**

TABLE OF AUTHORITIES

COURT CASES: **PAGE**

TABLE OF AUTHORITIES

COURT CASES: **PAGE**

ADMINISTRATIVE CASES:

STATUTES:

TABLE OF AUTHORITIES

STATUTES: **PAGE**

TABLE OF AUTHORITIES

STATUTES: **PAGE**

REGULATIONS:

OTHER:

INTRODUCTION

Under the Natural Gas Act, first enacted in 1938, the U.S. Congress has delegated to the Federal Energy Regulatory Commission ("FERC" or "Commission") the authority to regulate the interstate and wholesale operations of natural gas companies. That delegation includes the authority to decide whether applications to construct and operate interstate natural gas pipelines are within the public interest. *See* 15 U.S.C. § 717f. In the Omnibus Budget Reconciliation Act of 1986, Congress has authorized the Commission to collect fees and charges from regulated entities, including natural gas pipeline companies, to recover the expense of its regulatory programs. *See* 42 U.S.C. § 7178.

Decades into the Commission's administration of these (and related) statutory authorities, plaintiffs Delaware Riverkeeper and Maya Von Rossum (collectively, "Riverkeeper") now ask this Court to take the extraordinary step of declaring unconstitutional relevant funding and pipeline authorization provisions. Riverkeeper alleges bias, both structural and actual, so severe as to deprive it of fundamental due process when challenging a pipeline application before the Commission.

But this Court lacks jurisdiction to consider Riverkeeper's claim. Riverkeeper does little more than raise the unsubstantiated specter of future agency indifference to the future merits of a pipeline application. In support, Riverkeeper

offers only the PennEast Pipeline project, an application pending now before the Commission.

This simply will not suffice to establish this Court's jurisdiction under Federal Rule of Civil Procedure 12(b)(1) or Riverkeeper's ability to state a claim upon which relief can be granted under Rule 12(b)(6). Just two years ago, the D.C. Circuit heard a near-identical claim of Commission bias, based on its funding structure, allegedly infecting its consideration of natural gas pipeline applications, both in general and as to the specific pipeline at issue. *See No Gas Pipeline v. FERC*, 756 F.3d 764 (D.C. Cir. 2014). Characterizing the claim as "novel, and even creative," *id*. at 768, the court, although finding it lacked original jurisdiction over a pure Budget Act claim, explained that such a bias challenge – indeed any challenge – can only be brought by a party that has first established standing. *Id*. at 770.

Like Jersey City in the *No Gas Pipeline* case, here Riverkeeper similarly "has made no real attempt to demonstrate standing." *Id*. To the extent Riverkeeper is arguing structural bias based on the Commission's funding, its argument – and more important, any possibility of real, immediate harm – is based on a fundamental misunderstanding of how the Commission is funded. The Commission does not receive additional funding by approving gas projects.

Instead, the U.S. Congress sets the Commission's budget through annual and supplemental appropriations. The Commission is authorized to raise revenue to reimburse the Treasury for its appropriations, through annual charges to the natural gas, oil, and electric industries it regulates. *See* 42 U.S.C. § 7178(a)(1). For natural gas pipelines, the Commission divides its applicable expenses among existing pipelines by setting a per-unit annual charge for pipeline companies based on each company's share of total transported gas. *See id*. § 7178(b) (directing Commission to compute charges in an equitable manner); *see also* 18 C.F.R. § 382.202 (regulation applicable to annual charges on natural gas pipelines). Increasing the number of pipelines only changes the number of pipelines that divide the Commission's expenses. In other words, it does not increase the pie – it only changes how the pie is divided.

And to the extent that Riverkeeper is arguing actual bias regarding the PennEast pipeline application, this is neither the time nor the court to articulate such an objection. The Natural Gas Act is explicit as to judicial review, which occurs only after a party is aggrieved by final agency action, and only in the court of appeals. *See* 15 U.S.C. § 717r (judicial review, in the D.C. Circuit or the court of appeals where the natural gas company is located, follows: a Commission order on the merits; an application for rehearing; and a Commission order on rehearing).

The Commission has not yet acted upon the PennEast pipeline application. If and when it does, Riverkeeper can raise to the court of appeals any argument that the Commission's decision is based on considerations other than record evidence. *See Town of Dedham v. FERC*, 2015 WL 4274884, at *1 (D. Mass. July 15, 2015) (rejecting a similar attempt by a plaintiff to preempt agency and judicial review of a pipeline application, finding that it "is well-settled that § 717r's exclusivity provision forecloses judicial review of a FERC certificate in district court"); *see also No Gas Pipeline v. FERC*, 756 F.3d at 771 (rejecting petitioner's actual bias claim because petitioner failed to first raise it to FERC, then the court of appeals).

Instead, here, Riverkeeper runs to federal district court in anticipation of an adverse decision by the Commission on the PennEast application. It is no wonder why Riverkeeper prefers district court, rather than court of appeals, review of its actual bias claim: The D.C. Circuit already has found that such a claim, based on the perceived past success of other pipeline applications, "provides no foundation upon which we could review that claim," and "adds nothing to the strength of an otherwise unsupported claim." *No Gas Pipeline*, 756 F.3d at 770. "The fact that [pipeline applicants] generally succeed in choosing to expend their resources on applications that serve their own financial interests does not mean that an agency which recognizes merit in such applications is biased." *Id*.

Once the PennEast application is removed from consideration, Riverkeeper is left making unsubstantiated claims of bias – based on a lack of understanding of the Budget Act – unconnected to alleged generalized and indeterminate harms. Nor can Riverkeeper demonstrate how granting its complaint would alter any Commission natural gas pipeline decisions. If Riverkeeper has filed its complaint simply because it disagrees with the statutory scheme that Congress has enacted for the Commission, then its remedy lies in a petition to Congress – not this Court.

BACKGROUND

A. The Commission

The Commission is an independent federal agency that, among other statutory responsibilities, regulates the interstate transmission and wholesale sale of natural gas. Comp. ¶ 64; *see generally Schneidewind v. ANR Pipeline,* 485 U.S. 293, 301 (1988) (The Natural Gas Act "confers upon FERC exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce.") (quoting *Northern Nat'l Gas Co. v. State Corp. Comm'n of Kansas,* 372 U.S. 84, 91 (1963)). The Commission is comprised of up to five members appointed by the President, with the advice and consent of the U.S. Senate, with no more than three being members of the same political party. *See* Compl. ¶ 60; *see also* 42 U.S.C. § 7171(a)-(b) (statute establishing the Commission and transferring authority to it).

Commissioners serve for up to five-year terms and have an equal vote on regulatory matters. *See* Compl. ¶ 61.

B. Commission Funding

Each year, Congress appropriates funds for the Commission's operations, with the stipulation that the Commission assess fees and charges on the industries it regulates to reimburse the Treasury. Compl. ¶¶ 66, 67; *see also* 42 U.S.C. § 7178. First, the Commission submits a budget request and then Congress issues an appropriation (sometimes less than the Commission requested). *See* 42 U.S.C. § 7171(j) (requiring the Commission to submit annual authorization and appropriation requests); *see also* http://www.ferc.gov/about/strat-docs/requests-reports.asp (showing ten years of requests and, within those requests, the prior year corresponding appropriations); *compare* http://www.ferc.gov/about/strat-docs/fy15-budg.pdf (requesting fiscal year 2015 budget of $327,277,000) *with* Consolidated Appropriations Resolution, 2015, Pub. L. No. 113-235, Div. D, Title III, 128 Stat. 2321 (2014) (setting fiscal year 2015 budget at $304,389,000).

The Commission assesses filing fees and annual charges under several statutes. Title V of the Independent Offices Appropriations Act of 1952 permits the Commission to charge filing fees for the costs of certain services to natural gas, electric and oil companies which make filings with the Commission. 31 U.S.C. § 9701; *see also New England Power Co. v. Federal Power Commission*, 467 F.2d

425 (1972), *aff'd*, 415 U.S. 345 (1974). (The Federal Power Commission was the statutory predecessor to the Federal Energy Regulatory Commission; *see* 42 U.S.C. § 7151.) Sections 10(e) and 30(e) of the Federal Power Act, 16 U.S.C. §§ 803(e), 823a(e), provide for the assessment of certain fees on the hydroelectric industry. Finally, the Omnibus Budget Reconciliation Act of 1986 (the "Budget Act") provides that "the Federal Energy Regulatory Commission shall, using the provisions of this section and authority provided by other laws, assess and collect fees and annual charges in any fiscal year in amounts equal to all of the costs incurred by the Commission in that fiscal year." 42 U.S.C. § 7178(a)(1). "The fees or annual charges assessed shall be computed on the basis of methods that the Commission determines, by rule, to be fair and equitable." *Id*. § 7178(b).

The Commission's Order No. 472 rulemaking, adopted in 1987 and implementing the Budget Act for all the industries it regulates, describes how the Commission determines annual charges applicable to natural gas pipelines. *See Annual Charges Under the Omnibus Budget Reconciliation Act of 1986*, Order No. 472, FERC Stats. & Regs. ¶ 30,746, 52 Fed. Reg. 21,263, *clarified*, Order No. 472-A, FERC Stats. & Regs. ¶ 30,750, 52 Fed. Reg. 23,650, *on reh'g*, Order No. 472-B, FERC Stats. & Regs. ¶ 30,767, 52 Fed. Reg. 36,013 (1987), *on reh'g*, Order No. 472-C, 42 FERC ¶ 61,013; *see also* 18 C.F.R. § 382.202. In calculating annual charges, the Commission first subtracts all filing fee collections (collected pursuant

to the Independent Offices Appropriations Act)[1] from its total gas program costs, to yield collectible gas program costs. *See* 52 Fed. Reg. at 21,264, 21,276. The Commission divides the collectible gas program costs by the amount of jurisdictional gas sold and transported by all billable gas pipelines, to yield the charge per million cubic feet gas sold and transported. *See* 52 Fed. Reg. 21,276. Then, the Commission multiplies that charge by the amount of jurisdictional gas sold and transported by each individual gas pipeline, to yield each individual pipeline's annual charge. *Id.*

C. The Natural Gas Act

Natural Gas Act sections 1(b) and (c) grant the Commission jurisdiction over the transportation and wholesale sale of natural gas in interstate commerce, with jurisdiction over the production, gathering, and local distribution of natural gas reserved to the States. 15 U.S.C. § 717(b) and (c); *see generally Oneok, Inc. v. Learjet, Inc.*, 135 S.Ct. 1591, 1596 (2015) (detailing FERC's jurisdictional authority under the NGA). Under Natural Gas Act section 7(c), any person seeking to construct, extend, acquire, or operate a facility for the transportation or sale of natural gas in interstate commerce must secure a certificate of public

[1] Pursuant to authority granted in the Independent Offices Appropriations Act, Commission regulations provide for a charge of $1,000 payable with the filing of a natural gas pipeline certificate application, unless the Commission orders direct billing of the costs of processing the application under 18 C.F.R. § 381.107. *See* 18 C.F.R. § 381.207(b).

convenience and necessity from the Commission. 15 U.S.C. § 717f(c)(1)(A). Under NGA section 7(e), the Commission shall issue a certificate to any qualified applicant upon finding that the proposed construction and operation of a pipeline facility is required by the public convenience and necessity, and the Commission may attach reasonable terms and conditions to such a certificate. 15 U.S.C. § 717f(e); *see generally Schneidewind*, 485 U.S. at 302 ("FERC will grant the certificate only if it finds the company able to undertake the project in compliance with the rules and regulations of the regulatory scheme.").

Pipeline applicants seeking certification from the Commission must comply with extensive application requirements, including public notice and comment and environmental review proceedings. *See generally* 18 C.F.R. §§ 157.1-157.22. In 2002, the Commission developed and implemented, through a FERC staff guidance document, a new pre-filing process for developers of interstate natural gas pipelines. *See Guidance: FERC Staff NEPA Pre-Filing Involvement In Natural Gas Projects* (Oct. 23, 2002) ("Pre-Filing Guidance"). The Pre-Filing Guidance encouraged pipeline project sponsors "to engage in early project development involvement with the public and agencies, as contemplated by the National Environmental Policy Act (NEPA)." *Id*. at 1 (stating that information should be filed seven to eight months prior to filing an application).

In 2005, pursuant to the Energy Policy Act of 2005, codified at 15 U.S.C. § 717b-1(a), the Commission developed formal rules for the pre-filing process. *See* 18 C.F.R. § 157.21(b). The rules formalized the process set forth in the Pre-Filing Guidance and are designed such that a prospective applicant will engage FERC staff, federal and state agencies, tribal authorities, and the public in identifying potential issues and developing additional information before the prospective applicant submits an application.

D. The PennEast Pipeline Project

On September 24, 2015, PennEast Pipeline Company filed its application for a certificate of public convenience and necessity. *See* Compl. ¶ 87. The PennEast project is a proposal to construct a 114-mile, 36-inch diameter pipeline through Pennsylvania and New Jersey. Compl. ¶¶ 89-90. Recently, the Commission issued a notice regarding the schedule for environmental review of the PennEast proposal. *See PennEast Pipeline Co.*, "Notice of Schedule For Environmental Review of the PennEast Pipeline Project," Docket No. CP15-558-000 (Mar. 29, 2016). Pursuant to the schedule in the Notice, environmental review is not scheduled to be complete until March 16, 2017. *See id*. Once the environmental review is complete, a Commission order approving, with appropriate terms and conditions, or disapproving the application will follow.

STANDARD OF REVIEW

A court may dismiss a complaint for lack of subject matter jurisdiction at any time. *See* Fed. R. Civ. P. 12(b)(1). Although the court must indulge all reasonable inferences in favor of the non-moving party, the plaintiff bears the burden of invoking the court's subject matter jurisdiction, including establishing the elements of standing. *Arpaio v. Obama*, 797 F.3d 11, 19 (D.C. Cir. 2015) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). "'To survive a motion to dismiss for lack of standing, a complaint must state a plausible claim that the plaintiff has suffered an injury in fact fairly traceable to the actions of the defendant that is likely to be redressed by a favorable decision on the merits.'" *Williams v. Lew*, No. 15-5065, slip op. at 7 (D.C. Cir. Apr. 22, 2016) (quoting *Humane Soc'y v. Vilsack*, 797 F.3d 4, 8 (D.C. Cir. 2015)).

The court need not accept a plaintiff's unsupported factual inferences or legal conclusions. *See Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002). "'Threadbare recitals of the elements of [standing], supported by mere conclusory statements, do not suffice.'" *Arpaio*, 797 F.3d at 11 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009)*; see Williams*, 15-5065, slip op. at 7 (court does not accept "'threadbare recitals of a cause of action's elements, supported by mere conclusory statements'") (quoting *Iqbal*, 556 U.S. at 663). A court may look beyond the pleadings to determine jurisdiction. *See Olaniyi v. District of Columbia*, 763

F.Supp.2d 70, 84 (D.D.C. 2011) (quoting *Jerome Stevens Pharms., Inc. v. FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005)).

Similarly, although a court must construe all facts for a Rule 12(b)(6) motion in the non-moving party's favor, the plaintiff's factual allegations "must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A plaintiff's complaint must "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). A court need not accept a plaintiff's legal conclusions as true. *Iqbal*, 556 U.S. at 678. Nor must a court presume the veracity of legal conclusions that are couched as factual allegations, *see Twombly*, 550 U.S. at 555, or "accept inferences that are unsupported by the facts set out in the complaint." *Arpaio*, 797 F.3d at 19 (quoting *Islamic Am. Relief Agency v. Gonzales*, 477 F.3d 728, 732 (D.C. Cir. 2007)). On a motion to dismiss for failure to state a claim, a court "may consider only the facts alleged in the complaint . . . and matters of which [the court] may take judicial notice." *EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997).

ARGUMENT

I. Riverkeeper's Complaint Fails For Lack Of Standing

Riverkeeper raises vague allegations of actual bias – or the "possible temptation of bias" – because of a 30-year old funding provision in the Budget Act.

But in challenging – without any support – the fairness and integrity of the Commission's proceedings, Riverkeeper misstates how the Commission is actually funded. As discussed in more detail in Section II below, the Commission does not receive increased fees or revenues when it approves a natural gas project. *See infra* pp. 31-35; *see also supra* pp. 6-8 (Commission funding). The Commission does not receive revenues for Commission operations directly from gas pipelines, nor does it keep any revenues that may be over-collected. *See* 42 U.S.C. § 7178(e). Instead, Congress provides for the Commission's budget through annual and supplemental appropriations. *See id*.

Yet even if one accepts Riverkeeper's misrepresentations about the Budget Act's funding provisions as true, Riverkeeper lacks standing. The "irreducible constitutional minimum of standing" requires a plaintiff to state a "plausible claim," *Williams*, No. 15-5065, slip op. at 7, that a plaintiff has suffered an actual or imminent injury in fact, fairly traceable to the challenged agency action, that will likely be redressed by a favorable decision. *R.J. Reynolds Tobacco Co. v. FDA*, 810 F.3d 827, 829 (D.C. Cir. 2016) (quoting *Lujan*, 504 U.S. at 560); *see N.C. Util. Comm'n v. FERC*, 653 F.2d 655, 663 (D.C. Cir. 1981) (the burden is on the petitioner to show the "specifics of the aggrievement alleged"). Associational standing requires that at least one of the association's members demonstrate standing. *See City of Orrville v. FERC*, 147 F.3d 979, 990 n.12 (D.C. Cir. 1998).

A. Riverkeeper Has Not Demonstrated A Concrete And Particularized Injury Traceable To A Commission Action

An injury in fact must be "concrete and particularized," and "actual or imminent, not conjectural or hypothetical." *No Gas Pipeline*, 756 F.3d at 767 (quoting *Lujan*, 504 U.S. at 560); *see also Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009) (A court must be satisfied that the "the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction.") (emphasis original). A plaintiff must point to "specific facts," alleging that a particular action of the defendant will result in a concrete harm to the plaintiff. *Clapper v. Amnesty Int'l*, 133 S.Ct. 1138, 1149 n.14 (2013) (citing *Lujan*, 504 U.S. at 561); *see also Summers*, 555 U.S. at 495. And a plaintiff seeking prospective declaratory and injunctive relief must establish an ongoing or future injury that is "'certainly impending';" it cannot rest on past injury. *Arpaio*, 797 F.3d at 19 (quoting *Clapper*, 133 S.Ct. at 1147).

A "'conjectural or hypothetical'" injury is not sufficient. *No Gas Pipeline*, 756 F.3d at 767 (in addition to rejecting a petitioner's claim of bias from the Commission's funding, the D.C. Circuit also rejected, for lack of standing, additional environmental objections concerning a gas pipeline's purported effects on radon and safety) (quoting *Lujan*, 504 U.S. at 560).[2] Such conclusory

[2] Speculative claims are insufficient whether cast in terms of standing or ripeness. *See R.J. Reynolds*, 810 F.3d at 829 (courts "treat ripeness cases as

statements and legal conclusions are insufficient to state a plausible basis for standing. *Williams*, 15-5065, *slip op.* at 8 (citing *Iqbal*, 556 U.S. at 663). Stacking "speculation upon hypothetical upon speculation" does not establish an actual injury. *Occidental Permian Ltd. v. FERC*, 673 F.3d 1024, 1027 (D.C. Cir. 2012) (dismissing for lack of standing because any alleged harm would only result from future Commission action); *see also Clapper*, 133 S.Ct. at 1148 (claims that rely upon a "highly attenuated chain of possibilities" do not satisfy the requirement that "an injury must be certainly impending"). Standing cannot rest on such speculation that "depend[s] on future events that may never come to pass, or that may not occur in the form forecasted." *Flint Hills Res. Alaska, LLC v. FERC*, 627 F.3d 881, 889 (D.C. Cir. 2010).

Without a direct, personal stake in the litigation, a party is left raising "a generally available grievance about government" inadequate to state a case or controversy. *Ass'n of Am. Phys. & Surgeons v. HHS*, 2006 WL 2882707, at *4 (D.D.C. Oct. 6, 2006) (citing *Lujan*, 504 U.S. at 573-74); *see also Summers*, 555 U.S. at 494 ("generalized harm to the forest or the environment will not alone support standing"). Courts otherwise would be allowed to "oversee legislative or executive action," which would "significantly alter the allocation of power away

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pertinent to whether the risk of injury is imminent enough"); *Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 386 (D.C. Cir. 2012) ("Part of the [ripeness] doctrine is subsumed into the Article III requirement of standing.").

from a democratic form of government." *Summers*, 555 U.S. at 494.

1. Riverkeeper's Claim Of Actual Bias Is Premature And An Attempt To Evade The Natural Gas Act

The only actual bias alleged by Riverkeeper relates to the PennEast project, and the only individual named is Ms. Maya van Rossum. Riverkeeper makes no attempt to demonstrate, through an affidavit or otherwise, that Ms. van Rossum has suffered an injury in fact. *See Am. Chemistry Council v. Dep't of Transp.*, 468 F.3d 810, 820 (D.C. Cir. 2006) ("An organization bringing a claim based on associational standing must show that at least one specifically-identified member has suffered an injury-in-fact"). Instead, as plaintiffs concede, PennEast has only recently sought approval for its pipeline proposal. *See* Compl. ¶¶ 87-88. The Commission has not yet completed its environmental study of – much less approved – the PennEast pipeline. *See id.* ¶ 88. Nor has the Commission yet considered any objections that Riverkeeper or others may have to any pipeline certificate the Commission may issue. *See id.* ¶¶ 92-93 (noting that Riverkeeper has intervened in opposition to the project).

Courts routinely find that a party lacks standing to seek judicial redress when Commission proceedings are ongoing and the Commission has not reached a final decision. *See, e.g.*, *Occidental*, 673 F.3d at 1027 ("FERC has simply not yet determined or approved the rates Occidental's subsidiaries will pay – it has not even *been asked* to do so – so it is impossible to say now that Occidental has been

harmed.") (emphasis original); *PNGTS Shippers' Grp. v. FERC*, 592 F.3d 132, 138 (D.C. Cir. 2010) ("being forced to confront questions in a future legal proceeding does not rise to the level of injury required for Article III standing"); *Alabama Mun. Distribs. Grp. v. FERC*, 312 F.3d 470, 473 (D.C. Cir. 2002) (dismissing challenge to initial rates, set in Natural Gas Act section 7 certificate proceeding, for lack of jurisdiction where final rates would not be determined until a later rate case). Likewise, the D.C. Circuit has rejected claims of bias in ongoing agency proceedings as too speculative to constitute an imminent harm, holding that "bias in a proceeding that might take place years from now is not 'actual or imminent.'" *Nevada v. NRC*, 199 Fed. App'x 1 (D.C. Cir. 2006) (finding the plaintiff lacked standing for claim that the NRC's Waste Confidence Rule would skew the judgment of the NRC Commissioners during the Yucca Mountain licensing proceeding).

Riverkeeper will have the opportunity to challenge the Commission's eventual consideration of the PennEast proposal. Once the Commission acts upon a pipeline certificate request, the Natural Gas Act prescribes a specific method for agency rehearing and judicial review. *See Williams Nat. Gas Co. v. City of Okla. City*, 890 F.2d 255, 262 (10th Cir. 1989) (citing *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 335-340 (1958)) (Congress may prescribe the procedures and conditions for judicial review of administrative orders – including by limiting

what courts may consider those challenges).[3]

An aggrieved party must first seek rehearing before the Commission. *See* 15 U.S.C. § 717r(a). If the Commission denies rehearing, the Act provides that any party "aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals." *Id.* § 717r(b). The court of appeals then "has 'exclusive' jurisdiction 'to affirm, modify, or set aside such order in whole or in part.'" *Am. Energy Corp v. Rockies Express Pipeline LLC*, 622 F.3d 602, 605 (6th Cir. 2010) (quoting § 717r(b)); *see also, e.g., Williams Nat. Gas. Co.*, 890 F.2d at 262 (observing that the court would be "hard pressed to formulate a doctrine with a more expansive scope" than the rule that "judicial review . . . is exclusive in the courts of appeals once the FERC certificate issues").

Riverkeeper is certainly aware of § 717(r)'s requirements. *See Del. Riverkeeper Network v. FERC*, No. 16-1092 (D.C. Cir. filed Mar. 8, 2016) (objecting to FERC approval of Leidy Southeast pipeline project); *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304 (D.C. Cir. 2014) (objecting to FERC

[3] Because the statutory scheme plainly requires challenges to FERC proceedings to be brought in the court of appeals, Riverkeeper similarly fails to identify a waiver of sovereign immunity permitting this suit to be brought in district court. The United States has sovereign immunity unless it consents to be sued, and "the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States v. Mitchell*, 445 U.S. 535, 538 (1980). Without an "unequivocally expressed" consent, a court lacks subject matter jurisdiction. *Id.*

approval of Northeast Upgrade pipeline project). So its complaint can only be understood as a preemptive attempt to avoid D.C. Circuit precedent that actual bias claims with "no foundation" lack standing. *No Gas Pipeline*, 756 F.3d at 770. In so finding, the *No Gas Pipeline* court rejected exactly the evidence offered by Riverkeeper here – the purported approval rate for natural gas pipeline certificate applications. The Court explained that the "only asserted basis for the actual bias" by the petitioner – that the Commission "consistently granted applications from pipelines" – "adds nothing to the strength of an otherwise unsupported claim." *Id.* Because "by the time applicants and their expert counsel have worked through changes, adaptations, and amendments, they are not likely to pursue many certifications that are hopeless." *Id.* "The fact that [applicants] generally succeed in choosing to expend their resources on applications that serve their own financial interests does not mean that an agency which recognizes merit in such applications is biased." *Id.; see also Minisink Residents for Envir. Pres. and Safety v. FERC*, 762 F.3d 97, 108 n.7 (D.C. Cir. 2014) (rejecting argument that language in a FERC approval order demonstrated the agency's bias in favor of a natural gas certificate application – "[I]t would require quite a leap on our part to equate its statements with prejudgment.").

Although Riverkeeper may seek to preempt Commission and appellate review of the PennEast pipeline proposal, the Natural Gas Act precludes

complaints regarding the Commission's consideration of natural gas pipeline certifications in district court. A statute that provides for direct appellate review implicitly "demonstrates that Congress intended to preclude challenges" – including constitutional challenges – prior to the completion of agency proceedings. *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 208, 215 (1994); *accord Elgin v. Dep't of Treasury*, 132 S. Ct. 2126, 2135-37 (2012).

Another district court recently rejected a similar attempt to obtain interlocutory district court review of Commission actions in an ongoing natural gas pipeline proceeding. *See Dedham*, 2015 WL 4274884. That court held that – despite artful pleading – the plaintiff "*is* effectively asking [the district court] for review of" the Commission's natural gas certificate order and related notice to proceed. *Id.*at *2 (emphasis in original). But the "[r]eview of FERC orders is placed in the courts of appeals by § 717r." *Id.* Riverkeeper's impermissible reach for premature relief in district court should likewise be rejected.

2. Riverkeeper's Vague Allegations Of Environmental Or Property Harms Do Not Demonstrate Standing

Nor can Riverkeeper's alleged environmental and property harms salvage standing. A plaintiff cannot establish standing when it fails to demonstrate how the alleged procedural injury results in the claimed concrete harms. *See Del. Dept. of Nat. Res. and Envtl. Control v. FERC*, 558 F.3d 575, 578-79 (D.C. Cir. 2009) (an "alleged procedural injury does not confer standing unless the procedure

affects a concrete and substantive interest"); *see also Summers*, 555 U.S. at 496-97 (an "injury-in-fact remains a "hard floor of Article III jurisdiction;" a "deprivation of a procedural right without some concrete interest that is affected by the deprivation" is insufficient for Article III standing).

In *Summers*, the Supreme Court rejected standing for a claimed injury by the National Forest Service for failing to apply certain due process procedures to a national forest project. *Id.* at 495. The Court found insufficient the claim that plaintiff had visited many national forests and planned to visit unnamed national forests in the future, because the plaintiff failed to "allege [that] *any* particular timber sale or other project claimed to be" lacking due process protections "will impede a specific and concrete plan" of the plaintiff to enjoy the national forests. *Id*. (emphasis in original).

Likewise, in *Williams*, the D.C. Circuit recently rejected standing for a constitutional challenge to the debt limit statute as "entirely conjectural." No. 15-5065, slip op. at 9. Plaintiff's claimed injuries from a potential United States default on its debt obligations rested on "an extended chain of contingencies" based on predictions of future events, and thus was "overly speculative." *Id.* at 9-10 (finding that any alleged injuries must be "certainly impending"). Nor did the plaintiff have standing for a procedural due process claim, as it "turns entirely on

hypothetical future injury from the arbitrary prioritization of Treasury funds." *Id.* at 10.

Yet Riverkeeper's allegations consist entirely of such generalized past or potential property or environmental harms to unnamed members from unnamed pipeline projects:

- "DRN is therefore deeply familiar with the impacts to human health, the environment, and property rights as a result of pipeline construction activities, as well as the biased process the Commission has utilized to approve pipeline projects." Compl. ¶ 40;

- "DRN's members own property that has been, and/or in the future will be, adversely impacted by Commission-jurisdictional pipeline construction and operational activities." *Id.* ¶ 48;

- "DRN's members who live within the blast radius of proposed or existing Commission-jurisdictional pipelines are concerned about the increased risk of bodily and/or property harm as a result of pipeline accidents or explosions." *Id.* ¶ 49.

Alleged past injuries do not provide standing for Riverkeeper's sought-after declaratory or injunctive relief. *See Williams*, No. 15-6065, slip op. at 9 (finding that plaintiff's alleged past injuries were "irrelevant" to standing for declaratory and injunctive relief because such claims require "concrete and particular current or future injuries-in-fact"); *Arpaio*, 797 F.3d at 19 (same). And even if such past allegations were in theory sufficient, Riverkeeper's amorphous assertions fail to specify how the alleged bias resulted in the claimed harms or where the harm occurred. *See Summers*, 555 U.S. at 495 (finding lack of standing for alleged past

injury where the plaintiff failed to allege with specificity where the harm occurred or how the alleged harm resulted from the alleged injury); *see also Chamber of Commerce of the United States v. EPA*, 642 F.3d 192, 199 (D.C. Cir. 2011) (To have associational standing, "it is not enough to aver that unidentified members have been injured. Rather, the petitioner must specifically identify members who have suffered the requisite harm.") (internal quotations and citations omitted).

Nor can Riverkeeper's speculative future injuries support standing. Not only are Riverkeeper's claimed future injuries "indeterminate," *Metcalf v. Nat'l Petroleum Council*, 553 F.2d 176, 185 (D.C. Cir. 1977), but they are entirely "conjectural." *Williams*, 15-5065, slip op. at 9 (rejecting standing for claimed future harm because jurisdiction cannot be based on "worries and concerns that lack a reasoned basis"). Riverkeeper does not identify how any "particular" Commission pipeline certificate that is "claimed to be unlawfully subject" to the Commission's alleged bias "will imp[ose] a specific and concrete" harm to a Riverkeeper member. *Summers*, 555 U.S. at 495. To take one example, Riverkeeper alleges that its members have been, or will be, subject to eminent domain proceedings. *See* Compl. ¶ 49. What members? When? Where? What projects? Without more, there is no evidence that any Riverkeeper members will actually be subject to such eminent domain proceedings resulting from a natural gas pipeline certificate. Riverkeeper's alleged future injuries instead improperly

require an extended chain of speculative contingencies. *Williams*, No. 15-5065, slip op. at 9; *see Summers*, 555 U.S. at 497 (listing the number of assumptions embedded in plaintiff's insufficient allegations for standing).

3. Riverkeeper's Alleged "Appearance of Bias" Is Too Speculative To Support Standing

Without any actual evidence of bias from final Commission decisions – or evidence of specific harm resulting from those decisions – Riverkeeper is left raising generalized grievances about structural bias or the "appearance of bias" from the Budget Act's funding structure. But the D.C. Circuit has held that such allegations of bias are "'speculative and conjectural in the purest sense.'" *Metcalf*, 553 F.2d at 186; *see Ass'n of Am. Phys. & Surgeons*, 2006 WL 2882707, at *7 (claims that alleged bias will result in future injury are "far too speculative to support standing"). Even if a court were to accept the existence of bias, "the shape (and corresponding impact) of any scheme remain unknown." *Ass'n of Am. Phys. & Surgeons*, 2006 WL 2882707, at *7 (finding the plaintiff's allegations required a "series of tenuous inferences").

Riverkeeper's claims in this case are similar to those raised by the plaintiffs in *Metcalf*. In *Metcalf*, the plaintiffs argued that the National Petroleum Council violated various federal statutes because the membership of the Council was not fairly balanced and its advice was inappropriately influenced by special interests. The plaintiffs predicated their standing to sue on the basis of injuries they alleged

to have suffered as consumers and citizens, and the named plaintiff (Metcalf) also sought standing in his capacity as a United States Senator. 553 F.2d at 183.

But the D.C. Circuit affirmed the absence of standing. *Id.* The court held that allegations that an industry imbalance on the Council resulted in biased recommendations, which in turn caused government agencies to adopt policies favoring the petroleum industry, which in turn caused the plaintiffs to be injured as consumers and citizens, were "equally unspecified and indeterminate." 553 F.2d at 185. The court held that any "detrimental effects of this allegedly biased information will occur at some unspecified time in the future." *Id.*

Such claims were equally "abstract in nature," lacking the "essential dimension of specificity." *Id*. at 187. The asserted injuries of higher gas prices, the unavailability of alternative energy sources, and aesthetic blight – if they were to materialize – would "likely be of the type held in common by all members of the public and thus an insufficient basis for standing." *Id.* The court rejected the premise that standing could be premised upon a "generalized grievance" or one that would allow federal courts to become a "forum for the vindication of value preferences with respect to the quality of legislation" enacted by Congress." *Id.* at 188. To "allow standing based on these speculative injuries would undermine the basic policy in the law of standing which seeks to ensure the 'concrete adverseness'" or "specificity" necessary for an Article III case or controversy. *Id.*

at 187.

In contrast, the bias cases cited by Riverkeeper involve concrete, imminent harms. *See Tumey v. Ohio*, 273 U.S. 510, 515 (1927) (plaintiff suffered a concrete harm because he was arrested, charged with the unlawful possession of intoxicating liquor, and convicted by the mayor who had a direct, personal, and substantial pecuniary interest in the outcome of the proceedings over which he presided). In fact, in the litigation at issue in *Esso Standard Oil Co. v. Cotto,* 389 F.3d 212 (1st Cir. 2004), the plaintiff's original complaint for declaratory and injunctive relief for having to defend itself against a fine before an allegedly biased administrative tribunal was dismissed because the administrative proceedings to which it was subjected had not yet concluded. *See Esso Standard Oil Co. v. Cotto,* 327 F.Supp.2d 110, 129 (D.P.R. 2004). Esso was only permitted to pursue its claim *after* the proceedings concluded and the administrative tribunal issued an unfavorable decision. *Id.*

In this case, Riverkeeper's claimed future injuries are "indeterminate." *Metcalf*, 553 F.2d at 185. Without a "distinct and palpable injury" to a specific member, *id.* at 187, Riverkeeper is left asking the Court to assume that the challenged funding structure of the Commission will cause it to make certain biased decisions at an unspecified date, which will adversely affect an unspecified Riverkeeper member in an unspecified manner at an unspecified location. *See id.*

at 185. Such generalized and tenuous injuries based on allegations of bias are inadequate "speculative, conjectural, generalized injuries." *Id*. at 190; *see also FTC v. Standard Oil Co.*, 449 U.S. 232, 244 (1980) (time and expense of participating in an administrative proceeding does not create an injury warranting judicial intervention).

In reality, Riverkeeper brings a "citizen suit," *Summers*, 555 U.S. at 497, challenging the constitutionality of a 30-year old funding statute and asking the Court to serve as the "continuing monitor[] of the wisdom and soundness of Executive action." *Metcalf*, 553 F.2d at 190. Such a complaint must be dismissed for lack of standing. *See Clapper*, 133 S.Ct. at 1147 (The standing inquiry is "especially rigorous when reaching the merits of the dispute would force [a court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional.").

B. Riverkeeper's Alleged Harms Are Not Redressible By The Relief Sought

In addition to the lack of specificity concerning actual, concrete harms, Riverkeeper also lacks standing because it cannot show that any alleged harms are traceable to the Commission's funding structure, or redressible by the relief its seeks. "[T]here must be a causal connection between the injury and the conduct complained of . . . [and] it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan*, 504 U.S. at 560

(citations omitted). In particular, Riverkeeper alleges that the Commission is biased because of the Budget Act's funding provision and, as a result, it asks this Court to declare unconstitutional the provision in 42 U.S.C. § 7178 that authorizes FERC to assess charges on pipeline operators and other entities that it regulates. Riverkeeper cannot show that any alleged structural bias is the cause of its purported injuries, nor that such a declaration would have any impact on the future operation of the Commission.

First, the assertion that the Commission would reach different natural gas pipeline decisions if the Budget Act were declared unconstitutional is grounded in a misunderstanding about the Commission's funding structure. *See supra* pp. 6-8, 30-32 (explaining funding). Because the Commission obtains its funding directly from the U.S. Treasury, there is no reason to presume that declaring the Budget Act provision unconstitutional would eliminate funding for the Commission. Courts have dismissed cases for lack of standing under circumstances where a plaintiff cannot demonstrate that the relief sought would have any impact on the outcome they complain of. *See, e.g., Assoc. of Am. Phys. & Surgeons,* 2006 WL 2882707, at *8 (citing *Fertilizer Inst. v. EPA,* 938 F.Supp. 52, 55 (D.D.C. 1996)) (no standing where "no reason to believe that the Committee would do anything differently with one or two more industry representatives serving on it"). Riverkeeper cannot show that the Commission, if funded differently, would be less

likely to issue pipeline certificates to applicants that demonstrate that a proposed pipeline meets the "public convenience and necessity" standard set forth in the Natural Gas Act. This is particularly true where Commission decisions have been and would continue to be subject to "arbitrary and capricious" judicial review under § 717(r) of the Natural Gas Act – decisions must be based on record evidence now, and they would still need to be based on record evidence under any alternate funding structure. *See* 15 U.S.C. § 717r(b) (Commission's findings of fact are conclusive if supported by substantial record evidence).

Second, Riverkeeper asks for the alternative relief of declaring unconstitutional the Commission's power of eminent domain, declaring unconstitutional the Commission's preemption of state and local laws, or declaring unconstitutional the Commission's rules and regulations for processing the PennEast or other natural gas pipeline certificates. *See* Compl. ¶ 261 (suggesting that "the Court could mitigate[e] the constitutional violation by removing or reducing the Commission's other powers"). But Riverkeeper makes no attempt to explain how removal of those Natural Gas Act "powers" remedies any of its amorphous claims of bias.

Further, all of these alternative forms of relief are matters within the exclusive jurisdiction of the circuit courts of appeals, *see supra* pp. 16-20, which have already created a substantial body of precedent affirming these "powers." *See*

Hughes v. Talen Energy Mktg., LLC, No. 14-614, 2016 WL 1562481, at *7 (S.Ct. Apr. 19, 2016) (explaining that the Supremacy Clause of the U.S. Constitution dictates that a state law is preempted when, as is the case of FERC's regulation of wholesale electricity rates, "Congress has legislated comprehensively to occupy an entire field of regulation, leaving no room for the States to supplement federal law"); *see also Schneidewind v. ANR Pipeline*, 485 U.S. 293 (1988) (finding state regulation preempted by comprehensive FERC authority under the Natural Gas Act); *Dominion Transmission, Inc. v. Summers*, 723 F.3d 238, 244-45 (D.C. Cir. 2013) (explaining the preemptive effect of a natural gas pipeline certificate under the Natural Gas Act on certain state and local laws); *Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 973 (D.C. Cir. 2000) (holding that the Natural Gas Act confers eminent domain on a natural gas certificate holder and FERC does not have the discretion to deny a certificate holder the power of eminent domain); *see also, e.g., Myersville Citizens For A Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1308-09 (D.C. Cir. 2015) (affirming Commission processing of natural gas pipeline certificate under standard of review that requires the court to "assure ourselves that the Commission's 'decisionmaking is reasoned, principled, and based upon the record'") (quoting *Am. Gas Ass'n v. FERC*, 593 F.3d 14, 19 (D.C. Cir. 2010)).

II. Riverkeeper's Complaint Fails For Its Failure to State A Claim

Not only does Riverkeeper fail to establish jurisdiction, it fails to adequately state a basis upon which relief can be granted. Riverkeeper asserts essentially one due process claim – that the funding structure provided under the Budget Act creates "an administrative process that is tainted with structural bias, or the appearance of bias, as well as actual bias in violation of Plaintiffs' rights under the Due Process Clause." Compl. ¶ 263. Assuming without deciding that Riverkeeper can show a constitutionally cognizable property interest, its structural bias claim fails. Under the framework established by the Supreme Court, a plaintiff must show a direct pecuniary interest (not applicable here). Or a plaintiff must demonstrate that an adjudicator's judgments increase in some way the money available and under the control of the adjudicator, and that the increase is substantial, such that "the situation . . . offer[s] a possible temptation to the average . . . [adjudicator] to . . . lead [it] not to hold the balance nice, clear and true." *Ward v. City of Monroeville*, 409 U.S. 57, 60 (1972); *see also Schweiker v. McClure*, 456 U.S. 188, 195-96 (1982); *Navastar Intl. Transp. v. EPA*, 941 F.2d 1339, 1360 (6th Cir. 1991). Simply asserting that the Commission is funded through charges to the natural gas pipeline industry is not enough. *See Van Harken v. City of Chicago*, 103 F.3d 1346, 1353 (7th Cir. 1997) ("the mere fact that an administrative or

adjudicative body derives a financial benefit from fines or penalties that it imposes is not in general a violation of due process").

There is simply no set of facts that Riverkeeper can discover that can satisfy the elements of this claim because Riverkeeper's complaint is predicated on a fundamental misunderstanding of how the Commission is funded. Riverkeeper avers that the Commission is funded by charges on the natural gas industry that it regulates. *See* Compl. ¶ ¶ 4-6. But then Riverkeeper concludes that the Commission "cannot fairly preside over the review and approval process of proposed jurisdictional natural gas pipeline projects because the revenue collected . . . comprises a substantial portion of the Commission's overall budget." Compl. ¶ 8.

What Riverkeeper does not address, and what this Court can take judicial notice of (*see EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997)), is that the Commission (much less an individual Commissioner) does not set its own budget levels. *See supra* pp. 6-8. Because the Commission has no control over the amount of money it is ultimately appropriated each year, and because it is beyond speculation that the Commission would ever consider the natural gas pipeline industry's long-term ability to pay annual fees in the adjudication of any single pipeline proposal, Riverkeeper's complaint does not "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555-56;

see also Trudeau v. FTC, 456 F.3d 178, 193 (D.C. Cir. 2006) ("We do not agree that the truth or falsity of a statement can never be decided as a matter of law.").

In all of the cases finding institutional or structural bias, the adjudicator, as a result of the adjudication, increased, in some way, monies available to it. *See Gibson v. Berryhill*, 411 U.S. 564, 578 (1973) (optometry board composed solely of practicing optometrists and revocation of licenses by the board would "possibly redound to the personal benefit of members of the [b]oard"); *Ward*, 409 U.S. at 58 ("major part of village income is derived from the fines" imposed in mayor's court); *Dugan v. Ohio*, 277 U.S. 61, 62-63 (1928) (no due process violation, but "all the fees taxed and collected under [the mayor's] convictions were paid into the city treasury, and were contributions to a general fund out of which his salary as mayor was payable"); *Tumey*, 273 U.S. at 520 (no fees are paid to mayor unless defendant is convicted); *Esso Standard Oil Co.*, 389 F.3d at 219 (collected fines were deposited in a special account over which board had complete discretion); *see also Capteron v. A.T. Massey Coal Co.*, 556 U.S. 868, 884 (2009) (contributor to judge's campaign "has a significant and disproportionate influence," thereby creating an impermissible "possible temptation"); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 240 (1980) (no due process violation, when agency administering child labor laws set fines that reimbursed, at administrator's discretion, the enforcement expenses of its regional offices); *Alpha Epsilon Phi Tau Chapter Hous. Ass'n v.*

City of Berkeley, 114 F.3d 840, 844 (9th Cir. 1997) (no due process violation, when board had opportunity to go over budget after budget estimate had been met).

That common factual scenario is completely absent here. When FERC approves a gas project it does not receive increased fees for doing so or any extra revenue to offset its expenses. *See Texas Eastern Transmission, LP*, 141 FERC ¶ 61,043, at P 21 (Oct. 18, 2012) (describing Commission funding process) (petitions for review subsequently dismissed in *No Gas Pipeline* case). If the Commission approves a new pipeline, once that project goes into service, the administrative costs of the Commission's natural gas program will be spread across a wider group of regulated natural gas pipelines. If the Commission does not approve the project, it will continue to fully recover its costs from those pipelines that are already in service. *See id*. at P 22.

Riverkeeper makes no allegation – nor can it – that the Commission has executive responsibilities for obtaining funds from the natural gas industry that would motivate partisanship. *See Mallinckrodt v. Little*, 616 F.Supp.2d 128, 147 (D. Me. 2009) (dismissing bias claim where fees derived are placed in a fund which the Board did not control, and where transfer from the fund to the Board was capped at annual ceiling). In fact, Riverkeeper concedes that annual fees received from the natural gas industry are "deposited into the Treasury as a direct offset to its appropriation, resulting in no net appropriation." Compl. ¶ 67.

What Riverkeeper fails to explain, as the Commission explained in its rulemaking implementing the Budget Act, is that "Congress will continue to approve the Commission's budget through annual and supplemental appropriations. The annual charges thus do not constitute a 'blank check' to the Commission but merely serve . . . to reimburse the [Treasury] for the Commission's expenses approved by Congress." Order No. 472 at 30,620. Congress can and does set expense limits for FERC that can be less than the agency requests. *See* http://www.ferc.gov/about/strat-docs/requests-reports.asp (showing ten years of requests and, within those requests, the prior year corresponding appropriations); *see, e.g.*, Consolidated Appropriations Resolution, 2015, Publ. L. No. 113-235, Div. D, Title III, 128 Stat. 2321 (2014) (setting lower budget than FERC requested).

So the Commission is unlike an agency that sets its own budget and then also establishes a per-unit fee on those its regulates to recover those expenses. *Cf. Alpha Epsilon Phi Tau*, 114 F.3d at 844 (finding first prong of structural bias claim satisfied where board's budget is derived from registration fees and it itself adjudicates whether a landlord must pay those fees). The only step the Commission is legally obligated to take is to make an annual authorization and appropriation request to Congress each year showing the amount requested and an assessment of its budgetary needs. *See* 42 U.S.C. § 7171(j); *see also N. Mariana*

Islands v. Kaipat, 94 F.3d 574, 580-81 (7th Cir. 1996) (finding no strong, official motive of administrative head of the judiciary – who "submits budget requests" and consults with governor on expenditures – that would present a "possible temptation" to assess greater fines). Congress then makes its determination. Because the Commission does not set its own budget and has no ability to increase the amount of money it has at its disposal through approving pipeline projects, Riverkeeper has failed to show the first prong of a structural bias claim, and its complaint should be dismissed. This alone requires dismissal of Riverkeeper's complaint pursuant to Fed. R. Civ. P. 12(b)(6).

But Riverkeeper also cannot show the second element of a structural bias claim – that the amount of money attributable to the budget of an institution from adjudications is substantial. *See Alpha Epsilon Phi Tau*, 114 F.3d at 845-46 (question is whether institutional motive is "so strong . . . that it reasonably warrant[s] fear of partisan influence on [the] judgement") (quoting *Kaipat*, 94 F.2d 574). Here, Riverkeeper suggests that because natural gas pipeline work makes up twenty percent of the Commission's budget, it must be biased. Compl. ¶ 83. But that is not the relevant inquiry. Riverkeeper would need to demonstrate that the Commission's funding structure (not just the percentage of its budget) makes it sensitive to the need for new pipelines in a manner that would drive the agency to be motivated to approve new pipeline projects. Because the Commission cannot

increase its revenue by approving natural gas pipelines, and because every pipeline decision must be based on the agency's assessment of record evidence, there can be no sensitivity and no partisan influence to approve natural gas pipelines.

As the Commission has explained (in the agency proceeding leading to the D.C. Circuit's *No Gas Pipeline* decision), "there is no financial incentive for the Commission to grant or deny an application for a gas project, as the outcome will have no more than a *de minimis* impact on the total cost of carrying out the Commission's regulatory responsibilities." *Texas Eastern*, 141 FERC ¶ 61,043, at P 22. The Commission's approval of a new pipeline project – even if it led to an increase in the amount of natural gas sold and thus an increase in the annual charges collected – would not have any impact on its revenues because it is statutorily required to "eliminate any overrecovery or underrecovery of its total costs, and any overcharging or undercharging of any person." *Id*. at P 21 (citing 42 U.S.C. § 7178(e)).

Unlike *Ward*, where "a major part of village income is derived from the fines, forfeitures, costs, and fees imposed by" the mayor, 409 U.S. at 58, here, the Commission has no financial stake in the outcome of any decision it makes. *See Texas Eastern*, P 22 (explaining that FERC will "reimburse the Treasury no more and no less than what it actually expends to meet its statutory mandates"); *accord Marshall*, 446 U.S. at 246 (finding challenged statutory provision did not result in

"any increase in the funds available to the [agency] over the amount appropriated by Congress"); *id*. at 250 (pressures relied on in such cases as *Tumey* and *Gibson* to show a biasing influence are "entirely absent").

Finally, Riverkeeper's allegation that the Commission approves pipeline projects simply to "secure [a] long-term revenue stream for its naturally increasing budget," Compl. ¶ 151, defies logic and common sense. *See Iqbal*, 556 U.S. at 679 (a Rule 12(b)(6) motion "requires the reviewing court to draw on its judicial experience and common sense"). Any pipeline decision by the Commission, to sustain appellate review, must be based on the agency's assessment of record evidence and must be responsive to the arguments of the parties. *See Myersville*, 783 F.3d at 1308. Moreover, the Commission does not exclusively rely on annual charges from natural gas pipelines to fund its budget. It recovers annual charges from three different sectors of the energy industry (natural gas utilities, electric utilities and oil pipelines). *See* 18 C.F.R. §§ 382.201-03 (annual charges assessed against electric utilities, and oil and gas pipeline companies); *id*. § 381.207 (fees under the Natural Gas Act); *id*. §§ 381.401-03 (fees under the Natural Gas Policy Act); *id*. §§ 381.501-05 (fees applicable to certain matters under Parts II and III of the Federal Power Act and Public Utility Regulatory Policies Act); *id*. § 11.1-21 (annual charges under Part I of the Federal Power Act related to hydroelectric licenses).

The Commission is also hardly unique among federal agencies in assessing fees and other charges on the industries its regulates. *See Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212, 214 (1989) (upholding constitutionality of user fees established by Consolidated Omnibus Budget Reconciliation Act of 1985, 49 U.S.C. § 1682a, and recognizing that legislation as "one of a number of recent congressional enactments designed to make various federal regulatory programs partially or entirely self-financing"); *see also Texas Eastern*, 141 FERC ¶ 61,043, at P 20 n. 32 (citing Government Accountability Office report finding that 27 agencies rely on user fees for a significant portion of their budget). The Supreme Court has held these kinds of indirect interests too "remote" to constitute structural bias violative of due process. *See Dugan*, 277 U.S. at 65 (relation of judge as adjudicator to his responsibilities as one of five commissioners responsible for executive responsibility and finances too remote to violate due process); *see also Blackwelder v. Safnauer*, 689 F.Supp. 106, 145-47 (N.D.N.Y. 1988) (rejecting due process challenge to local superintendents' determinations on home-schooling where superintendents receive state funding on a per-pupil basis).

Instead of stating facts that demonstrate the elements of a structural bias claim, Riverkeeper asks this Court to draw inferences of structural bias from various allegations that Riverkeeper claims demonstrate favoritism to the natural gas pipeline industry. *See* Compl. ¶¶ 234-39 (suggesting FERC is biased because

some employees leave for private sector positions); Compl. ¶¶ 181-90 (suggesting that FERC is biased because it has not pursued enforcement cases against natural gas pipelines); Compl. ¶¶ 178-80 (suggesting FERC is biased based on number of natural gas pipelines FERC approves); Compl. ¶¶ 224-33 (suggesting FERC is biased for not allocating funds to an Office of Public Participation). All of these allegations can be refuted – *see, e.g.*, *No Gas Pipeline*, 756 F.3d at 770 (explaining that natural gas pipeline approvals are not necessarily evidence of bias). But even accepting their truth, at the preliminary motions stage, they cannot substitute for allegations of fact necessary to demonstrate their claim. *See Trudeau*, 456 F.3d at 193 (the court need not "accept inferences drawn by plaintiffs if such inferences are unsupported by the facts set out in the complaint") (citations omitted). The appropriate question on a motion to dismiss is whether, if the factual allegations in the complaint are assumed to be true, the complaint states a claim on which relief can be granted. *See Twombly*, 550 U.S. at 555-56; *Kassem v. Wash. Hosp. Ctr.*, 513 F.3d 251, 253 (D.C. Cir. 2008) (citing *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007)). Under this standard, the court's inquiry is directed to the allegations actually set forth in the complaint, not toward a hypothetical "set of facts" outside the complaint.

III. In The Alternative, This Court Should Decline To Hear This Declaratory Judgment Case

And even if Riverkeeper had standing – and even if it adequately pled its claim – this Court should decline jurisdiction under the Declaratory Judgment Act because Riverkeeper's claims are premature. The Declaratory Judgment Act provides that "[i]n a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, ***may*** declare the rights and other legal relations of any interested party seeking such declaration." 28 U.S.C. § 2201(a) (emphasis added).

As the Supreme Court has explained, the statute "confers a discretion on the courts rather than an absolute right upon the litigant." *Wilton v. Seven Falls Co.*, 515 U.S. 277, 287 (1995) (quoting *Pub. Serv. Comm'n of Utah v. Wycoff*, 344 U.S. 237, 241 (1952)). Based on "considerations of practicality and wise judicial administration," this Court is therefore "authorized, in the sound exercise of its discretion, to stay or to dismiss an action seeking a declaratory judgment before trial or after all arguments have drawn to a close." *Id*. at 288; *see also, e.g.*, *Brillhart Excess Ins. Co. of Am.*, 316 U.S. 491, 494 (1942) ("Although the District Court had jurisdiction of the suit under the Federal Declaratory Judgments Act . . . it was under no compulsion to exercise that jurisdiction." (citation omitted)).

The D.C. Circuit has provided that courts should consider:

- Whether a declaratory judgment would finally settle the controversy between the parties, and whether other remedies are available or other proceedings pending;

- The convenience of the parties, and the equity of the conduct of the declaratory judgment plaintiff;

- The prevention of "procedural fencing," and the state of the record; and

- The degree of adverseness between the parties, and the public importance of the question to be decided.

Bazarian Int'l Fin. Assocs. v. Desarrollos Aerohotelco, C.A., 793 F.Supp.2d 124, 131 (D.D.C. 2011) (quoting *Haines Corp. v. Millard*, 531 F.2d 581, 591 n.4 (D.C. Cir. 1976)) (declining jurisdiction, finding that a declaratory judgment was not likely to settle the dispute because it involved ongoing legal and factual issues).

Just as Riverkeeper lacks standing because its allegations involve premature speculation, so too would a declaratory judgment fail to resolve Riverkeeper's complaint. Riverkeeper's only specific allegations involve the ongoing PennEast pipeline proceeding. If the Commission issues a certificate order to PennEast Pipeline, Riverkeeper has a statutorily-prescribed method to seek administrative and judicial review pursuant to § 717r of the Natural Gas Act. *See supra* pp. 17-18. Riverkeeper likewise has the opportunity to challenge any other application to the Commission, or any final decision of the Commission, it believes problematic. But Riverkeeper should not obtain declaratory relief for potential harms for

Commission proceedings that are ongoing, have not yet occurred, or may occur at some indefinite time in the future.

CONCLUSION

For the reasons stated, this Court should dismiss the Plaintiffs' complaint for their failure to establish jurisdiction or their failure to state a claim. Alternatively, this Court should exercise its discretion to decline to offer declaratory relief.

Respectfully submitted,

Dated: May 3, 2016

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF), and paper copies will be sent to those indicated as non-registered participants.

Dated: May 3, 2016

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