ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

Nos. 17-1098, *et al.*

ALLEGHENY DEFENSE PROJECT, *ET AL.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION
Respondent.

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

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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May 10, 2018

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and Amici

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

B. Rulings Under Review

1. *Transcontinental Gas Pipe Line Company, LLC*, 158 FERC ¶ 61,125 (2017) ("Certificate Order"), JA ___;

2. *Transcontinental Gas Pipe Line Company, LLC*, Letter Order Granting Rehearings for Further Consideration (Mar. 13, 2017) ("Certificate-Tolling Order"), JA ___;

3. *Transcontinental Gas Pipe Line Company, LLC*, Letter Order Authorizing Certain Construction Activities (Sept. 15, 2017) ("Construction Order"), JA ___;

4. *Transcontinental Gas Pipe Line Company, LLC*, Letter Order Granting Rehearings for Further Consideration (Oct. 17, 2017) ("Construction-Tolling Order"), JA ___; and

5. *Transcontinental Gas Pipe Line Company, LLC*, 161 FERC ¶ 61,250 (2017) ("Certificate Rehearing Order"), JA ___.

C. Related Cases

This case has not previously been before this Court or any other court. In addition to the cases identified in Petitioners' Rule 28(a)(1) certificate, the following related case is pending judicial review in this Court: *Town of*

Weymouth, Mass. v. FERC, D.C. Cir. Nos. 17-1135, *et al.*, which has been scheduled for oral argument on the same day before the same panel of this Court.

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

May 10, 2018

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Certificate Rehearing Order	*Transcontinental Gas Pipe Line Company, LLC*, 161 FERC ¶ 61,250 (2017)
Certificate-Tolling Order	*Transcontinental Gas Pipe Line Company, LLC*, Letter Order Granting Rehearings for Further Consideration (Mar. 13, 2017)
Commission or FERC	Federal Energy Regulatory Commission
Construction Order	*Transcontinental Gas Pipe Line Company, LLC*, Letter Order Authorizing Certain Construction Activities (Sept. 15, 2017)
Construction Rehearing Order	*Transcontinental Gas Pipe Line Company, LLC*, 162 FERC ¶ 61,192 (2018)
Construction-Tolling Order	*Transcontinental Gas Pipe Line Company, LLC*, Letter Order Granting Rehearings for Further Consideration (Oct. 17, 2017)
Draft Environmental Statement	Draft Environmental Impact Statement
FEIS or Environmental Statement	Final Environmental Impact Statement
Hillabee	Hillabee Expansion Project, a component of the Southeast Market Pipeline Project
NEPA	National Environmental Policy Act
Order Denying Stay	*Transcontinental Gas Pipe Line Company, LLC*, 160 FERC ¶ 61,042 (2017)
Policy Statement	*Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶61,227 (1999)

GLOSSARY (cont.)

Policy Statement Clarification	*Certification of New Interstate Natural Gas Pipeline Facilities*, 90 FERC ¶ 61,128 (2000)
Project	Atlantic Sunrise Project
Remand Order	*Florida Southeast Connection, LLC*, 162 FERC ¶ 61,233 (2018), *reh'g pending*
Transco	Certificate applicant Transcontinental Gas Pipe Line Company, LLC

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Nos. 17-1098, *et al.*

ALLEGHENY DEFENSE PROJECT, *ET AL.*,
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FEDERAL ENERGY REGULATORY COMMISSION
Respondent.

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

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUES

The Federal Energy Regulatory Commission ("FERC" or "Commission") conditionally approved, after extensive review, an application to construct and operate an interstate natural gas pipeline -- the Atlantic Sunrise Project ("Project") -- to meet growing demand for natural gas.

The issues on appeal, presented by two groups (environmental petitioners and landowner petitioners) in four petitions for review of five Commission orders, are:

(1) Whether the Commission reasonably determined that there was need for the Project, where record evidence showed that all Project capacity would be used under long-term contracts and that there was demand for natural gas in the mid-Atlantic and southeastern markets served by the Project;

(2) Whether due process was satisfied here, where: (a) consistent with the Natural Gas Act, pipeline construction started, and district court eminent domain proceedings began, while agency rehearing on the merits of certificate approval was pending; and (b) the Commission determined there was no need for a trial-type hearing regarding a "public use" claim that the Commission could resolve on the written record; and

(3) Whether the Commission satisfied National Environmental Policy Act requirements through its comprehensive environmental review that evaluated downstream greenhouse gas emissions and route alternatives.

COUNTERSTATEMENT OF JURISDICTION

The consolidated proceedings here challenge five Commission orders: (1) *Transcontinental Gas Pipe Line Company, LLC*, 158 FERC ¶ 61,125 (2017) ("Certificate Order"), JA ___; (2) *Transcontinental Gas Pipe Line Company, LLC*,

Letter Order Granting Rehearings for Further Consideration (Mar. 13, 2017) ("Certificate-Tolling Order"), JA ___; (3) *Transcontinental Gas Pipe Line Company, LLC*, Letter Order Authorizing Certain Construction Activities (Sept. 15, 2017) ("Construction Order"), JA ___; (4) *Transcontinental Gas Pipe Line Company, LLC*, Letter Order Granting Rehearings for Further Consideration (Oct. 17, 2017) ("Construction-Tolling Order"), JA ___; and (5) *Transcontinental Gas Pipe Line Company, LLC*, 161 FERC ¶ 61,250 (2017) ("Certificate Rehearing Order"), JA ___. Addendum A to this Brief provides a one-page chart of petitions, parties, and orders.

Petitioners filed the first two of the four petitions for review (Nos. 17-1098 and 17-1128) while the Commission was considering requests for rehearing of its Certificate Order and, thus, before the Commission had issued its final order in this proceeding. For this reason, the Commission and its supporting intervenor (the pipeline applicant) filed motions to dismiss those petitions as incurably premature under this Court's precedent. On September 21, 2017, the Court referred the motions to dismiss to the merits panel, and directed the parties to address in their briefs the jurisdictional issues presented in the motions.

As explained below, the Court lacks subject matter jurisdiction over two of the petitions (Nos. 17-1098 and 17-1128) and three of the challenged orders (the Certificate-Tolling Order, the Construction Order, and the Construction-Tolling

Order). Petitioners' brief does not address the reserved jurisdictional issues, beyond noting simply (Br. 2 & n.5) that the Commission acted on the requests for rehearing of its Certificate Order.

I. The Natural Gas Act's Rehearing And Finality Requirements

Natural Gas Act section 19(a), 15 U.S.C. § 717r(a), provides, in pertinent part, that: an aggrieved party may file a request for rehearing of a Commission order within 30 days after the Commission issues that order; "[n]o 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;" and "[u]nless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied."

This and other Courts have uniformly determined that this does not require the Commission to act on the merits of a rehearing request within 30 days; rather, the Commission appropriately "acts upon the application for rehearing" by providing notice, through a "tolling order," within the 30-day period that it intends to further consider a rehearing request, as it did here. *Cal. Co. v. Fed. Power Comm'n*, 411 F.2d 720, 721 (D.C. Cir. 1969); *see also City of Glendale, Cal. v. FERC*, No. 03-1261, 2004 WL 180270, at *1 (D.C. Cir. Jan. 22, 2004) ("Nor is there merit to petitioner's contention that this court should treat FERC's orders tolling the period for resolving petitioner's requests for agency rehearing as

effectively denying rehearing; the tolling orders do not resolve the rehearing requests but simply extend the time to consider them."); *Kokajko v. FERC*, 837 F.2d 524, 525 (1st Cir. 1988) ("The statutory language, . . . although requiring FERC to 'act' upon the application for rehearing within thirty days after filing, lest the application is deemed denied, does not state . . . that FERC must 'act on the merits' within that time lest the application is deemed denied."); *Gen. Am. Oil Co. of Tex. v. Fed. Power Comm'n*, 409 F.2d 597, 599 (5th Cir. 1969) (Commission "acted" for purposes of Natural Gas Act section 19 by providing notice that it intends to further consider rehearing requests); *Delaware Riverkeeper Network v. FERC*, 243 F. Supp. 3d 141, 145-46 (D.D.C. 2017), *on appeal*, D.C. Cir. No. 17-5084 (noting that the D.C. Circuit and other courts of appeals have held that "section 717r's language requiring the Commission to take action with regard to a rehearing request within 30 days, or have it deemed denied, does not require FERC to act on the merits."). Indeed, just two months ago another court of appeals dismissed as premature a similar petition seeking review of a FERC pipeline certificate order while requests for rehearing of that order were pending, and where the agency had issued a tolling order giving itself more than 30 days to act on those

requests. *See Coal. to Reroute Nexus v. FERC*, 6th Cir. No. 17-4302 (Mar. 15, 2018) (citing cases) (attached at Addendum B).[1]

Under Natural Gas Act section 19(b), 15 U.S.C. § 717r(b), "[a]ny 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 . . . by filing in such court, within sixty days after the order of the Commission upon application for rehearing, a written petition . . . ." The statutory prerequisites of a request for rehearing, an order on rehearing, and a petition for review within 60 days of the rehearing order are mandatory; failure to satisfy any of these prerequisite deprives the reviewing court of jurisdiction. *Process Gas Consumers Grp. v. FERC*, 912 F.2d 511, 514 (D.C. Cir. 1990); *see also Williston Basin Interstate Pipeline Co. v. FERC*, 475 F.3d 330, 336 (D.C. Cir. 2006) ("Statutory jurisdictional requirements, such as the provisions of 15 U.S.C. § 717r, are not mere technicalities that can be brushed aside by a court."); *Clifton Power Corp. v. FERC*, 294 F.3d 108, 111-12 (D.C. Cir. 2002) (a petition for review filed before the rehearing order issues is "incurably premature" and "must be dismissed").

[1] Likewise, another court of appeals, in an unpublished summary order, recently granted FERC and supporting intervenor motions to dismiss a petition for review of a FERC pipeline certificate order while requests for rehearing of that order were pending, and where the agency had issued a tolling order. *See Appalachian Voices v. FERC*, 4th Cir. No. 18-1114 (Mar. 21, 2018).

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

II. Petition Nos. 17-1098 and 17-1128

A chart setting out the consolidated petitions, the date each was filed, and the Commission orders each challenges is set out in Addendum A. Petition No. 17-1098 (filed by the Environmental-Petitioners[2]) seeks review only of the Certificate Order. Petition No. 17-1128 (filed by the Landowner-Petitioners[3]) seeks review of the Certificate Order and the Certificate-Tolling Order. These petitions were filed on March 23, 2017 and May 12, 2017, respectively – before

[2] The Environmental-Petitioners (petitioners in Nos. 17-1098 and 17-1263) are: Allegheny Defense Project, Clean Air Council, Heartwood, Lancaster Against Pipelines, Lebanon Pipeline Awareness, Sierra Club, and Accokeek, Mattawoman, Piscataway Creeks Communities Council, Inc.

[3] The Landowner-Petitioners (petitioners in Nos. 17-1128 and 18-1030) are: Hilltop Hollow Limited Partnership, Hilltop Hollow Limited Partnership, LLC, and Stephen D. Hoffman.

the Commission issued the Certificate Rehearing Order (on December 6, 2017) addressing the matters raised in the requests for rehearing of the Certificate Order. Accordingly, these petitions were incurably premature, and should be dismissed. *See Clifton Power*, 294 F.3d at 110-11; *see also Papago Tribal Util. Auth. v. FERC*, 628 F.2d 235, 238-239 & n.11 (D.C. Cir. 1980) (explaining that a party must file for Commission rehearing before it may file a petition for review, and that the order denying the request for rehearing is the final, reviewable agency order).

Issuance of the Certificate-Tolling Order does not change this. "[T]olling orders do not resolve the rehearing requests but simply extend the time to consider them." *Glendale*, No. 03-1261, 2004 WL 180270, at *1 (citing *Kokajko*, 837 F.2d at 525); *see also Cal. Mun. Utils. Ass'n v. FERC*, No. 01-1156, 2001 WL 936359, at *1 (D.C. Cir. Jul. 31, 2001) ("In light of the agency's tolling order and subsequent clarification order, it is clear petitioners' rehearing requests are still under consideration by the Commission. The petitions for review are, therefore, incurably premature." (internal citation omitted)); 18 C.F.R. § 375.302(v) ("The Commission authorizes the Secretary, or the Secretary's designee to: Toll the time for action on requests for rehearing.").

III. The Construction Order

The Construction Order issued on September 15, 2017. Environmental-Petitioners filed a rehearing request regarding that order on September 22, 2017. R. 4161, JA ___-__. October 17, 2017, the Commission's Secretary issued an order tolling the time for the Commission to issue an order addressing the matters raised on rehearing. R. 4181, JA ___.

On December 15, 2017 and January 29, 2018, respectively, Environmental-Petitioners and Landowner-Petitioners filed petitions for review (Nos. 17-1263 and 18-1030) challenging the Construction Order (and other orders). These petitions (and, in fact, all the consolidated petitions) were filed before the Commission, on March 1, 2018, acted on rehearing of the Construction Order. Thus, the portions of petition Nos. 17-1263 and 18-1030 challenging the Construction Order are incurably premature and should be dismissed. *See Clifton Power*, 294 F.3d at 110-11; *Cal. Mun. Utils. Ass'n*, 2001 WL 936359, at *1; *Glendale*, 2004 WL 180270, at *1; *Papago*, 628 F.2d at 238-239 & n.11; *see also Del. Riverkeeper Network v. FERC*, 857 F.3d 388, 399 (D.C. Cir. 2017) (letter orders, such as the Construction Order, are "appealable after rehearing before the Commission").

IV. The Certificate-Tolling Order And Construction-Tolling Order

The Landowner-Petitioners seek review of the Certificate-Tolling Order in petition No. 17-1128, and the Environmental-Petitioners seek review of the

Construction-Tolling Order in petition No. 17-1263. Because neither set of petitioners sought Commission rehearing of these tolling orders, however, they waived their opportunity to challenge them on appeal. *See* Natural Gas Act section 19(a), 15 U.S.C. § 717r(a); *Del. Riverkeeper*, 857 F.3d at 393, 399 (petitioner "did not request rehearing of the letter orders, so the letter orders are not properly before [the Court] for review"); *Moreau v. FERC*, 982 F.2d 556, 564 (D.C. Cir. 1993) (dismissing appeal of pipeline construction orders as premature where the Commission had issued a tolling order but had not yet ruled on the merits of the rehearing petition); *see also* 18 C.F.R. §§ 375.301(a), 385.713, and 385.1902(a) (Commission rehearing can be sought regarding any staff action taken pursuant to delegated authority).

STATUTES AND REGULATIONS

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

STATEMENT OF FACTS

I. Statutory And Regulatory Background

A. Natural Gas Act

The principal purpose of the Natural Gas Act is to "encourag[e] the orderly development of plentiful supplies of . . . natural gas at reasonable prices." *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1307 (D.C.

Cir. 2015) (quoting *NAACP v. Fed. Power Comm'n*, 425 U.S. 662, 669-70 (1976)). "'Subsidiary' purposes include respecting 'conservation, environmental, and antitrust' limitations." *Id.* (quoting *NAACP*, 425 U.S. at 670 & n.6).

The Natural Gas Act vests the Commission with jurisdiction over the transportation and wholesale sale of natural gas in interstate commerce. *Id.*; Natural Gas Act sections 1(b) and (c), 15 U.S.C. §§ 717(b), (c). Before a company may construct or operate a facility that transports natural gas in interstate commerce, it must obtain a certificate of "public convenience and necessity" from the Commission. Natural Gas Act section 7(c), 15 U.S.C. § 717f(c); *Myersville*, 783 F.3d at 1307. Natural Gas Act § 7(e), 15 U.S.C. § 717f(e), provides that the Commission "shall issue" a certificate to any qualified applicant if it finds that the proposed construction and operation of the pipeline facility "is or will be required by the present or future public convenience and necessity." The Commission may attach reasonable terms and conditions to the certificate. Natural Gas Act § 7(e), 15 U.S.C. § 717f(e); *Myersville*, 783 F.3d at 1307-08.

Natural Gas Act section 7(h), 15 U.S.C. § 717f(h), grants eminent domain rights to a FERC-issued certificate holder that "cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipeline. . . ."

B. The Certificate Process

In 2002, to encourage pipeline sponsors to involve the public and agencies in early project-development, as contemplated by the National Environmental Policy Act ("NEPA"), the Commission implemented a pre-filing process for potential interstate natural gas projects. *See* Guidance: FERC Staff NEPA Pre-Filing Involvement in Natural Gas Projects at 1 (Oct. 23, 2002).[4]

In 2005, pursuant to the Energy Policy Act of 2005, the Commission promulgated rules codifying the pre-filing Guidance. *See* 18 C.F.R. § 157.21. Under these rules, before a prospective applicant submits a formal certificate application, it engages FERC staff, federal and state agencies, tribal authorities, and the public to identify potential issues and develop additional information.

If a formal certificate application is filed, the Commission initially reviews it under criteria set out in its Certificate Policy Statement.[5] *See Myersville*, 783 F.3d

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[4] Available at: https://www.fws.gov/habitatconservation/gas_prefiling_FERC_staff_NEPA_guidance_2004.pdf.

[5] *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999) ("Policy Statement"), *clarified*, 90 FERC ¶ 61,128 ("Policy Statement Clarification"), *further clarified*, 92 FERC ¶ 61,094 (2000). The Commission recently issued a Notice of Inquiry seeking information and stakeholder perspectives to help the Commission explore whether, and if so how, it should revise its approach under its currently effective Policy Statement. *Certification of New Interstate Natural Gas Pipeline Facilities*, 163 FERC ¶ 61,042 (2018).

at 1309. The Policy Statement has a threshold requirement, i.e., that the applicant is prepared to financially support the project without subsidies from its existing customers. Policy Statement, 88 FERC at 61,745, 61,746. Thus, the applicant must show that the project can "'stand on its own financially' through investment by the applicant and support from new customers subscribed to the expanded capacity through 'preconstruction contracts.'" *Myersville*, 783 F.3d at 1309 (quoting Policy Statement, 88 FERC at 61,746; citing Policy Statement Clarification, 90 FERC at 61,392).

This means an applicant will have to recover the full project costs solely from shippers contracting for the new capacity (i.e., incremental rates), and not from existing customers. Policy Statement Clarification, 90 FERC at 61,390; *see also* Policy Statement, 88 FERC at 61,747. The Commission has determined, as a general matter, that the threshold requirement is satisfied if a pipeline proposes incremental rates for new facilities that are higher than its existing system rates. *E.g.*, *Dominion Transmission, Inc.*, 155 FERC ¶ 61,106 P 15 (2016); *Transcontinental Gas Pipe Line Corp.*, 98 FERC ¶ 61,155 (2002).

This threshold requirement ensures that: existing customers do not subsidize a project that does not serve them; landowners will not be subject to eminent domain for projects that are not financially viable; existing pipelines do not have to compete against new market entrants whose projects receive a financial subsidy

through rolled-in rates; and captive customers do not have to shoulder costs of unused capacity from projects that are not financially viable. Policy Statement, 88 FERC at 61,746, 61,747-48.

If the Commission determines that existing customers will not subsidize a new project, it then balances the project's public benefits against any potential adverse consequences (after the applicant has made efforts to eliminate or minimize any adverse effects on existing customers, existing pipelines, and landowners and communities). *Myersville*, 783 F.3d at 1309; Policy Statement, 88 FERC at 61,745-46, 61,748-50; *see also id.* at 61,749 (explaining that this balancing, which precedes the environmental analysis, largely focuses on economic interests such as landowners' property rights). Adverse consequences might include degradation in service, unfair competition, or negative impacts on landowners' property. *Myersville*, 783 F.3d at 1309 (citing Policy Statement, 88 FERC at 61,747-48). "Public benefits may include 'meeting unserved demand, eliminating bottlenecks, access to new supplies, lower costs to consumers, providing new interconnects that improve the interstate grid, providing competitive alternatives, increasing electric reliability, or advancing clean air objectives.'" *Id.*, 783 F.3d at 1309 (quoting Policy Statement, 88 FERC at 61,748).

The Commission will approve a certificate application only if the public benefits from the project outweigh any adverse effects. Policy Statement,

88 FERC at 61,750. Thus, while FERC will begin its environmental review (discussed in the next section) during pre-filing or when an application is filed, if it concludes that the project's public benefits do not outweigh its adverse effects, there would be no need to complete the environmental analysis because the project would not be approved. Policy Statement Clarification, 90 FERC at 61,397-98.

C. National Environmental Policy Act

The National Environmental Policy Act, 42 U.S.C. §§ 4321, *et seq.*, "require[s] the Commission to 'consider and disclose' the environmental effects of the actions it certifies." *Del. Riverkeeper*, 857 F.3d at 394 (quoting *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 96 (1983)); *see also Myersville*, 783 F.3d at 1322 (NEPA "requires federal agencies to consider fully the environmental effects of their proposed actions") (internal quotation omitted); *Minisink Residents for Envtl. Pres. and Safety v. FERC*, 762 F.3d 97, 111 (D.C. Cir. 2014) (NEPA requires the Commission to take a "hard look" at the environmental impact of its action).

NEPA is a procedural statute that prescribes the process federal agencies must follow but does not require any particular result. *Myersville*, 783 F.3d at 1322; *Minisink*, 762 F.3d at 111 (D.C. Cir. 2014); *see also Del. Riverkeeper*, 857 F.3d at 394 ("So long as the agency takes a hard look at the environmental consequences, NEPA does not mandate particular results.").

Regulations implementing NEPA generally require agencies to consider the environmental effects of a proposed action by preparing either an environmental assessment or a more comprehensive environmental impact statement. *See* 40 C.F.R. § 1501.4 (detailing when to prepare an environmental impact statement versus an environmental assessment). An agency must prepare an environmental impact statement when it determines that a proposed action may be a "major Federal action significantly affecting the quality of the human environment . . . ." 42 U.S.C. § 4332(2)(C). An environmental impact statement must include "a detailed statement by the responsible official on – (i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, and (iii) alternatives to the proposed action . . . ." *Id.*

II. The Atlantic Sunrise Application

On March 31, 2015, after completing an extensive, year-long pre-filing process (*see* R. 1-1584), Transcontinental Gas Pipe Line Company, LLC ("Transco") submitted an application for a Natural Gas Act section 7(c), 15 U.S.C. § 717f(c), certificate authorizing it to construct and operate the Atlantic Sunrise Project. R. 1585. The Project would provide an additional 1.7 million dekatherms per day of firm transportation service on Transco's system from northern Pennsylvania to Alabama, including markets along the system in Pennsylvania,

Maryland, Virginia, North Carolina, South Carolina, Georgia, Alabama, and interconnects with existing pipelines serving the Florida market. *Id.*, Transmittal Letter at 3, JA ___. Moreover, the Project would deliver natural gas to an interconnection with Dominion Transmission's pipeline in Virginia. *Id.* at 10, JA ___.

The application explained, among other things, that: Transco had executed binding precedent agreements with nine shippers for all of the Project's capacity (*id.* 4, 9-11, JA ___, ___-___); Transco was proposing an incremental rate for service on Project facilities (*id.* 14-15, JA ___); the Project would provide access to new gas supply sources and would serve the incremental growth of natural gas markets (*id.* 15-16, JA ___-__); and the Project was designed, in light of stakeholder concerns expressed during the pre-filing process, to minimize impacts on communities and the environment (*id.* 7, 16-17, JA ___, ___-___). *See also* R. 3913, Final Environmental Impact Statement ("FEIS" or "Environmental Statement") at ES-2, JA ___ (noting Transco's statement that the Project would: provide its customers and the markets they serve with greatly enhanced access to natural gas supplies; support the overall reliability and diversity of energy infrastructure along the Atlantic seaboard and points south; and meet increased market demands for natural gas).

Numerous entities and individuals, including the petitioners here, filed comments raising issues regarding eminent domain rights, rates, project route and system alternatives, land use, construction and operational safety, noise impacts, cumulative impacts, indirect effects, socioeconomic impacts, and impacts on various natural and cultural resources including geology, air, groundwater, and wetlands. *See* Certificate Order P 14, JA ___.

III. The Environmental Analysis

As part of the pre-filing process, on July 18, 2014, the Commission issued a Notice of Intent to Prepare an Environmental Impact Statement and Notice of Public Scoping Meetings for the Project. R. 894; *see* Certificate Order P 68, JA ___. The Notice briefly described the project and the environmental review process, provided a preliminary list of environmental issues identified by Commission staff, and requested written and oral comments from the public about the Project and issues that should be considered during preparation of the draft environmental impact statement. *See* Certificate Order P 68, JA ___; FEIS at ES- 2, JA ___. Ninety-three speakers provided oral comments at public scoping meetings held in Pennsylvania in August 2014. *See* Certificate Order P 69, JA ___; FEIS at ES-2, JA ___. In addition, over 600 written comments were submitted to the Commission during the scoping process. *See* Certificate Order P 69, JA ___.

All the comments were placed into the public record and considered in the Draft Environmental Impact Statement ("Draft Environmental Statement"). *See id.*

Several months after the certificate application was filed, the Commission provided notice and an additional comment period regarding several proposed project routes alternatives. *See id.* P 70, JA ___.

On May 5, 2016, Commission staff issued the Draft Environmental Statement, which addressed the comments and issues raised until its publication. R. 2769; *see also* Certificate Order P 72, JA ___. More than 560 written comments (plus more than 900 nearly identical letters) were filed with the Commission regarding the Draft, and more than 200 people orally commented on it at four public comment meetings held in Pennsylvania in June 2016. *See* Certificate Order P 72, JA ___; FEIS at ES-2 to ES-3, JA ___-__.

In October 2016, the Commission again provided notice and an additional comment period regarding two project route alternatives identified after the Draft Environmental Statement issued. *See* Certificate Order P 73, JA ___. Twenty-five comments were filed regarding these alternatives. *See id.*

On December 30, 2016, the Commission issued the Final Environmental Statement, which considered the issues identified through the public review process, addressed timely comments on the Draft, and evaluated the potential impacts of construction and operation of the Project on: geology; soils; water

resources; wetlands; vegetation; wildlife and aquatic resources; threatened, endangered and special status species; land use, recreation, and visual resources; socioeconomics; cultural resources; air quality and noise; safety and reliability; alternatives; and cumulative impacts. *See* Certificate Order P 75, JA ___; FEIS at ES-3, JA ___. Commission staff concluded that, while construction and operation of the Project would result in some adverse environmental impacts, those impacts would be reduced to less-than-significant levels with implementation of the proposed mitigation measures. FEIS at ES-18, JA ___. This determination was based on staff's review of information provided by Transco in its application and in response to data requests; field investigations; scoping; literature research; alternatives analyses; and comments from individuals, federal, state and local agencies, and Native American tribes. *Id.*; *see also* Certificate Order P 79, JA ___.

IV. The Commission's and Court's Orders

A. The Certificate Orders

Based upon the extensive record, and after applying the analysis set out in its Policy Statement, the Commission determined, in accordance with Natural Gas Act section 7 and NEPA, that the Project, with the conditions set out in Appendix C of the Certificate Order, would have less-than-significant adverse environmental impacts and that the public convenience and necessity required its approval. Certificate Order PP 33, 79, 172, JA ___, ___, ___; *see also id.* PP 20-32, 68-171,

JA ___-__, ___-__; Certificate Rehearing Order PP 27-29, 50-95, JA ___-__, ___-__.

First, the Commission determined that the threshold requirement, that Transco's existing customers not subsidize the Project, was satisfied since Transco proposed an incremental rate higher than its existing system-wide rate for service on the Project that would recover all Project costs. Certificate Order P 22, JA ___.

Next, the Commission found that the record showed there was a demonstrated need for the Project. *Id.* PP 23, 28-30, JA ___, ___-__. Transco designed the Project to meet the growing demand for natural gas in mid-Atlantic and southeastern markets, and substantiated that demand by executing long-term, binding precedent agreements with nine shippers for all of the Project's capacity. *Id.* PP 23, 28, 29, JA ___, ___, ___. Comments submitted by two Project shippers and an existing Transco end-use customer provided further evidence that there was demand for the Project in the mid-Atlantic and southeastern markets. *Id.* P 30, JA ___; R. 2666, Seneca Resources Corp. Comment at 1-2, JA ___-__; R. 1877, Southern Co. Servs. Comment at 1-4, JA ___-__; R. 1795, Washington Gas Light Co. Intervention Motion at 1-2, JA ___-__; R. 2678, Washington Gas Light Co. Comment at 1 , JA ___. Moreover, a study submitted by one of the petitioners here (Clean Air Council) suggested that pipelines like the Project may aid in the

delivery of lower-priced gas to higher-priced markets. Certificate Order P 28, JA ___; Certificate Rehearing Order P 28, JA ___.

The Commission then balanced the Project's demonstrated need against any potential adverse consequences. The record showed that the Project would not adversely affect existing Transco customers or other pipelines or their captive customers. Certificate Order P 24, JA ___. Furthermore, the Commission found, by routing the Project, to the extent practicable, within or adjacent to existing rights-of-way and committing to continue to negotiate with landowners for the use of their land, Transco had taken appropriate steps to minimize adverse effects on landowners and the surrounding communities. *Id.* P 25, JA ___. After balancing all of this, the Commission found, consistent with the Natural Gas Act and Commission policy, that the public convenience and necessity required approval of the Project, subject to the conditions set out in Appendix C of the Certificate Order, JA ___-__. *Id.* P 33, JA ___.

The Commission thoroughly considered the environmental aspects of the Project, taking into account the Environmental Statement and all public comments. *Id.* PP 68-173, JA ___-__. The Commission agreed with the Environmental Statement's conclusion that, while the Project would result in some adverse environmental impacts, those impacts would be reduced to less-than-significant levels with the Statement's recommended mitigation measures. *Id.* PP 79, 172,

JA ___, ___. Those mitigation measures were included as conditions of the certificate. *Id.* P 172, Appendix C, JA ___, ___-__.

The Commission's environmental analysis considered numerous issues. As relevant here, the Commission evaluated the Project's downstream impacts on greenhouse gas emissions, and further evaluated that issue in light of this Court's recent decision in *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017). Certificate Rehearing Order PP 92-95, JA ___-__; Certificate Order PP 143-47, JA ___-__; FEIS at 4-316 to 4-319, JA ___-__. The Commission also considered the Conestoga Alternative Route, but agreed with the Environmental Statement's finding that it was not environmentally preferable to Transco's proposed route. Certificate Order PP 157, 161, JA ___-__; FEIS at 3-55 to 3-57, JA ___-__.

On March 13, 2017, "[i]n order to afford additional time for consideration of the matters raised or to be raised" in requests for rehearing of the Certificate Order, the Commission's Secretary issued the Certificate-Tolling Order, JA ___, granting rehearing "for the limited purpose of further consideration" by the Commission. The Certificate-Tolling Order explained that, if it were not issued, timely-filed rehearing requests would have been deemed denied. *Id.*

B. The Court's And Commission's Stay Denial Orders

In February and March, 2017, the petitioners (collectively, "Allegheny") asked the Commission to stay the Certificate Order. *See Transcontinental Gas*

Pipe Line Co., LLC, 160 FERC ¶ 61,042 (2017) ("Order Denying Stay"), JA ___-__. The Commission denied the stay requests on August 31, 2017. *Id.*; *see also* Certificate Rehearing Order PP 97-102, JA ___-__ (denying rehearing requests of Order Denying Stay). The Commission found, consistent with its stay factors, that: the parties requesting a stay had not shown they would suffer irreparable injury without a stay; a stay would substantially harm Transco because it had a limited window to comply with Fish and Wildlife tree clearing recommendations necessary to mitigate impacts on threatened and endangered species in the project area; and a stay was not in the public interest because delaying construction could delay completion of the Project, which the Commission determined is required by the public convenience and necessity. Order Denying Stay PP 5-17, JA ___-__.

The Commission also responded to claims that it should not permit construction to proceed before it substantively acted on requests for rehearing of the Certificate Order. The Commission explained that, if Transco elected to proceed with construction, "it bears the risk that we will revise or reverse our initial decision or that our orders will be overturned on appeal. If this were to occur, Transco might not be able to utilize any new facilities, and could be required to remove them or to undertake further remediation." *Id.* P 18, JA ___. The Commission reiterated all of this in denying rehearing regarding the stay requests. Certificate Rehearing Order PP 97-102, JA ___-__.

This Court twice denied petitioner requests to stay the Commission's orders here. The Environmental-Petitioners first filed an emergency motion for stay of the Certificate Order on October 30, 2017, asserting that the Commission did not adequately assess the Project's downstream effects on climate change. On November 8, 2017, the Court denied the emergency stay motion, finding that Environmental-Petitioners had "not satisfied the stringent requirements for a stay pending court review." November 8, 2017 Order (citing *Nken v. Holder*, 556 U.S. 418, 434 (2009), and D.C. Circuit Handbook of Practice and Internal Procedures 33 (2017) (requiring four-factor showing)).

On January 16, 2018, following the Commission's issuance of its Certificate Rehearing Order, Environmental-Petitioners again sought a Court stay, asserting the same grounds. The Court again found Environmental-Petitioners had not satisfied the stringent requirements for a stay pending court review and denied the motion on February 16, 2018.

C. The Limited Construction Authorization Order

On September 5 and 8, 2017, Transco requested limited authority to construct specific Project facilities. R. 4143 at 1-4, JA ___-__; R. 4150 at 1-2, JA ___-__. When these requests were filed, the Commission already had determined, in the Certificate Order, that the Project was required in the public convenience and necessity and, in the Order Denying Stay, that a stay of

construction pending Commission rehearing of the Certificate Order was unwarranted. Transco's requests explained that it had satisfied all Certificate Order conditions related to the requested construction.

The Commission granted Transco's limited construction authorization requests in a letter order issued on September 15, 2017. Construction Order, JA ___. The order stated that the construction authorization was limited to the specific facilities and activities at issue in those requests. *Id.* 1, JA ___.

On September 19, 2017, as amended on September 22, 2017, the Environmental-Petitioners sought rehearing of the Construction Order. R. 4159, 4161. The Commission issued the Construction-Tolling Order (JA ___) on October 17, 2017, granting rehearing for the limited purpose of providing the Commission additional time to consider the matters raised on rehearing. The Commission denied rehearing of the Construction Order on March 1, 2018, after all petitions for review here were filed. *Transcontinental Gas Pipe Line Co., LLC*, 162 FERC ¶ 61,192 (2018) ("Construction Rehearing Order"). *See also* Addendum A to this Brief (table of petitions, parties, and orders on review.)

SUMMARY OF ARGUMENT

Balancing the need to meet growing demand for natural gas with potential adverse impacts is a challenging task ultimately entrusted to the Commission by

Congress. The Commission satisfied all its statutory responsibilities in conditionally approving the Atlantic Sunrise Project.

The Commission examined and balanced the many competing interests here, as it must under the Natural Gas Act, and found that the need for the Project to serve increasing demand for natural gas in the mid-Atlantic and southeastern regions outweighed any unmitigated impacts on landowners and surrounding communities. The Commission also satisfied its responsibilities under the National Environmental Policy Act, as it developed and carefully considered a comprehensive record on potential environmental impacts, and imposed numerous environmental conditions and mitigation measures which ensure that Project impacts would be less-than-significant.

Environmental and landowner claims on appeal effectively ask the Court to conduct a *de novo* review of Project need and impacts. That is unnecessary and contrary to the Court's deferential review under both the Natural Gas Act and NEPA.

Project Need

The Commission fully satisfied Natural Gas Act requirements here. The Commission's determination that there was need for the Project was supported by substantial evidence and is consistent with Commission policy.

The record shows that the Project's capacity is fully subscribed under long-term precedent agreements, which Commission policy and this Court's precedent establish are enough. Comments submitted by two Project shippers and an existing Transco end-use customer provided additional evidence that there was demand for the Project in the mid-Atlantic and southeastern markets. In addition, a study submitted by a petitioner here showed that pipelines like the Project may help deliver low-priced gas to higher-priced markets.

Due Process

Due process was satisfied here. Environmental-Petitioners claim they were denied due process because the Commission issued procedural tolling orders and authorized specific, limited construction before it issued an order addressing the merits of requests for rehearing of the Certificate Order. The Court lacks jurisdiction to address that claim because Environmental-Petitioners either failed to seek rehearing of, or prematurely filed petitions seeking judicial review regarding, the orders underlying that claim.

In any event, Environmental-Petitioners' due process claim fails on the merits. They have not established that they have been denied a federally-protected liberty or property interest. Pennsylvania Constitution Article I section 27 does not provide the necessary federally-protected interest; it merely confers a potential public right to sue Pennsylvania for failing to protect the environment.

Moreover, while Environmental-Petitioners complain that the Commission allowed certain limited construction to commence before agency rehearing and judicial review, Congress designed the Natural Gas Act to produce that default outcome. Under the Natural Gas Act, neither requests for Commission rehearing nor petitions for judicial review stay a Commission order. Both the Commission and this Court denied requests to stay the effectiveness of the Certificate Order. Furthermore, uniform court precedent establishes that the Commission may, consistent with the Natural Gas Act, take more than 30 days to issue an order on the merits of rehearing requests by providing notice, as it did here, that it intends to further consider those requests.

Landowner-Petitioners' due process claim, which challenges the Commission's issuance of the Certificate-Tolling Order and the actions of a district court, is not properly before the Court either. Landowner-Petitioners waived their opportunity to challenge the Certificate-Tolling Order by failing to request Commission rehearing of that order. Furthermore, the proceeding here, on petitions for review of FERC orders, is not the appropriate proceeding to challenge district court eminent domain actions.

In any case, the Commission reasonably determined that, since it was able to resolve Landowner-Petitioners' public use claim on the written record, a trial-type hearing on that issue was unnecessary. Landowner-Petitioners were heard on their

public use claim; they simply were unsuccessful in advancing their arguments to the Commission. Under the Natural Gas Act, their rehearing requests did not act to stay the Certificate Order, and that statute provides the certificate holder with eminent domain authority.

Downstream Greenhouse Gas Effects

The Commission also fully satisfied National Environmental Policy Act requirements. The Commission determined that, if the Project's maximum capacity of natural gas were transported and burned 365 days a year, it would result in downstream emissions of approximately 32.9 million metric tons per year of carbon dioxide equivalent, and that this would increase emissions in the 16 states to which Project gas could be delivered by no more than 1.4 percent, and would increase national emissions by 0.6 percent.

While Allegheny argues that the Commission should have taken the additional step of using the Social Cost of Carbon tool, it waived that argument by failing to raise it to the Commission on rehearing. In any case, a recent Commission order explained why the Social Cost of Carbon tool would not meaningfully inform natural gas transportation project decisions.

Allegheny claims the Commission improperly determined that downstream gas emissions would be insignificant, and based that determination on a finding that estimated emissions could be partially offset if demand for project gas were

instead met by coal or oil. But the Commission did not make a downstream emissions significance finding. And the Certificate Rehearing Order discussed the potential partial offset only as an additional point after finding that the estimated downstream emissions represented an upper bound because projects are not designed to run at maximum capacity every day of the year.

Allegheny's challenges to the Commission's findings regarding the Hillabee Expansion Project also fail. In comments on the Draft Environmental Statement, Allegheny claimed that Hillabee and the Project were connected and cumulative actions and therefore needed to be evaluated in the same environmental impact statement. The Commission reasonably found that claim waived since it was raised well outside the Project's environmental scoping and comment period. Alternatively, the Commission reasonably found that the projects were not connected or cumulative actions, as each would serve a significant purpose even if the other were not built. Thus, there was no need for the Commission to consider potential Hillabee downstream greenhouse gas effects in its analysis of the Project here.

Conestoga Alternative Route

The Commission reasonably considered the Conestoga Alternative Route, but found it was not environmentally preferable to Transco's proposed route. While that alternative route had some advantages – it was one mile shorter and

would follow existing rights-of-way for a greater percentage of its length – it had significant disadvantages. It would cross more recreational areas and/or preserves, waterbodies, and forested lands, and would provide limited available workspace and inconsistent elevations for construction.

ARGUMENT

I. Standard Of Review

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

Because the grant or denial of a certificate of public convenience and necessity is "peculiarly within the discretion of the Commission," the Court does not "substitute its judgment for that of the Commission." *Myersville*, 783 F.3d at 1308 (cleaned up); *Minisink*, 762 F.3d at 106 (same). The Court evaluates only

whether "the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Myersville*, 783 F.3d at 1308 (cleaned up); *see also Minisink*, 762 F.3d at 106 (the Court considers only whether the Commission's decision was "reasoned, principled, and based upon the record") (cleaned up).

The Commission's factual findings are conclusive if supported by substantial evidence. *Minisink*, 762 F.3d at 108. Substantial evidence "requires more than a scintilla, but can be satisfied by something less than a preponderance of evidence." *Id.* (internal quotation omitted). Thus, the possibility that different conclusions may be drawn from the same evidence does not mean the Commission's findings are not supported by substantial evidence. *See Ariz. Corp. Comm'n v. FERC*, 397 F.3d 952, 954 (D.C. Cir. 2005) (the question is not whether record evidence supports petitioner's version of events, but whether it supports FERC's).

When a court is called upon to review an agency's construction of a statute it administers, such as the Commission's administration of the Natural Gas Act, well-settled principles apply. If Congress has directly spoken to the precise question at issue, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842-43 (1984). If the statute is silent or

ambiguous on the question at issue, then the court must decide whether the agency's decision is based on a permissible construction of the statute and, if it is, the court must defer to the agency's construction. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013).

Likewise, the Court gives "substantial deference" to the Commission's interpretation of its own precedent. *NRG Power Mktg., LLC v. FERC*, 718 F.3d 947, 953, 957 (D.C. Cir. 2013). Moreover, the Commission's "evaluation of scientific data within its expertise" is afforded "an extreme degree of deference." *Myersville*, 783 F.3d at 1308 (cleaned up).

Agency action taken pursuant to NEPA is entitled to a high degree of deference as well. *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 377-78 (1989). "As long as the agency's decision is fully informed and well-considered, it is entitled to judicial deference and a reviewing court should not substitute its own policy judgment." *EarthReports, Inc. v. FERC*, 828 F.3d 949, 954-55 (D.C. Cir. 2016) (cleaned up). Thus, when the Court reviews agency action taken "under NEPA, the court's role is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary and capricious." *Nat'l Comm. for the New River, Inc. v. FERC*, 373 F.3d 1323, 1327 (D.C. Cir. 2004); *see also, e.g.*, *Myersville*, 783 F.3d at 1322 (noting that FERC's NEPA obligations are "essentially procedural"); *Del.*

Riverkeeper, 857 F.3d at 394 ("So long as the agency takes a hard look at the environmental consequences, NEPA 'does not mandate particular results.'") (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989)).

II. The Commission Fully Satisfied Natural Gas Act Requirements

A. The Finding That There Was Need For The Project Was Supported By Substantial Evidence And Consistent With Commission Policy

Allegheny contends that the Commission's finding that there was need for the Project "relied entirely on the existence of contracts with gas shippers for the pipeline's capacity" and, therefore, is contrary to Commission policy and lacks substantial evidence. Br. 42; *see also id.* 44 (asserting that the Commission "relied solely on the fact that Transco secured precedent agreements"); *id.* 46 ("it was improper for FERC to rely entirely on the precedent agreements to demonstrate the public need for the Project."); *id.* 42-46 (same). Allegheny is mistaken.

First, this Court has found that precedent agreements showing a project is fully subscribed are "adequate to support the finding of market need." *Myersville*, 783 F.3d at 1311. Moreover, this Court has determined that it is consistent with the Commission's 1999 Policy Statement to base a market need finding solely on precedent agreements. *Id.*; *see also Sierra Club*, 867 F.3d at 1379 (an applicant can establish market need by presenting precedent agreements).

As in prior cases, the "Petitioners [here] identify nothing in the policy statement or in any precedent construing it to suggest that it requires, rather than permits, the Commission to assess a project's benefits by looking beyond the market need reflected by the applicant's existing contracts with shippers." *Myersville*, 783 F.3d at 1311; *Minisink*, 762 F.3d at 111 n.10. "To the contrary," the policy statement specifically recognizes that such agreements 'always will be important evidence of demand for a project.'" *Minisink*, 762 F.3d at 111 n.10 (quoting Policy Statement, 88 FERC at 61,748); *see also* Certificate Rehearing Order P 27, JA ___ ("It is well established . . . that long-term commitments serve as 'significant evidence of demand for the project.'") (quoting Policy Statement, 88 FERC at 61,748). Thus, even if the Commission had relied solely on the precedent agreements here in finding there was a need for the Project, its finding would have been based on substantial evidence and consistent with the Policy Statement.

In fact, however, the Commission did not rely solely on contracts. In addition to the long-term, binding precedent agreements for all the Project's capacity (Certificate Order PP 23, 28, 29, JA _____, ___; Certificate Rehearing Order P 27, JA ___), the Commission relied on comments submitted by two Project shippers and an existing end-use Transco customer (Certificate Order at P 30, JA ___; Certificate Rehearing Order P 28, JA ___), and a study submitted by

one of the petitioners here, the Clean Air Council (Certificate Order P 28, JA ___; Certificate Rehearing Order P 28, JA ___). The study showed that pipelines like the Project may help deliver lower-priced gas to higher-priced markets. Certificate Order P 28, JA ___; Certificate Rehearing Order P 28, JA ___.

The shipper and end-use customer comments provided additional evidence, on top of the precedent agreements, that there was demand for the Project in the mid-Atlantic and southeastern markets. Certificate Order P 30, JA ___; Certificate Rehearing Order P 28, JA ___. Specifically, Seneca Resources Corp., a Project shipper, stated that the Project "will provide needed pipeline capacity for Seneca to deliver its shale gas produced in Appalachia to mid-Atlantic and southeastern markets in the United States," and that the Project's "timely construction [was] essential to meeting the market demands for the 2017 heating season." R. 2666, Seneca Resources Corp. Comment at 1, JA ___; *see also id.* at 2, JA ___ (same). Seneca further noted that it had "entered into long-term natural gas sales contracts for all of its 189,405 [dekatherms]/day" of Project capacity. *Id.* at 1, JA ___.

Another shipper, Southern Company Services, explained that it provides retail and wholesale service in southeastern markets, and that the Project will help it provide customers highly reliable service at the lowest practicable cost. R. 1877, Southern Co. Servs. Comment at 1-4, JA ___-__.

In addition, Washington Gas Light Co., an existing Transco customer engaged primarily in the retail sale and delivery of natural gas in the Washington D.C. metropolitan area, stated that: the Washington D.C. region is a growing market; the Project will help alleviate inadequate gas pipeline infrastructure issues and provide critically needed capacity; and the Project will provide access to competitively-priced alternative gas supplies, helping Washington Gas cost-effectively meet its customers' future firm natural gas requirements. R. 1795, Washington Gas Intervention Motion at 1-2, JA ___-__; R. 2678, Washington Gas Comment at 1. *See also* R. 1795 at 2, JA ___ (by introducing a new source of gas into this service territory, the Project will support the reliability and diversification of energy in the eastern portion of the country).

Allegheny's opening brief neither acknowledges nor challenges the Commission's reliance on the study or the shipper and end-user comments. Instead, Allegheny asserts, mistakenly, that the Commission ignored evidence purportedly showing that much of the gas to be transported on the Project would be exported to other countries rather than used to serve domestic demand. Br. at 43-45. The Commission considered that evidence, but determined it did not undermine its ultimate conclusion that the Project was required by the public convenience and necessity. *See* Certificate Rehearing Order P 29 & nn.60-61, P 30 n.62, PP 34, 80, JA ___, ___, ___, ___.

As the Commission pointed out, the Policy Statement does not require that precedent agreements be with natural gas end-users rather than marketers and producers. *Id.* P 29, JA ___ (citing *Maritimes & Ne. Pipeline, LLC*, 87 FERC ¶ 61,061, 61,241 (1999)). Here, the record showed that the Project would meet the growing demand for natural gas in the mid-Atlantic and southeastern markets, shippers and an end-use customer provided specific evidence of that demand, and Transco executed long-term contracts for all the Project's capacity. Certificate Order PP 23, 28-30, JA ___, ___-__; Certificate Rehearing Order PP 27-28, JA ___. The Commission found that the public at large would benefit from increased natural gas supply reliability, and upstream natural gas producers would benefit from having access to additional markets for their product. Certificate Rehearing Order P 34, JA ___. The Commission also noted that natural gas transported on the Project could not be exported unless the Department of Energy, which has statutory authority over exports of the natural gas commodity, determined its export was not inconsistent with the public interest. *Id.* (citing Natural Gas Act § 3(a), 15 U.S.C. § 717b(a); 10 C.F.R. § 590.201); *id.* P 80, JA ___; *see also Sierra Club v. FERC*, 827 F.3d 36, 62 (D.C. Cir. 2016) (explaining that the Department of Energy has authority under Natural Gas Act § 3(a), 15 U.S.C. § 717b(a), to approve or deny applications to export the natural gas commodity).

B. Due Process Was Satisfied Here

Each set of petitioners asserts it has been denied due process, in a different way. Environmental-Petitioners contend they were denied due process because pipeline construction commenced before the Commission ruled on the merits of their requests for rehearing of the Certificate Order. Br. 30-41. Landowner-Petitioners contend they were "denied the right to be heard on whether Transco's taking of their property actually satisfies the public use requirement of the Fifth Amendment." Br. 47; *see also* Br. 46-51 (same). Both contentions lack merit.

1. Environmental-Petitioners Were Not Denied Due Process By Issuance of The Tolling And Construction Orders

As discussed in the Counterstatement of Jurisdiction, the Court lacks jurisdiction to address Environmental-Petitioners' challenges to the Certificate-Tolling Order, the Construction Order, and the Construction-Tolling Order, because Environmental-Petitioners either failed to seek rehearing of those orders or prematurely filed their petitions for review challenging them. *See supra* pp. 9-10. In any event, Environmental-Petitioners' due process challenge to issuance of those orders lacks merit.

(a) Environmental-Petitioners Have Not Established A Federally-Protected Liberty Or Property Interest

"The first inquiry in every due process challenge is whether the [petitioner] has been deprived of a protected interest in 'liberty' or 'property.' Only after

finding the deprivation of a protected interest do[es the Court] look to see if the [government's] procedures comport with due process." *Gen. Elec. Co. v. Jackson*, 610 F.3d 110, 117 (D.C. Cir. 2010) (quoting *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999)) (second alteration by Court). Environmental-Petitioners have not established a protected liberty or property interest here.

Environmental-Petitioners assert that Article I section 27 of the Pennsylvania Constitution provides the necessary property or liberty interest.[6] Br. 32-35. But, while section 27 may confer a public right to sue Pennsylvania for failing to protect the environment, it does not create a federally-protected liberty or property interest for Fifth Amendment purposes. *Del. Riverkeeper*, 243 F. Supp. 3d at 153, *on appeal*, D.C. Cir. No. 17-5084.

The Pennsylvania Supreme Court decisions Environmental-Petitioners rely on (Br. 32-33) do not help them. Those cases merely confirm that section 27 might permit a suit against Pennsylvania for failing to protect the environment. *See Pa.*

[6] Section 27 provides that:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and aesthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

Envtl. Def. Found. v. Commonwealth, 161 A.2d 911, 930-35 (Pa. 2017); *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 951-59 (Pa. 2013).

Environmental-Petitioners also argue that the Natural Gas Act provides them the necessary protected interest because it permits them to participate in a certificate hearing and to seek rehearing and judicial review, and because the Commission must consider environmental impacts in determining whether a proposed pipeline is in the public convenience and necessity. Br. 35 (citing Natural Gas Act § 7(c)(1)(B), 15 U.S.C. § 717f(c)(1)(B); *id.* § 19(a) and (b), 15 U.S.C. § 717r(a) and (b); and *Sierra Club*, 867 F.3d at 1373). As this Court has held, however, "'an expectation of receiving process is not, without more, a liberty interest protected by the Due Process Clause.'" *Brandon v. D.C. Bd. of Parole*, 823 F.2d 644, 648 (D.C. Cir. 1987) (quoting *Olin v. Wakinekona*, 461 U.S. 238, 250 n.12 (1983)).

(b) Environmental-Petitioners' Due Process Claim Lacks Merit

Even if Environmental-Petitioners could establish a federally-protected liberty or property interest, their due process claim would fail on its merits. Environmental-Petitioners claim the Commission denied them due process because the Certificate-Tolling Order, the Construction Order, and the Construction-Tolling Order issued before the Commission ruled on their requests for rehearing of the Certificate Order. Br. 30-41. Their concern is that the Commission allowed

certain, limited construction to commence before agency rehearing and judicial review have occurred.

But Congress designed the Natural Gas Act to produce that default outcome. Natural Gas Act section 19(c), 15 U.S.C. § 717r(c), specifically provides that neither the filing of an application for Commission rehearing nor a petition for judicial review operates as a stay of the effectiveness of the Commission's order unless the Commission or court specifically orders a stay. *See also* Construction Rehearing Order, 162 FERC ¶ 61,192 PP 13-14 (same); Certificate Rehearing Order P 37, JA ___ (citing *Jupiter Corp. v. FPC*, 424 F.2d 783, 791 (D.C. Cir. 1969)); *Pub. Citizen*, 839 F.3d at 1174 (explaining in the context of the analogous FERC-administered Federal Power Act that, where judicial review is limited due to an operation of law, "this outcome inheres in the very text of the [statute]. Accordingly, it lies with Congress, not this Court, to provide the remedy"). Both the Commission and the Court (twice) denied requests to stay the Certificate Order. Order Denying Stay, 160 FERC ¶ 61,042; Certificate Rehearing Order PP 97-102, JA ___-__; Court's November 8, 2017 and February 16, 2018 Stay Denial orders; *see supra* pp. 23-25.

Furthermore, as discussed *supra* p. 4, this and other courts have uniformly determined that Natural Gas Act section 19(a), 15 U.S.C. § 717r(a), does not require the Commission to act on the merits of a rehearing request within 30 days.

See Certificate Rehearing Order P 37, JA ___; *see also Cal. Co.*, 411 F.2d at 721; *Glendale*, No. 03-1261, 2004 WL 180270, at *1; *Kokajko*, 837 F.2d at 525; *Del. Riverkeeper*, 243 F. Supp. 3d at 145-46; *Coal. to Reroute Nexus*, 6th Cir. No. 17-4302 (Mar. 15, 2018). Rather, the Commission appropriately "acts upon the application for rehearing" by providing notice, as it did here, within that 30-day timeframe that it intends to further consider a rehearing request. *See*, *e.g.*, *Cal. Co.*, 411 F.2d at 721; *Gen. Am. Oil*, 409 F.2d at 599.

Environmental-Petitioners assert that this case authority should not apply here because this case involves environmental issues. Br. 38, 40. That assertion, however, has no basis in the statute or in this Court's precedent.

Natural Gas Act section 19(a), 15 U.S.C. § 717r(a), states, in pertinent part, that, "[u]nless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied." In *California Co.*, 411 F.2d at 721-22, this Court determined that the Commission has power to act on the merits of rehearing requests beyond the 30-day period so long as it gives notice of its intent to do so.

In doing so, the Court affirmed the Commission's interpretation of the provision, i.e., that Congress included it in the statute only to permit the Commission to deny rehearing requests by silence. *California Co.*, 411 F.2d at 721-22. *See also id.* at 722 ("[W]hile this proposition is far from self-evident, it is

the Commission's contention of long standing, and is entitled to respect as such. We choose to follow the Commission's interpretation, for it avoids the administrative and judicial problems created by appellants' position without robbing the statute of all effect."); *id.* ("We are reluctant to impute to Congress a purpose to limit the Commission to 30 days' consideration of applications for rehearing, irrespective of the complexity of the issues involved, with jurisdiction then passing to the courts to review a decision which at that moment would profitably remain under active consideration by the agency."). *See also Coal. to Reroute Nexus*, 6th Cir. No. 17-4302 (dismissing as premature petition challenging a FERC Natural Gas Act pipeline certificate order because rehearing requests were still pending before the Commission since the Commission issued a tolling order) (attached at Addendum B).

Before the Certificate-Tolling Order issued, the Commission already had determined, based on the lengthy record compiled in the FERC proceeding, that the Project, with the conditions set out in Certificate Order Appendix C, would have less-than-significant adverse environmental impacts and was required by the public convenience and necessity.[7] Certificate Order PP 20-32, 68-171 JA ___-__,

[7] The Commission affirmed these findings in the Certificate Rehearing Order PP 27-29, 50-95, JA ___-__, ___-__. Thus, the due process claim fails on the additional basis that, even assuming error here, Environmental-Petitioners were not

___-__. Before the Construction and Construction-Tolling Orders issued, the Commission additionally had determined that a stay of construction pending Commission rehearing of the Certificate Order was not warranted. Order Denying Stay, 160 FERC ¶ 61,042, JA ___-__.[8] Moreover, the Construction Order found that Transco had complied with all Certificate Order environmental conditions and had received all federal authorizations related to the limited authorized construction activities. Construction Order at 1, JA ___; *see also* Construction Authorization Requests (R. 4143 at 2-3, JA ___-__; R. 4150 at 1-2, JA ___-__).

Environmental-Petitioners received all the process the Natural Gas Act provides them. They participated in the hearing on the application, they have been able to seek Commission rehearing and judicial review, and the Commission has considered the Project's environmental impacts in determining whether it was required by the public convenience and necessity. *See* Br. 35 (setting out process Environmental-Petitioners believe is due under the Natural Gas Act). Contrary to Environmental-Petitioners' belief, *see* Br. 37, issuing the Construction Order did not predetermine the outcome of the requests for rehearing. As the Commission

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prejudiced by that error. *See Myersville*, 783 F.3d at 1327 ("Due process challenges to agency action are subject to the general prejudicial error rule.").

[8] The Commission affirmed this finding in the Certificate Rehearing Order PP 97-102, JA ___-__.

explained, if Transco proceeded with any construction it would bear the risk that the Commission would revise or reverse its Certificate Order determinations or that those determinations would be set aside on appeal. If that were to occur, Transco might not be able to use any Project facilities, might be required to remove them, or might be required to undertake further remediation. Order Denying Stay P 18, JA ___; *see also* Certificate Rehearing Order P 100, JA ___ (same); Construction Rehearing Order, 162 FERC ¶ 61,192 P 14 (same); *see also, e.g.*, *Sierra Club v. U.S. Army Corps of Eng'rs*, 803 F.3d 31, 43 (D.C. Cir. 2015) (proceeding not moot because if court found agency's NEPA analysis legally inadequate, the project could be made subject to further conditions or restrictions, closed, or removed).

2. Landowner-Petitioners Have Been Heard On Their Claim That The Project Does Not Satisfy A Public Use

Landowner-Petitioners' due process claim challenges, in large part, the Commission's issuance of the Certificate-Tolling Order. *See* Br. 46-51. As already discussed, Landowner-Petitioners waived their opportunity to challenge that order when they chose not to petition the Commission for its rehearing. *See* Counterstatement of Jurisdiction, *supra* pp. 9-10.

The remainder of Landowner-Petitioners' due process claim challenges the actions of a district court in eminent domain proceedings initiated after the Certificate Order issued. *See* Br. 47-48. District courts or state courts, not the Commission, have jurisdiction over eminent domain proceedings. Natural Gas Act

§ 7(h), 15 U.S.C. § 717f(h); *see* also Certificate Rehearing Order P 35, JA ___ (same); *Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 973 (D.C. Cir. 2000) ("The Commission does not have the discretion to deny a certificate holder the power of eminent domain."). Thus, Landowner-Petitioners' challenge to the district court's eminent domain actions is not properly before the Court.

Even if Landowner-Petitioners' due process challenges were properly before the Court, they would fail. Landowner-Petitioners first contend they were denied the right to be heard on their public use claim because the Commission did not grant them a trial-type hearing. Br. 47. As this Court has held, however, the Commission need not hold a trial-type hearing where, as here, it was able to resolve the issues on the written record (*see* Certificate Order P 16, JA ___). *Minisink*, 762 F.3d at 115; *see also, e.g.*, *Blumenthal v. FERC*, 613 F.3d 1142, 1145-46 (D.C. Cir. 2010) (same; finding due process satisfied where petitioner had opportunity to submit its objections and they were carefully considered by the Commission).

The Commission was able to resolve Landowner-Petitioners' public use claim on the written record, and carefully considered and reasonably responded to that claim. The Commission acknowledged that the Fifth Amendment's Takings Clause requires that a taking serve a "public purpose." Certificate Order P 67, JA ___ (citing *Kelo v. New London*, 545 U.S. 469, 479-80 (2005)). And the

Commission noted that Congress declared in the Natural Gas Act that the transportation and sale of natural gas in interstate commerce for ultimate distribution to the public is in the public interest. *Id.* (citing Natural Gas Act § 1(a), 15 U.S.C. § 717(a)); Certificate Rehearing Order P 33, JA __.

The Commission then explained that, if a pipeline obtains a certificate of public convenience and necessity, Natural Gas Act section 7(h), 15 U.S.C. § 717f(h), authorizes it to acquire property necessary to construct the certificated facilities by exercising the right of eminent domain. Certificate Order P 67, JA ___; Certificate Rehearing Order P 31, JA ___. Congress did not indicate that anything beyond a Commission public convenience and necessity finding (*see* Natural Gas Act section 7(e), 15 U.S.C. § 717f(e)) was necessary to trigger eminent domain rights. Certificate Rehearing Order P 32, JA ___. The Commission also pointed out that its public convenience and necessity analysis balances the public benefits of a project against any residual adverse effects. *Id.* (citing Policy Statement, 88 FERC at 61,747-49); *see also id.* P 34, JA ___ (discussing the Project's public benefits).

The Commission determined, consistent with this Court's precedent, that the public convenience and necessity finding meets the public purpose showing required to satisfy the Takings Clause. Certificate Order P 67, JA ___; Certificate Rehearing Order PP 32-33, JA ___ (citing *Midcoast*, 198 F.3d at 973 (finding that

public convenience and necessity determination establishes that a project serves a public purpose)); *see also* Certificate Rehearing Order P 33 & n.71, JA ___ (citing, *e.g.*, *Troy Ltd. v. Renna*, 727 F.2d 287, 301 (3rd Cir. 1984) ("authoriz[ing] an occupation of private property by a common carrier . . . engaged in a classic public utility function" is an "exemplar of a public use"); *E. Tenn. Natural Gas Co. v. Sage*, 361 F.3d 808, 821 (4th Cir. 2004) ("Congress may, as it did in the NGA, grant condemnation power to 'private corporations . . . execut[ing] works in which the public is interested.'") (quoting *Miss. & Rum River Boom Co. v. Patterson*, 98 U.S. 403, 406 (1878)) (omission and alteration by Court)). Landowner-Petitioners do not mention these cases or challenge the Commission's reliance on them in their opening brief.

The second basis for Landowner-Petitioners' claim – that they were denied the right to be heard on their public use claim because eminent domain proceedings took place while their request for rehearing of the Certificate Order was pending (Br. 47-51) – fails as well. As already discussed (*supra* p. 43), and as Landowner-Petitioners seem to acknowledge (Br. 48-49), Congress designed the Natural Gas Act to produce that default outcome.

The Commission may, under the Natural Gas Act, issue an order tolling the time for it to consider and issue an order on the merits of rehearing requests. Natural Gas Act section 19(a), 15 U.S.C. § 717r(a); *see also Cal. Co.*, 411 F.2d at

721; *Glendale*, No. 03-1261, 2004 WL 180270, at *1; *Gen. Am. Oil*, 409 F.2d at 599; *Del. Riverkeeper*, 243 F. Supp. 3d at 145-46; *Kokajko*, 837 F.2d at 525; *Coal. to Reroute Nexus*, 6th Cir. No. 17-4302. Moreover, the Natural Gas Act provides that neither requests for Commission rehearing nor petitions for judicial review stay the effectiveness of a Commission order. Natural Gas Act section 19(c), 15 U.S.C. § 717r(c); *see also* Construction Rehearing Order, 162 FERC ¶ 61,192 PP 13-14 , JA ___-__; Certificate Rehearing Order P 37, JA ___. Furthermore, the Natural Gas Act itself confers the power of eminent domain on a certificate holder. Natural Gas Act § 7(h), 15 U.S.C. § 717f(h); *see also* Certificate Order P 67, JA ___; Certificate Rehearing Order P 31, JA ___.

And, again, before eminent domain proceedings began, Landowner-Petitioners' claim already had been answered by this Court's precedent and the Certificate Order, both of which held that the public convenience and necessity determination establishes that a FERC-certificated project serves a public purpose. *Midcoast*, 198 F.3d at 973; Certificate Order P 67, JA ___.

III. The Commission Fully Satisfied Its NEPA Obligations

A. The Commission Reasonably Assessed The Project's Downstream Greenhouse Gas Effects

1. The Commission's Analysis

The Commission took the requisite hard look at the greenhouse gas effects of the downstream use of gas to be transported on the Project. The Environmental

Statement determined (using a methodology developed by the Environmental Protection Agency) that, if the Project's maximum capacity (1.7 million dekatherms per day) of natural gas were transported on the pipeline 365 days a year and then burned, this would result in downstream emissions of approximately 32.9 million metric tons per year of carbon dioxide equivalent. FEIS 4-318, JA ___; Certificate Order P 143, JA ___; Certificate Rehearing Order PP 92-93, JA ___-__; *see also* FEIS 4-316 to 4-319. Allegheny agrees this estimate is accurate. *See* Br. 13-14 ("Burning [Project] gas would emit 32.9 million metric tons per year of carbon dioxide.").

The Commission explained that this estimate represents the upper bound for downstream emissions because pipeline projects are designed for peak use, not to run at maximum capacity every day of the year. Certificate Rehearing Order P 92, JA ___; Certificate Order P 143, JA ___. Thus, the Commission concluded, it is unlikely the estimated level of greenhouse gas emissions would occur. Certificate Rehearing Order P 93, JA ___.

The Commission also noted that, if demand for Project gas were instead met by coal or oil, greenhouse gas emissions would be higher; likewise, if that demand were met instead by renewables, such as solar or wind resources, greenhouse gas emissions would be substantially lower. Certificate Rehearing Order P 93, JA ___;

see also FEIS 4-318, JA___ (explaining that natural gas is a lower carbon dioxide emitting fuel than oil or coal).

The Certificate Rehearing Order further evaluated the greenhouse gas emissions in light of this Court's decision in *Sierra Club*, 867 F.3d at 1371-75, which issued after the Environmental Statement and Certificate Order. Certificate Rehearing Order P 94, JA ___. The Commission first determined that the Project was designed not to provide service to any particular end user or market, but to deliver Project gas into the Transco and Dominion pipeline systems, which can deliver gas to 16 states. *Id.*; *see also* Certificate Order P 10, JA ___ (noting that a precedent agreement committed the Project to deliver 350,000 dekatherms per day of firm transportation service to Dominion Transmission's pipeline system).[9]

Then, to give the downstream emissions estimate context, the Commission compared it to both the most recent (2015) total greenhouse gas fossil fuel combustion inventory for those 16 states and the most recent (2015) national greenhouse gas inventory. Certificate Rehearing Order P 94, JA ___. This comparison showed that the Project's estimated 32.9 million metric tons of

[9] This resolves Allegheny's query (Br. 19 n.13) why the comparison included 16 states rather than just the seven states Transco's system traverses. The 16 states are: Texas, Louisiana, Mississippi, Alabama, Georgia, Florida, North Carolina, South Carolina, Virginia, West Virginia, Ohio, Maryland, Delaware, Pennsylvania, New Jersey, and New York. Certificate Rehearing Order n.214, JA ___.

greenhouse gas emissions would increase emissions in those 16 states (which had total 2015 greenhouse gas emissions of 2,590 million metric tons) by no more than 1.4 percent, and would increase national emissions (which had 5,411 million metric tons of carbon dioxide emissions in 2015) by 0.6 percent. *Id.*[10]

2. Allegheny's Challenges To The Commission's Analysis Lack Merit

Allegheny challenges the Commission's analysis on several bases, Br. 13-30, all of which lack merit.

First, Allegheny contends that the Commission should have found that downstream greenhouse gas emissions are an indirect effect of the Project. Br. 14-16). As the Commission explained, however, the Court's determination in *Sierra Club*, 867 F.3d at 1371-75 – that downstream greenhouse gas emissions from burning natural gas to be transported on the pipeline project at issue there were an indirect effect of that project – was made in the context of factual circumstances that do not exist here. Certificate Rehearing Order P 92 & n.209, JA ___.

In *Sierra Club*, the record established that all project gas would be transported to a few specific power plants in Florida. 867 F.3d at 1371. In those circumstances, the Court found it reasonably foreseeable that project gas would be

[10] Citing www.eia.gov/environment/emissions/state/, and www.epa.gov/sites/Production/files/2017-02/documents/2017_complete_report.pdf

burned in those specific plants. *Id.* at 1372; *see also* Certificate Rehearing Order n.209, JA ___ (same).

Here, by contrast, the Project was not designed to provide service to any particular end user or market, but to deliver project gas into Transco's and Dominion's pipeline systems, which can deliver gas to 16 states. Certificate Rehearing Order n.209, P 94 & n.214, JA ___, ___; Certificate Order P 10, JA ___; Certificate Application at 10, JA ___; *see also* Br. 16 (acknowledging "[t]he fact that this Project's capacity is not currently slated for delivery to specific power plants"). Thus, unlike in *Sierra Club*, the specific end-use of Project gas here is not reasonably foreseeable and, therefore, does not require further environmental examination. *See* Certificate Rehearing Order n.209, JA ___.

In any event, the Commission quantified and considered the downstream greenhouse gas effects from burning Project gas. *See* Certificate Rehearing Order PP 92-93, JA ___; Certificate Order PP 139, 143, JA ___, ___; FEIS 4-318, JA ___. This analysis showed that burning the Project's maximum gas capacity 365 days a year would result in downstream emissions of approximately 32.9 million metric tons per year of carbon dioxide, and that this would increase emissions in the 16 states to which Project gas can be delivered by no more than

1.4 percent, and increase national emissions by 0.6 percent.[11] Certificate Rehearing Order PP 92, 94, JA ___, __. *See also Nat. Res. Def. Council v. U.S. Nuclear Regulatory Comm'n*, 879 F.3d 1202, 1210-12 (D.C. Cir. 2018) (an agency may augment its environmental review in its orders) (citing *Friends of the River v. FERC*, 720 F.2d 93, 97, 105-08 (D.C. Cir. 1983)). Thus, the Commission took a hard look at the Project's downstream greenhouse gas effects, including its cumulative impact.

Allegheny contends the Commission should have taken an additional analytical step by using the Social Cost of Carbon tool or should have explained why it did not do so.[12] Br. 19-20 (citing *Sierra Club*, 867 F.3d at 1375). But, unlike in *Sierra Club*, the petitioners' requests for rehearing here (R. 3962, JA ___-__; R. 3976, JA ___-__; R. 3985, JA ___-__) neither mentioned the Social Cost of Carbon tool nor asked the Commission to convert emissions estimates to concrete harms by using that tool. *See Sierra Club*, 867 F.3d at 1375.

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[11] In a footnote, Allegheny appears to argue that the Commission's analysis was deficient because it compared Project emissions to the 2015 national greenhouse gas inventory rather than to national emissions-control goals. Br. 18-19 n.13 (citing *Sierra Club*, 867 F.3d at 1374). *Sierra Club*, however, left open to agency discretion what type of comparison to conduct. *See Sierra Club*, 867 F.3d at 1374 ("Quantification would permit the agency to compare the emissions from this project to . . . total emissions from the state or the region, or to regional or national emissions-control goals.").

[12] The Social Cost of Carbon tool "attempts to value in dollars the long-term harm done by each ton of carbon emitted." *Sierra Club*, 867 F.3d at 1375.

The portion of the rehearing request Allegheny points to in support of this contention (R. 3962 at 34, JA ____) simply asserted that the 32.9 million metric tons of carbon dioxide finding was not sufficient to "adequately analyze[] the climate change impact of emitting millions of metric tons of carbon dioxide," and then went on to challenge the Commission's discussion of potential emissions offsets. R. 3962 at 33-34, JA ___-__. Accordingly, the petitioners here waived their opportunity to raise the Social Cost of Carbon claim on appeal. *See* Natural Gas Act sections 19(a) and (b), 15 U.S.C. §§ 717r(a) and (b); *see also, e.g., Ind. Util. Reg. Comm'n v. FERC*, 668 F.3d 735, 739 (D.C. Cir. 2012) (construing identical provision in Federal Power Act section 313, 16 U.S.C. § 825*l*); *Intermountain Mun. Gas Agency v. FERC*, 326 F.3d 1281, 1285-86 (D.C. Cir. 2003).

In any case, the Commission's recent order issued in response to *Sierra Club*, 867 F.3d at 1371-1375, explained why the Social Cost of Carbon tool would not meaningfully inform natural gas transportation project decisions. *Fla. Southeast Connection, LLC*, 162 FERC ¶ 61,233 PP 11, 30-51 (2018) ("Remand Order"), *reh'g pending*; *see also EarthReports*, 828 F.3d at 956 (affirming FERC's determination that Social Cost of Carbon tool is not useful in FERC's NEPA analysis). Among other reasons, the Commission explained that: the appropriate discount rate to be used under this tool remains contentious, which can lead to

significantly varying results (Remand Order P 49); this tool would require the Commission to "arbitrarily determine what potential increase in atmospheric greenhouse gas concentration, rise in sea level, rise in sea water temperatures, and other calculated physical impacts would be significant for [a] particular project" (*id.* P 48); and that there are no established criteria identifying which monetized values are to be considered significant, so the Commission would have no basis on which to reasonably determine whether a particular calculated dollar figure would be significant (*id.* P 51).

Next, Allegheny argues that the Commission erroneously found that the Project's downstream greenhouse gas emissions were insignificant. Br. 17-27. But neither the Environmental Statement nor the Commission's orders made a finding regarding whether downstream emissions were significant. *See* FEIS 4-316 to 4- 319, JA ___-___; Certificate Order PP 139, 143, JA ___, ___; Certificate Rehearing Order PP 92-94, JA ___-__. The Environmental Statement did state that "neither construction nor operation of the Project would significantly contribute to [greenhouse gas] emissions or climate change," but that determination related only to Project "construction and operation" emissions, not to any downstream impacts. FEIS 4-318, JA ___.

The Commission recently explained, in the supplemental environmental impact statement and Remand Order issued in response to *Sierra Club*, 867 F.3d at

1371-1375, that it cannot make a significance finding regarding downstream emissions because there is neither a widely accepted standard establishing what constitutes a "significant" greenhouse gas emission, nor is there any research setting out a project level greenhouse gas emissions significance threshold for climate change. Remand Order, 162 FERC ¶ 61,233 PP 26-27; Supplemental Environmental Statement at 7, FERC Docket No. CP14-554, accession no. 20180205-3021, available at https://www.ferc.gov/docs-filing/elibrary.asp. Without an appropriate standard to use as a benchmark for comparison, the Commission determined it would be inappropriate to ascribe significance to a given rate or volume of greenhouse gas emissions. Remand Order, 162 FERC ¶ 61,233 PP 26-27; Supplemental Environmental Statement at 7. *See Sierra Club*, 867 F.3d at 1374 (acknowledging that "in some cases quantification may not be feasible").

Allegheny also asserts that the Commission improperly based its purported insignificance determination solely on a finding that the estimated emissions could be partially offset if demand for project gas were instead met by coal or oil. Br. 19 n.13, 20-26. The Certificate Rehearing Order discussed this potential partial offset, however, only as an additional point after finding that the estimated downstream emissions represented an upper bound because projects are not

designed to run at maximum capacity every day of the year. Certificate Rehearing Order P 93, JA ___.

The Commission recognized that this potential offset, like the possibility that Project gas could offset renewable energy resources, could not be quantified; any estimate would be too uncertain given the many variables involved, i.e., which fuels would be displaced, to what extent, and for how long. *Id.* P 95, JA ___. Allegheny asserts that these potential offsets, and the possibility that Project gas could displace gas that otherwise would be transported via different means, needed to be quantified before the Commission could rely on a potential offset to find Project downstream climate impacts insignificant. Br. 21, 24-25. As already discussed, however, the Commission did not make a significance finding.

Allegheny's final argument on this point involves the Hillabee Expansion Project ("Hillabee"), which is a component of the Southeast Market Pipeline Project at issue in this Court's 2017 *Sierra Club* decision. Br. 27-30. On rehearing to the Commission here, Allegheny argued that "FERC improperly segmented Atlantic Sunrise from other closely related and interdependent projects," including Hillabee. R. 3962 at 5, JA ___; *see also id.* at 5-6, JA ___-__. "Segmentation refers to the requirement that an agency must consider other connected and cumulative actions . . . in a single environmental document 'to prevent agencies from dividing one project into multiple individual actions' with less significant

environmental effects." Certificate Rehearing Order P 53, JA ___ (quoting *Myersville*, 783 F.3d at 1326).

Actions are connected if they: (1) automatically trigger other actions which may require environmental impact statements; (2) cannot or will not proceed unless other actions are taken previously or simultaneously; or (3) are interdependent parts of a larger action and depend on the larger action for their justification. 40 C.F.R. § 1508.25(a)(i)-(iii). Cumulative actions are those "which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement." *Id.* § 1508.25(a)(2).

The Commission first found that Allegheny waived the claim that Hillabee should be considered in the Project's Environmental Statement because Allegheny did not raise that claim until it filed comments on the Draft Environmental Statement (R. 3798 at 3-6, JA ___-__), which was well outside the Project's environmental scoping and comment period. Certificate Rehearing Order P 55, JA ___ (citing *Dept. of Transp. v. Pub. Citizen*, 541 U.S. 752, 764 (2004) ("Persons challenging an agency's compliance with NEPA must structure their participation so that it alerts the agency to the parties' position and contentions, in order to allow the agency to give the issue meaningful consideration.") (cleaned up)); *see also supra* p. 18 (discussing scoping process here).

In any event, the Commission reasonably determined that Allegheny's Hillabee claim lacked merit. Certificate Rehearing Order P 56, JA ___. While the Project would deliver natural gas to, and Hillabee would receive natural gas from, the Station 85 hub, the projects were not interdependent as Allegheny asserted (Br. 29). *Id.* Rather, the Station 85 hub connects to other interstate pipelines (i.e., Midcontinent Express Pipeline, LLC, and Gulf South Pipeline Co., LP) and intrastate pipelines, enabling Hillabee to receive natural gas from a number of sources other than the Project here. *Id.* Moreover, the Station 85 hub already had capacity to deliver more gas than Hillabee could accept. *Id.* Both the Project and Hillabee had "substantial independent utility," as each would serve a significant purpose even if the other were not built. *See id.* P 54, JA ___ (quoting *Coal. on Sensible Transp., Inc. v. Dole*, 826 F.2d 60, 69 (D.C. Cir. 1987)). Thus, as the Commission found, the Project and Hillabee were not connected or cumulative actions. *Id.* PP 52-54, 56, JA ___-__.

B. The Commission Reasonably Considered The Conestoga Alternative Route

Allegheny argues that the Commission failed to adequately consider the Conestoga Alternative Route. Br. 51-54. In fact, however, the Environmental Statement and the Commission fully considered that alternative, but found it was not environmentally preferable to Transco's proposed route. FEIS at 3-1, 3-55 to

3-57, JA ___, ___-__ (including a table at FEIS 3-55, JA ___, comparing the environmental factors for the alternative and proposed routes); Certificate Order PP 157, 159-61, JA ___-__.

The Environmental Statement explained that there were some advantages to the Conestoga Alternative Route – it was one mile shorter than the corresponding segment of Transco's proposed route, and it would follow existing rights-of-way for a greater percentage of its length than the proposed route would (54 percent v. 4 percent). Nonetheless, the Environmental Statement concluded that, because of its disadvantages, the Conestoga Alternative Route was not environmentally preferable.

The alternative route's main disadvantage was that it would cross seven recreational areas and/or preserves over a total distance of about 4.3 of its 11.1 miles, while the proposed route would cross only three natural heritage areas for a total distance of about 2.1 of its 12.1 miles. FEIS 3-55, 3-57, JA ___, ___. Moreover, while the proposed route, consistent with Department of Interior comments, would avoid Safe Harbor Woods, the Conestoga Alternative Route would cross that area. FEIS 3-55, 3-57, JA ___, ___. The alternative route also would cross 4.4 more miles of forested land than Transco's proposed route. FEIS 3-55, 3-57, JA ___, ___.

In addition, the alternative route would cross two scenic rivers (Tucquan Creek and Clark Run), while the proposed route would cross only one (Tucquan Creek). FEIS 3-55, 3-57, JA ___, ___. Moreover, the location at which the alternative route would cross Tucquan Creek would require significant tree clearing adjacent to the creek, while the proposed route's crossing location would not. FEIS 3-57, JA ___.

Another disadvantage was that, while the proposed route had sufficient available workspace and consistent elevations to enable horizontal directional drilling, the alternative route had limited available workspace and inconsistent elevations. FEIS 3-57, JA ___; *see also id.* 2-29 to 2-30, JA ___-__ (discussing horizontal directional drilling).

The Commission agreed with the Environmental Statement's conclusion that the Conestoga Alternative Route was not environmentally preferable. Certificate Order P 157, JA ___. In addition to the factors noted in the Environmental Statement, the Commission noted that, since the Conestoga Alternative Route would require more forest to be cleared, it could cause higher construction emissions. *Id.* P 161, JA ___.

Allegheny would prefer a Commission finding that the Conestoga Alternative Route is environmentally preferable. Br. 51-54. But where, as here, the agency takes a hard look at the environmental consequences, NEPA does not

mandate any particular result. *See Sierra Club v. DOE*, 867 F.3d 189, 196 (D.C. Cir. 2017); *Del. Riverkeeper*, 857 F.3d at 394; *Myersville*, 783 F.3d at 1322; *Minisink*, 762 F.3d at 111; *see also Sierra Club* 867 F.3d at 196 ("NEPA does not dictate particular decisional outcomes, but merely prohibits uninformed – rather than unwise – agency action.") (internal quotation omitted)); *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 503 (D.C. Cir. 2010) (NEPA ensures a "fully informed and well-considered decision, not necessarily the best decision"). Furthermore, as this Court has recognized, the Commission has broad discretion in balancing competing interests, as it did here. *See*, *e.g.*, *Minisink*, 762 F.3d at 111.

Allegheny's list of Conestoga Alternative Route advantages (Br. 53-54) either includes factors the Commission considered in its analysis, misstates the record, or constitutes unnecessary "flyspecking," which "encroaches on the deference to which the Commission is entitled for its technical analysis." *Myersville*, 783 F.3d at 1324; *see also id.* 1322-23 ("this court applies a 'rule of reason' to an agency's NEPA analysis and has repeatedly refused to 'flyspeck' the agency's findings in search of any deficiency no matter how minor") (internal quotation omitted). The Commission gave a hard look at and rejected the Conestoga Alternative Route; that was sufficient to discharge its NEPA obligations. *See id.* 1324.

CONCLUSION

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

Respectfully submitted,

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May 10, 2017

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g) and Circuit Rule 32(e), I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and this Court's November 21, 2017 Order providing that Respondent's brief not exceed 15,000 words because this brief contains 14,549 words, including the Table at Addendum A, and excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

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

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May 10, 2018

ADDENDUM A

Table Of Petitions, Parties, And Orders On Review

Petition Number	Date Filed	Parties Filing Petition	Orders Challenged
17-1098	Mar. 23, 2017	Allegheny Defense Project; Clean Air Council; Concerned Citizens of Lebanon County; Heartwood, Lancaster Against Pipelines; Lebanon Pipeline Awareness; Sierra Club	-Certificate Order
17-1128	May 12, 2017	Hilltop Hollow Limited Partnership; Hilltop, LLC; Stephen Hoffman	-Certificate Order -Certificate Tolling Order (no petitioner sought FERC rehearing)
17-1263	Dec. 15, 2017	Allegheny Defense Project; Clean Air Council; Heartwood, Lancaster Against Pipelines; Lebanon Pipeline Awareness; Sierra Club; Accokeek, Mattawoman, Piscataway Creeks Communities Council, Inc.	-Certificate Order -Construction Order -Construction Tolling Order (no petitioner sought FERC rehearing) -Certificate Rehearing Order
18-1030	Jan. 29, 2018	Hilltop Hollow Limited Partnership; Hilltop, LLC; Stephen Hoffman	-Certificate Order -Construction Order (Landowner-Petitioners did not seek FERC rehearing) -Certificate Rehearing Order

ADDENDUM B

Coal. to Reroute Nexus v. FERC,
6th Cir. No. 17-4302 (Mar. 15, 2018)

No. 17-4302

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Mar 15, 2018
DEBORAH S. HUNT, Clerk

COALITION TO REROUTE NEXUS; JOHN SELZER; ELAINE SELZER,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent,

NEXUS GAS TRANSMISSION, LLC,

Intervenor.

O R D E R

Before: NORRIS, ROGERS, and STRANCH, Circuit Judges.

The Coalition to Reroute Nexus, John Selzer, and Elaine Selzer ("Petitioners") petition for review of a Federal Energy Regulatory Commission ("FERC") order issuing certificates for the construction and operation of an interstate natural gas pipeline system. Respondent FERC and Intervenor Nexus Gas Transmission, LLC ("Nexus") move to dismiss the petition for lack of subject matter jurisdiction. Petitioners respond in opposition. In the alternative, Petitioner seeks the issuance of a writ of mandamus.

Petitioners also move for a stay pending consideration of their petition for review, which is opposed by FERC and Nexus. In addition, several grassroots organizations opposed to the

pipeline move to intervene. Nexus opposes that motion and moves to strike their response to its motion to dismiss.

On August 25, 2017, FERC issued an order granting certificates of public convenience and necessity to Nexus, permitting construction and operation of the pipeline project. In September 2017, a number of parties filed requests for rehearing of the order. FERC had thirty days to act upon the requests for rehearing or they may be deemed denied. *See* 15 U.S.C. § 717r(a). On October 23, 2017, FERC issued a tolling order, granting the requests for rehearing "for the limited purpose of further consideration." The order stated that the merits of the rehearing requests would be addressed in a future order.[1] To date, no such order has been issued.

The Natural Gas Act requires that an aggrieved party may petition the court for review of a FERC order within sixty days after the ruling on an application for rehearing. § 717r(b). The statutory requirements of the filing of a request for rehearing, a ruling on that request, and the filing of a petition for review within sixty days are mandatory. *See Williston Basin Interstate Pipeline Co. v. FERC*, 475 F.3d 330, 336 (D.C. Cir. 2006) ("There is no doubt that the time requirements of 15 U.S.C. § 717r(a), (b) of the [Act] establish jurisdictional requirements."); *Process Gas Consumers Grp. v. FERC*, 912 F.2d 511, 514 (D.C. Cir. 1990); *see also Ky. Utils. Co. v. FERC*, 789 F.2d 1210, 1214–15 (6th Cir. 1986) (finding failure to comply with substantially identical provisions in the Federal Power Act is a jurisdictional bar to judicial review).

FERC is authorized to issue tolling orders pursuant to 18 C.F.R. § 375.302(v). The October 2017 tolling order does not resolve the requests for rehearing and is not independently

[1] The tolling order indicated that it covers all rehearing requests that were timely filed, meaning that no requests were deemed denied by operation of law. Because FERC has the authority to "modify or set aside" its orders until judicial review has been sought, the tolling order includes even those requests filed over thirty days before its issuance. *See* 15 U.S.C. § 717r(a).

subject to judicial review. And the pendency of the requests for rehearing before FERC precludes judicial review of the August 2017 FERC decision because there is no final agency action for the court to review. *See Kokajko v. FERC*, 837 F.2d 524, 525 (1st Cir. 1988) (agreeing with other courts holding that tolling orders "are valid and that a petition for review filed prior to a decision on the merits of the application for rehearing is premature"); *Gen. Am. Oil Co. of Tx. v. FPC*, 409 F.2d 597, 599 (5th Cir. 1969); *see also City of Glendale v. FERC*, 2004 WL 180270, at *1.(D.C. Cir. Jan. 22, 2004) (holding "[a] petition for review of an agency order filed while an administrative request for reconsideration of the same order remains pending is incurably premature."). Thus, this petition for review is premature, and this court lacks jurisdiction to consider it.

In addition, Petitioners have not shown that relief in mandamus is warranted. "Mandamus is a drastic remedy that should be invoked only in extraordinary cases where there is a clear and indisputable right to the relief sought." *United States v. Young*, 424 F.3d 499, 504 (6th Cir. 2005). To warrant relief in mandamus, Petitioners must show their right to the writ is "clear and indisputable." *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 381 (2004) (quoting *Kerr v. U.S. Dist. Court for N. Dist. of Cal.*, 426 U.S. 394, 403 (1976)). "[M]andamus is not intended to substitute for appeal after final judgment." *In re Prof'ls Direct Ins. Co.*, 578 F.3d 432, 437 (6th Cir. 2009).

"In certain, very limited, circumstances, issuance of mandamus relief may be warranted where agency action has been delayed to such an extent as to frustrate the court's role of providing a forum for review." *In re Cal. Power Exch. Corp.*, 245 F.3d 1110, 1124 (9th Cir. 2001). If they meet the statutory requirements, Petitioners may petition for review following a decision on the merits of the requests for rehearing. They have not shown any "egregious" delay

by FERC that would warrant relief in mandamus. *See id.* (denying a writ of mandamus based on a four-month delay in a ruling by FERC); *Towns of Wellesley, Concord, and Norwood v. FERC*, 829 F.2d 275, 277 (1st Cir.1987) (concluding that a delay of fourteen months did not warrant relief in mandamus); *see also Kokajko*, 837 F.2d at 526.

Because this court lacks jurisdiction to consider the petition for review, it need not reach the other motions.

The motions to dismiss are **GRANTED**, and Petitioners' request for the issuance of a writ of mandamus is **DENIED**. The motion for a stay, motion to intervene, and motion to strike are **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

ADDENDUM C

STATUTES
AND
REGULATIONS

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

AMENDMENTS

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

§ 704. Actions reviewable

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

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

HISTORICAL AND REVISION NOTES

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

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

§ 705. Relief pending review

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

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

HISTORICAL AND REVISION NOTES

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

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

§ 706. Scope of review

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

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

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

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

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

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

(D) without observance of procedure required by law;

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

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

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

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

HISTORICAL AND REVISION NOTES

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

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

ABBREVIATION OF RECORD

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

CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

§ 801. Congressional review

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

(i) a copy of the rule;

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

(iii) the proposed effective date of the rule.

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

to time prescribe. The entire work may be done at, or ordered through, the Government Publishing Office whenever, in the judgment of the Joint Committee on Printing, the same would be to the interest of the Government: *Provided*, That when the exigencies of the public service so require, the Joint Committee on Printing may authorize the Commission to make immediate contracts for engraving, lithographing, and photolithographing, without advertisement for proposals: *Provided further*, That nothing contained in this chapter or any other Act shall prevent the Federal Power Commission from placing orders with other departments or establishments for engraving, lithographing, and photolithographing, in accordance with the provisions of sections 1535 and 1536 of title 31, providing for interdepartmental work.

(June 10, 1920, ch. 285, pt. III, §312, as added Aug. 26, 1935, ch. 687, title II, §213, 49 Stat. 859; amended Pub. L. 113–235, div. H, title I, §1301(b), (d), Dec. 16, 2014, 128 Stat. 2537.)

CODIFICATION

''Sections 1535 and 1536 of title 31'' substituted in text for ''sections 601 and 602 of the Act of June 30, 1932 (47 Stat. 417 [31 U.S.C. 686, 686b])'' on authority of Pub. L. 97–258, §4(b), Sept. 13, 1982, 96 Stat. 1067, the first section of which enacted Title 31, Money and Finance.

CHANGE OF NAME

''Director of the Government Publishing Office'' substituted for ''Public Printer'' in text on authority of section 1301(d) of Pub. L. 113–235, set out as a note under section 301 of Title 44, Public Printing and Documents.

''Government Publishing Office'' substituted for ''Government Printing Office'' in text on authority of section 1301(b) of Pub. L. 113–235, set out as a note preceding section 301 of Title 44, Public Printing and Documents.

§ 825*l*. Review of orders

(a) Application for rehearing; time periods; modification of order

Any person, electric utility, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, electric utility, 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 entity unless such entity shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Judicial review

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 United States court of appeals for any circuit wherein the licensee or public utility 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, if 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's order

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

(June 10, 1920, ch. 285, pt. III, §313, as added Aug. 26, 1935, ch. 687, title II, §213, 49 Stat. 860; amended June 25, 1948, ch. 646, §32(a), 62 Stat. 991; May 24, 1949, ch. 139, §127, 63 Stat. 107; Pub. L. 85–791, §16, Aug. 28, 1958, 72 Stat. 947; Pub. L. 109–58, title XII, §1284(c), Aug. 8, 2005, 119 Stat. 980.)

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

(Pub. L. 91–190, title I, §101, Jan. 1, 1970, 83 Stat. 852.)

COMMISSION ON POPULATION GROWTH AND THE AMERICAN FUTURE

Pub. L. 91–213, §§1–9, Mar. 16, 1970, 84 Stat. 67–69, established the Commission on Population Growth and the American Future to conduct and sponsor such studies and research and make such recommendations as might be necessary to provide information and education to all levels of government in the United States, and to our people regarding a broad range of problems associated with population growth and their implications for America's future; prescribed the composition of the Commission; provided for the appointment of its members, and the designation of a Chairman and Vice Chairman; required a majority of the members of the Commission to constitute a quorum, but allowed a lesser number to conduct hearings; prescribed the compensation of members of the Commission; required the Commission to conduct an inquiry into certain prescribed aspects of population growth in the United States and its foreseeable social consequences; provided for the appointment of an Executive Director and other personnel and prescribed their compensation; authorized the Commission to enter into contracts with public agencies, private firms, institutions, and individuals for the conduct of research and surveys, the preparation of reports, and other activities necessary to the discharge of its duties, and to request from any Federal department or agency any information and assistance it deems necessary to carry out its functions; required the General Services Administration to provide administrative services for the Commission on a reimbursable basis; required the Commission to submit an interim report to the President and the Congress one year after it was established and to submit its final report two years after Mar. 16, 1970; terminated the Commission sixty days after the date of the submission of its final report; and authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, such amounts as might be necessary to carry out the provisions of Pub. L. 91–213.

EXECUTIVE ORDER NO. 11507

Ex. Ord. No. 11507, eff. Feb. 4, 1970, 35 F.R. 2573, which related to prevention, control, and abatement of air and water pollution at federal facilities was superseded by Ex. Ord. No. 11752, eff. Dec. 17, 1973, 38 F.R. 34793, formerly set out below.

EXECUTIVE ORDER NO. 11752

Ex. Ord. No. 11752, Dec. 17, 1973, 38 F.R. 34793, which related to the prevention, control, and abatement of environmental pollution at Federal facilities, was revoked by Ex. Ord. No. 12088, Oct. 13, 1978, 43 F.R. 47707, set out as a note under section 4321 of this title.

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

§ 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

Pub. L. 102–486, title IV, § 404(b), Oct. 24, 1992, 106 Stat. 2879, 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, regulation, 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 outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States.

(8) ''State commission'' means the regulatory body of the State or municipality having jurisdiction to regulate rates and charges for the sale of natural gas to consumers within the State or municipality.

(9) ''Commission'' and ''Commissioner'' means the Federal Power Commission, and a member thereof, respectively.

(10) ''Vehicular natural gas'' means natural gas that is ultimately used as a fuel in a self-propelled vehicle.

(11) ''LNG terminal'' includes all natural gas facilities located onshore or in State waters that are used to receive, unload, load, store, transport, gasify, liquefy, or process natural gas that is imported to the United States from a foreign country, exported to a foreign country from the United States, or transported in interstate commerce by waterborne vessel, but does not include—

(A) waterborne vessels used to deliver natural gas to or from any such facility; or

(B) any pipeline or storage facility subject to the jurisdiction of the Commission under section 717f of this title.

(June 21, 1938, ch. 556, § 2, 52 Stat. 821; Pub. L. 102–486, title IV, § 404(a)(2), Oct. 24, 1992, 106 Stat. 2879; Pub. L. 109–58, title III, § 311(b), Aug. 8, 2005, 119 Stat. 685.)

AMENDMENTS

2005—Par. (11). Pub. L. 109–58 added par. (11).

1992—Par. (10). Pub. L. 102–486 added par. (10).

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)(1), 7291, and 7293 of Title 42, The Public Health and Welfare.

§ 717b. Exportation or importation of natural gas; LNG terminals

(a) Mandatory authorization order

After six months from June 21, 1938, no person shall export any natural gas from the United States to a foreign country or import any natural gas from a foreign country without first having secured an order of the Commission authorizing it to do so. The Commission shall issue such order upon application, unless, after opportunity for hearing, it finds that the proposed exportation or importation will not be consistent

with the public interest. The Commission may by its order grant such application, in whole or in part, with such modification and upon such terms and conditions as the Commission may find necessary or appropriate, and may from time to time, after opportunity for hearing, and for good cause shown, make such supplemental order in the premises as it may find necessary or appropriate.

(b) Free trade agreements

With respect to natural gas which is imported into the United States from a nation with which there is in effect a free trade agreement requiring national treatment for trade in natural gas, and with respect to liquefied natural gas—

(1) the importation of such natural gas shall be treated as a ''first sale'' within the meaning of section 3301(21) of this title; and

(2) the Commission shall not, on the basis of national origin, treat any such imported natural gas on an unjust, unreasonable, unduly discriminatory, or preferential basis.

(c) Expedited application and approval process

For purposes of subsection (a), the importation of the natural gas referred to in subsection (b), or the exportation of natural gas to a nation with which there is in effect a free trade agreement requiring national treatment for trade in natural gas, shall be deemed to be consistent with the public interest, and applications for such importation or exportation shall be granted without modification or delay.

(d) Construction with other laws

Except as specifically provided in this chapter, nothing in this chapter affects the rights of States under—

(1) the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.);

(2) the Clean Air Act (42 U.S.C. 7401 et seq.); or

(3) the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.).

(e) LNG terminals

(1) The Commission shall have the exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal. Except as specifically provided in this chapter, nothing in this chapter is intended to affect otherwise applicable law related to any Federal agency's authorities or responsibilities related to LNG terminals.

(2) Upon the filing of any application to site, construct, expand, or operate an LNG terminal, the Commission shall—

(A) set the matter for hearing;

(B) give reasonable notice of the hearing to all interested persons, including the State commission of the State in which the LNG terminal is located and, if not the same, the Governor-appointed State agency described in section 717b–1 of this title;

(C) decide the matter in accordance with this subsection; and

(D) issue or deny the appropriate order accordingly.

(3)(A) Except as provided in subparagraph (B), the Commission may approve an application described in paragraph (2), in whole or part, with such modifications and upon such terms and conditions as the Commission find[1] necessary or appropriate.

(B) Before January 1, 2015, the Commission shall not—

(i) deny an application solely on the basis that the applicant proposes to use the LNG terminal exclusively or partially for gas that the applicant or an affiliate of the applicant will supply to the facility; or

(ii) condition an order on—

(I) a requirement that the LNG terminal offer service to customers other than the applicant, or any affiliate of the applicant, securing the order;

(II) any regulation of the rates, charges, terms, or conditions of service of the LNG terminal; or

(III) a requirement to file with the Commission schedules or contracts related to the rates, charges, terms, or conditions of service of the LNG terminal.

(C) Subparagraph (B) shall cease to have effect on January 1, 2030.

(4) An order issued for an LNG terminal that also offers service to customers on an open access basis shall not result in subsidization of expansion capacity by existing customers, degradation of service to existing customers, or undue discrimination against existing customers as to their terms or conditions of service at the facility, as all of those terms are defined by the Commission.

(f) Military installations

(1) In this subsection, the term ''military installation''—

(A) means a base, camp, post, range, station, yard, center, or homeport facility for any ship or other activity under the jurisdiction of the Department of Defense, including any leased facility, that is located within a State, the District of Columbia, or any territory of the United States; and

(B) does not include any facility used primarily for civil works, rivers and harbors projects, or flood control projects, as determined by the Secretary of Defense.

(2) The Commission shall enter into a memorandum of understanding with the Secretary of Defense for the purpose of ensuring that the Commission coordinate and consult[2] with the Secretary of Defense on the siting, construction, expansion, or operation of liquefied natural gas facilities that may affect an active military installation.

(3) The Commission shall obtain the concurrence of the Secretary of Defense before authorizing the siting, construction, expansion, or operation of liquefied natural gas facilities affecting the training or activities of an active military installation.

(June 21, 1938, ch. 556, § 3, 52 Stat. 822; Pub. L. 102–486, title II, § 201, Oct. 24, 1992, 106 Stat. 2866; Pub. L. 109–58, title III, § 311(c), Aug. 8, 2005, 119 Stat. 685.)

[1] So in original. Probably should be ''finds''.

[2] So in original. Probably should be ''coordinates and consults''.

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

(b) Costs of production and transportation

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

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

§ 717e. Ascertainment of cost of property

(a) Cost of property

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

(b) Inventory of property; statements of costs

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

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

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

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

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

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

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

(c) Certificate of public convenience and necessity

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

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

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

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

(B) natural gas produced by such person.

(d) Application for certificate of public convenience and necessity

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

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

(e) Granting of certificate of public convenience and necessity

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

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

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

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

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

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

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

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

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

AMENDMENTS

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

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

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

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

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

EFFECTIVE DATE OF 1988 AMENDMENT

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

TRANSFER OF FUNCTIONS

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

§ 717g. Accounts; records; memoranda

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

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

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

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

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

(c) Information and reports available to State commissions

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

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

§ 717q. Appointment of officers and employees

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

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

CODIFICATION

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

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

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

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

AMENDMENTS

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

REPEALS

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

§ 717r. Rehearing and review

(a) Application for rehearing; time

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

(b) Review of Commission order

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

(c) Stay of Commission order

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

(d) Judicial review

(1) In general

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

(2) Agency delay

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

(3) Court action

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

(4) Commission action

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

(5) Expedited review

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

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

REFERENCES IN TEXT

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

CODIFICATION

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

(e) All FE orders, notices, or other FE documents shall be served on the parties by FE either by hand, registered mail, certified mail, or regular mail, except as otherwise provided in this part.

§ 590.108 Off-the-record communications.

(a) In any contested proceeding under this part:

(1) No interested person shall make an off-the-record communication or knowingly cause an off-the-record communication to be made to any decisional employee.

(2) No decisional employee shall make an off-the-record communication or knowingly cause an off-the-record communication to be made to any interested person.

(3) A decisional employee who receives, makes, or knowingly causes to be made an oral off-the-record communication prohibited by this section shall prepare a memorandum stating the substance of the communication and any responses made to it.

(4) Within forty-eight (48) hours of the off-the-record communication, a copy of all written off-the-record communications or memoranda prepared in compliance with paragraph (a)(3) of this section shall be delivered by the decisional employee to the Assistant Secretary and to the Deputy Assistant Secretary for Fuels Programs. The materials will then be made available for public inspection by placing them in the docket associated with the proceeding.

(5) Requests by a party for an opportunity to rebut, on the record, any facts or contentions in an off-the-record communication may be filed in writing with the Assistant Secretary. The Assistant Secretary shall grant such requests only for good cause.

(6) Upon being notified of an off-the-record communication made by a party in violation of this section, the Assistant Secretary may, to the extent consistent with the interests of justice and the policies of the NGA and the DOE Act, require the party to show cause why the party's claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of the violation.

(b) The prohibitions of paragraph (a) of the section shall apply only to contested proceedings and begin at the time either a protest or a motion to intervene or notice of intervention in opposition to the application or other requested action is filed with FE, or a party otherwise specifically notifies the Assistant Secretary and the other parties in writing of its opposition to the application or other requested action, whichever occurs first.

§ 590.109 FE investigations.

The Assistant Secretary or the Assistant Secretary's delegate may investigate any facts, conditions, practices, or other matters within the scope of this part in order to determine whether any person has violated or is about to violate any provision of the NGA or other statute or any rule, regulation, or order within the Assistant Secretary's jurisdiction. In conducting such investigations, the Assistant Secretary or the Assistant Secretary's delegate may, among other things, subpoena witnesses to testify, subpoena or otherwise require the submission of documents, and order testimony to be taken by deposition.

Subpart B—Applications for Authorization To Import or Export Natural Gas

§ 590.201 General.

(a) Any person seeking authorization to import or export natural gas into or from the United States, to amend an existing import or export authorization, or seeking any other requested action, shall file an application with the FE under the provisions of this part.

(b) Applications shall be filed at least ninety (90) days in advance of the proposed import or export or other requested action, unless a later date is permitted for good cause shown.

[54 FR 53531, Dec. 29, 1989; 55 FR 14916, Apr. 19, 1990]

§ 590.202 Contents of applications.

(a) Each application filed under § 590.201 shall contain the exact legal

the issue date of the Commission's order issuing the certificate. Applicant shall notify the Commission in writing no later than 10 days after expiration of this time period that the end-user/shipper is unable to meet the imposed timetable to commence service.

(c) Applicant must file with the Commission, in writing and under oath, an original and four conformed copies, as prescribed in §385.2011 of this chapter and, upon request must furnish an intervener with a single copy, of the following:

(1) Within ten days after the bona fide beginning of construction, notice of the date of such beginning;

(2) Within ten days after authorized facilities have been constructed and placed in service or any authorized operation, sale, or service has commenced, notice of the date of such placement and commencement and

(3) Within six months after authorized facilities have been constructed, a statement showing, on the basis of all costs incurred to that date and estimated to be incurred for final completion of the project, the cost of constructing authorized facilities, such total costs to be classified according to the estimates submitted in the certificate proceeding and compared therewith and any significant differences explained.

(d) With respect to an acquisition authorized by the certificate, applicant must file with the Commission, in writing and under oath, an original and four conformed copies as prescribed in §385.2011 of this chapter the following:

(1) Within 10 days after acquisition and the beginning of authorized operations, notice of the dates of acquisition and the beginning of operations; and

(2) Within 10 days after authorized facilities have been constructed and within 10 days after such facilities have been placed in service or any authorized operation, sale, or service has commenced, notice of the date of such completion, placement, and commencement, and

(e) The certificate issued to applicant is not transferable in any manner and shall be effective only so long as applicant continues the operations authorized by the order issuing such certificate and in accordance with the provisions of the Natural Gas Act, as well as applicable rules, regulations, and orders of the Commission.

(f) In the interest of safety and reliability of service, facilities authorized by the certificate shall not be operated at pressures exceeding the maximum operating pressure set forth in Exhibit G-II to the application as it may be amended prior to issuance of the certificate. In the event the applicant thereafter wishes to change such maximum operating pressure it shall file an appropriate petition for amendment of the certificate. Such petition shall include the reasons for the proposed change. Nothing contained herein authorizes a natural gas company to operate any facility at a pressure above the maximum prescribed by state law, if such law requires a lower pressure than authorized hereby.

(Sec. 20, 52 Stat. 832; 15 U.S.C. 717s)

[17 FR 7389, Aug. 14, 1952, as amended by Order 280, 29 FR 4879, Apr. 7, 1964; Order 317, 31 FR 432, Jan. 13, 1966; Order 324, 31 FR 9348, July 8, 1966; Order 493, 53 FR 15030, Apr. 27, 1988; Order 493–B, 53 FR 49653, Dec. 9, 1988; Order 603, 64 FR 26606, May 14, 1999]

§157.21 Pre-filing procedures and review process for LNG terminal facilities and other natural gas facilities prior to filing of applications.

(a) *LNG terminal facilities and related jurisdictional natural gas facilities.* A prospective applicant for authorization to site, construct and operate facilities included within the definition of ''LNG terminal,'' as defined in §153.2(d), and any prospective applicant for related jurisdictional natural gas facilities must comply with this section's pre-filing procedures and review process. These mandatory pre-filing procedures also shall apply when the Director finds in accordance with paragraph (e)(2) of this section that prospective modifications to an existing LNG terminal are modifications that involve significant state and local safety considerations that have not been previously addressed. Examples of such modifications include, but are not limited to, the addition of LNG storage tanks; increasing throughput requiring additional tanker arrivals or the use of larger vessels; or changing the purpose

of the facility from peaking to base load. When a prospective applicant is required by this paragraph to comply with this section's pre-filing procedures:

(1) The prospective applicant must make a filing containing the material identified in paragraph (d) of this section and concurrently file a Letter of Intent pursuant to 33 CFR 127.007, and a Preliminary Waterway Suitability Assessment (WSA) with the U.S. Coast Guard (Captain of the Port/Federal Maritime Security Coordinator). The latest information concerning the documents to be filed with the Coast Guard should be requested from the U.S. Coast Guard. For modifications to an existing or approved LNG terminal, this requirement can be satisfied by the prospective applicant's certifying that the U.S. Coast Guard did not require such information.

(2) An application:

(i) Shall not be filed until at least 180 days after the date that the Director issues notice pursuant to paragraph (e) of this section of the commencement of the prospective applicant's pre-filing process; and

(ii) Shall contain all the information specified by the Commission staff after reviewing the draft materials filed by the prospective applicant during the pre-filing process, including required environmental material in accordance with the provisions of part 380 of this chapter, ''Regulations Implementing the National Environmental Policy Act.''

(3) The prospective applicant must provide sufficient information for the pre-filing review of any pipeline or other natural gas facilities, including facilities not subject to the Commission's Natural Gas Act jurisdiction, which are necessary to transport regassified LNG from the subject LNG terminal facilities to the existing natural gas pipeline infrastructure.

(b) *Other natural gas facilities.* When a prospective applicant for authorization for natural gas facilities is not required by paragraph (a) of this section to comply with this section's pre-filing procedures, the prospective applicant may file a request seeking approval to use the pre-filing procedures.

(1) A request to use the pre-filing procedures must contain the material identified in paragraph (d) of this section unless otherwise specified by the Director as a result of the Initial Consultation required pursuant to paragraph (c) of this subsection; and

(2) If a prospective applicant for non-LNG terminal facilities is approved to use this section's pre-filing procedures:

(i) The application will normally not be filed until at least 180 days after the date that the Director issues notice pursuant to paragraph (e)(3) of this section approving the prospective applicant's request to use the pre-filing procedures under this section and commencing the prospective applicant's pre-filing process. However, a prospective applicant approved by the Director pursuant to paragraph (e)(3) of this section to undertake the pre-filing process is not prohibited from filing an application at an earlier date, if necessary; and

(ii) The application shall contain all the information specified by the Commission staff after reviewing the draft materials filed by the prospective applicant during the pre-filing process, including required environmental material in accordance with the provisions of part 380 of this chapter, ''Regulations Implementing the National Environmental Policy Act.''

(c) *Initial consultation.* A prospective applicant required or potentially required or requesting to use the pre-filing process must first consult with the Director on the nature of the project, the content of the pre-filing request, and the status of the prospective applicant's progress toward obtaining the information required for the pre-filing request described in paragraph (d) of this section. This consultation will also include discussion of the specifications for the applicant's solicitation for prospective third-party contractors to prepare the environmental documentation for the project, and whether a third-party contractor is likely to be needed for the project.

(d) *Contents of the initial filing.* A prospective applicant's initial filing pursuant to paragraph (a)(1) of the section for LNG terminal facilities and related jurisdictional natural gas facilities or paragraph (b)(1) of this section for

other natural gas facilities shall include the following information:

(1) A description of the schedule desired for the project including the expected application filing date and the desired date for Commission approval.

(2) For LNG terminal facilities, a description of the zoning and availability of the proposed site and marine facility location.

(3) For natural gas facilities other than LNG terminal facilities and related jurisdictional natural gas facilities, an explanation of why the prospective applicant is requesting to use the pre-filing process under this section.

(4) A detailed description of the project, including location maps and plot plans to scale showing all major plant components, that will serve as the initial discussion point for stakeholder review.

(5) A list of the relevant federal and state agencies in the project area with permitting requirements. For LNG terminal facilities, the list shall identify the agency designated by the governor of the state in which the project will be located to consult with the Commission regarding state and local safety considerations. The filing shall include a statement indicating:

(i) That those agencies are aware of the prospective applicant's intention to use the pre-filing process (including contact names and telephone numbers);

(ii) Whether the agencies have agreed to participate in the process;

(iii) How the applicant has accounted for agency schedules for issuance of federal authorizations; and

(iv) When the applicant proposes to file with these agencies for their respective permits or other authorizations.

(6) A list and description of the interest of other persons and organizations who have been contacted about the project (including contact names and telephone numbers).

(7) A description of what work has already been done, *e.g.*, contacting stakeholders, agency consultations, project engineering, route planning, environmental and engineering contractor engagement, environmental surveys/studies, and open houses. This description shall also include the identification of the environmental and engineering firms and sub-contractors under contract to develop the project.

(8) For LNG terminal projects, proposals for at least three prospective third-party contractors from which Commission staff may make a selection to assist in the preparation of the requisite NEPA document.

(9) For natural gas facilities other than LNG terminal facilities and related jurisdictional natural gas facilities, proposals for at least three prospective third-party contractors from which Commission staff may make a selection to assist in the preparation of the requisite NEPA document, or a proposal for the submission of an applicant-prepared draft Environmental Assessment as determined during the initial consultation described in paragraph (c) of this section.

(10) Acknowledgement that a complete Environmental Report and complete application are required at the time of filing.

(11) A description of a Public Participation Plan which identifies specific tools and actions to facilitate stakeholder communications and public information, including a project website and a single point of contact. This plan shall also describe how the applicant intends to respond to requests for information from federal and state permitting agencies, including, if applicable, the governor's designated agency for consultation regarding state and local safety considerations with respect to LNG facilities.

(12) Certification that a Letter of Intent and a Preliminary WSA have been submitted to the U.S. Coast Guard or, for modifications to an existing or approved LNG terminal, that the U.S. Coast Guard did not require such information.

(e) *Director's notices.* (1) When the Director finds that a prospective applicant for authority to site and construct a new LNG terminal has adequately addressed the requirements of paragraphs (a), (c) and (d) of this section, the Director shall issue a notice of such finding. Such notice shall designate the third-party contractor. The pre-filing process shall be deemed to have commenced on the date of the Director's notice, and the date of such

notice shall be used in determining whether the date an application is filed is at least 180 days after commencement of the pre-filing process.

(2) When the Director finds that a prospective applicant for authority to make modifications to an existing or approved LNG terminal has adequately addressed the requirements of paragraphs (a), (c) and (d) of this section, the Director shall issue a notice making a determination whether prospective modifications to an existing LNG terminal shall be subject to this section's pre-filing procedures and review process. Such notice shall designate the third-party contractor, if appropriate. If the Director determines that the prospective modifications are significant modifications that involve state and local safety considerations, the Director's notice will state that the pre-filing procedures shall apply, and the pre-filing process shall be deemed to have commenced on the date of the Director's notice in determining whether the date an application is filed is at least 180 days after commencement of the pre-filing process.

(3) When a prospective applicant requests to use this section's pre-filing procedures and review for facilities not potentially subject to this section's mandatory requirements, the Director shall issue a notice approving or disapproving use of the pre-filing procedures of this section and determining whether the prospective applicant has adequately addressed the requirements of paragraphs (b), (c) and (d) of this section. Such notice shall designate the third-party contractor, if appropriate. The pre-filing process shall be deemed to have commenced on the date of the Director's notice, and the date of such notice shall be used in determining whether the date an application is filed is at least 180 days after commencement of the pre-filing process.

(f) Upon the Director's issuance of a notice commencing a prospective applicant's pre-filing process, the prospective applicant must:

(1) Within seven days and after consultation with Commission staff, establish the dates and locations at which the prospective applicant will conduct open houses and meetings with stakeholders (including agencies) and Commission staff.

(2) Within 14 days, conclude the contract with the selected third-party contractor.

(3) Within 14 days, contact all stakeholders not already informed about the project, including all affected landowners as defined in paragraph §157.6(d)(2) of this section.

(4) Within 30 days, submit a stakeholder mailing list to Commission staff.

(5) Within 30 days, file a draft of Resource Report 1, in accordance with §380.12(c), and a summary of the alternatives considered or under consideration.

(6) On a monthly basis, file status reports detailing the applicant's project activities including surveys, stakeholder communications, and agency meetings.

(7) Be prepared to provide a description of the proposed project and to answer questions from the public at the scoping meetings held by OEP staff.

(8) Be prepared to attend site visits and other stakeholder and agency meetings arranged by the Commission staff, as required.

(9) Within 14 days of the end of the scoping comment period, respond to issues raised during scoping.

(10) Within 60 days of the end of the scoping comment period, file draft Resource Reports 1 through 12.

(11) At least 60 days prior to filing an application, file revised draft Resource Reports 1 through 12, if requested by Commission staff.

(12) At least 90 days prior to filing an application, file draft Resource Report 13 (for LNG terminal facilities).

(13) Certify that a Follow-on WSA will be submitted to the U.S. Coast Guard no later than the filing of an application with the Commission (for LNG terminal facilities and modifications thereto, if appropriate). The applicant shall certify that the U.S. Coast Guard has indicated that a Follow-On WSA is not required, if appropriate.

(g) Commission staff and third-party contractor involvement during the pre-filing process will be designed to fit each project and will include some or all of the following:

(1) Assisting the prospective applicant in developing initial information about the proposal and identifying affected parties (including landowners, agencies, and other interested parties).

(2) Issuing an environmental scoping notice and conducting such scoping for the proposal.

(3) Facilitating issue identification and resolution.

(4) Conducting site visits, examining alternatives, meeting with agencies and stakeholders, and participating in the prospective applicant's public information meetings.

(5) Reviewing draft Resource Reports.

(6) Initiating the preparation of a preliminary Environmental Assessment or Draft Environmental Impact Statement, the preparation of which may involve cooperating agency review.

(h) A prospective applicant using the pre-filing procedures of this section shall comply with the procedures in §388.112 of this chapter for the submission of documents containing privileged materials or critical energy infrastructure information.

[Order 665, 70 FR 60440, Oct. 18, 2005, as amended by Order 756, 77 FR 4894, Feb. 1, 2012; Order 769, 77 FR 65475, Oct. 29, 2012]

§ 157.22 Schedule for final decisions on a request for a Federal authorization

For an application under section 3 or 7 of the Natural Gas Act that requires a Federal authorization—*i.e.*, a permit, special use authorization, certification, opinion, or other approval—from a Federal agency or officer, or State agency or officer acting pursuant to delegated Federal authority, a final decision on a request for a Federal authorization is due no later than 90 days after the Commission issues its final environmental document, unless a schedule is otherwise established by Federal law.

[Order 687, 71 FR 62921, Oct. 27, 2006]

Subpart B—Open Seasons for Alaska Natural Gas Transportation Projects

SOURCE: Order 2005, 70 FR 8286, Feb. 18, 2005, unless otherwise noted.

§ 157.30 Purpose.

This subpart establishes the procedures for conducting open seasons for the purpose of making binding commitments for the acquisition of initial or voluntary expansion capacity on Alaska natural gas transportation projects, as defined herein.

§ 157.31 Definitions.

(a) ''Alaska natural gas transportation project'' means any natural gas pipeline system that carries Alaska natural gas to the international border between Alaska and Canada (including related facilities subject to the jurisdiction of the Commission) that is authorized under the Alaska Natural Gas Transportation Act of 1976 or section 103 of the Alaska Natural Gas Pipeline Act.

(b) ''Commission'' means the Federal Energy Regulatory Commission.

(c) ''Voluntary expansion'' means any expansion in capacity of an Alaska natural gas transportation project above the initial certificated capacity, including any increase in mainline capacity, any extension of mainline pipeline facilities, and any lateral pipeline facilities beyond those certificated in the initial certificate order, voluntarily made by the pipeline. An expansion done pursuant to section 105 of the Alaska Natural Gas Pipeline Act is not a voluntary expansion.

§ 157.32 Applicability.

These regulations shall apply to any application to the Commission for a certificate of public convenience and necessity or other authorization for an Alaska natural gas transportation project, whether filed pursuant to the Natural Gas Act, the Alaska Natural Gas Transportation Act of 1976, or the Alaska Natural Gas Pipeline Act, and to applications for expansion of such projects. Absent a Commission order to the contrary, these regulations are not applicable in the case of an expansion ordered by the Commission pursuant to section 105 of the Alaska Natural Gas Pipeline Act.

§ 157.33 Requirement for open season.

(a) Any application for a certificate of public convenience and necessity or

time after the adjournment of a meeting closed to the public, the Commission shall make available to the public, in the Division of Public Information of the Commission, Washington, DC, the transcript, electronic recording, or minutes of the discussion of any item on the agenda, or of any item of the testimony of any witness received at the meeting, except for such item or items of such discussion or testimony as the Director of Public Information determines may be withheld under § 375.204. Copies of such transcript, or minutes, or a transcription of such recording shall be furnished to any person at the actual cost of duplication or transcription.

(2) The determination of the Director of the Division of Public Information to withhold information pursuant to paragraph (f)(1) of this section may be appealed to the General Counsel or the General Counsel's designee, in accordance with § 388.107 of this chapter.

[45 FR 21217, Apr. 1, 1980, as amended at 52 FR 7825, Mar. 13, 1987]

Subpart C—Delegations

§ 375.301 Purpose and subdelegations.

(a) The purpose of this subpart is to set forth the authorities that the Commission has delegated to staff officials. Any action by a staff official under the authority of this subpart may be appealed to the Commission in accordance with § 385.1902 of this chapter.

(b) Where the Commission, in delegating functions to specified Commission officials, permits an official to further delegate those functions to a designee of such official, *designee* shall mean the deputy of such official, the head of a division, or a comparable official as designated by the official to whom the direct delegation is made.

(c) For purposes of Subpart C, *uncontested* and *in uncontested cases* mean that no motion to intervene, or notice of intervention, in opposition to the pending matter made under § 385.214 (intervention) has been received by the Commission.

[Order 112, 45 FR 79025, Nov. 28, 1980, as amended by Order 225, 47 FR 19058, May 3, 1982; Order 492, 53 FR 16062, May 5, 1988]

§ 375.302 Delegations to the Secretary.

The Commission authorizes the Secretary, or the Secretary's designee to:

(a) Sign official general correspondence on behalf of the Commission, except as otherwise provided in this section.

(b) Prescribe, for good cause, a different time than that required by the Commission's Rules of Practice and Procedure or Commission order for filing by public utilities, licensees, natural gas companies, and other persons of answers to complaints, petitions, motions, and other documents.

(c) Schedule hearings and issue notices thereof.

(d) Accept for filing notices of intervention and petitions to intervene by commissions and agencies of the States and the Federal government.

(e) Pass upon motions to intervene before a presiding administrative law judge is designated. If a presiding administrative law judge has been designated, the provisions of § 385.504(b)(12) of this chapter are controlling.

(f) Deny motions for extensions of time (other than motions made while a proceeding is pending before a presiding officer as defined in § 385.102(e)), except that such motions may be granted in accordance with § 385.2008 of this chapter.

(g) Reject any documents filed later than the time prescribed by an order or rule of the Commission, except that such documents may be accepted in accordance with § 385.2008 of this chapter.

(h) Reject any documents filed that do not meet the requirements of the Commission's rules which govern matters of form, except that such documents may be accepted in accordance with § 385.2001 of this chapter for good cause shown.

(i) Waive requirements of the Commission's rules which govern matters of form, when consistent with the public interest in a particular case.

(j) Pass upon, in contested proceedings, questions of extending time for electric public utilities, licensees, natural gas companies, and other persons to file required reports, data, and

information and to do other acts required to be done at or within a specific time by any rule, regulation, license, permit, certificate, or order of the Commission.

(k) Accept service of process on behalf of the Commission.

(l) Accept for filing bonds or agreements and undertakings submitted in rate suspension proceedings.

(m) Issue notices or orders instituting procedures to be followed concerning contested audit issues under part 41 or 158 of this chapter either when the utility:

(1) Initially notifies the Commission that it requests disposition of a contested issue pursuant to § 41.7 or 158.7 of this chapter; or

(2) Requests disposition of a contested issue pursuant to the shortened procedures provided in § 41.3 or 158.3 of this chapter.

(n) Publish notice of land withdrawals under section 24 of the Federal Power Act.

(o) Issue notices of applications filed under the Federal Power Act and the Natural Gas Act, fixing the time for filing comments, protests or petitions to intervene and schedule hearings on such applications when appropriate or required by law.

(p) Accept for filing amendments to agreements and contracts or rate schedules submitted in compliance with Commission orders accepting offers of rate settlements if such filings are in satisfactory compliance with such orders.

(q) Grant authorizations, pursuant to the provisions of § 35.1(a) of this chapter for a designated representative to post and file rate schedules of public utilities which are parties to the same rate schedule.

(r) Redesignate proceedings, licenses, certificates, rate schedules, and other authorizations and filing to reflect changes in the names of persons and municipalities subject to or invoking Commission jurisdiction under the Federal Power Act or the Natural Gas Act, where no substantive changes in ownership, corporate structure or domicile, or jurisdictional operation are involved.

(s) Change the appropriate hydroelectric project license article upon application by the licensee to reflect the specified reasonable rate of return as provided in § 2.15 of this chapter.

(t) Reject without prejudice all requests for rehearing and requests for modification of a proposed order issued in a proceeding under section 210 or section 211 of the Federal Power Act, 16 U.S.C. 824i, 824j.

(u) Reject without prejudice all motions for clarification that are combined with requests for rehearing and/or requests for modification of a proposed order issued in a proceeding under section 210 or section 211 of the Federal Power Act, 16 U.S.C. 824i, 824j.

(v) Toll the time for action on requests for rehearing.

(w) Issue notices in compliance with section 206(b) of the Federal Power Act.

(x) Issue instructions for electronic registration pursuant to, grant applications for waivers of the requirements of, and make determinations regarding exemptions from 18 CFR part 390.

(y) Direct the staff of the Dispute Resolution Service (DRS) to contact the parties in a complaint proceeding and establish a date by which DRS must report to the Commission whether a dispute resolution process to address the complaint will be pursued by the parties.

(z) Issue instructions pertaining to allowable electronic file and document formats, the filing of complex documents, whether paper copies are required, and procedural guidelines for submissions via the Internet, on electronic media or via other electronic means.

(aa) Issue a notice that the Commission will not further review on its own motion a Notice of Penalty filed under Section 215(e) of the Federal Power Act.

[43 FR 36435, Aug. 17, 1978]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 375.302, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at *www.fdsys.gov*.

§ 375.303 Delegations to the Director of the Office of Electric Reliability.

The Commission authorizes the Director or the Director's designee to:

(d) *Failure to take exceptions results in waiver*—(1) *Complete waiver*. If a participant does not file a brief on exceptions within the time permitted under this section, any objection to the initial decision by the participant is waived.

(2) *Partial waiver*. If a participant does not object to a part of an initial decision in a brief on exceptions, any objections by the participant to that part of the initial decision are waived.

(3) *Effect of waiver*. Unless otherwise ordered by the Commission for good cause shown, a participant who has waived objections under paragraph (d)(1) or (d)(2) of this section to all or part of an initial decision may not raise such objections before the Commission in oral argument or on rehearing.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 375, 49 FR 21316, May 21, 1984; Order 575, 60 FR 4860, Jan. 25, 1995]

§ 385.712 Commission review of initial decisions in the absence of exceptions (Rule 712).

(a) *General rule*. If no briefs on exceptions to an initial decision are filed within the time established by rule or order under Rule 711, the Commission may, within 10 days after the expiration of such time, issue an order staying the effectiveness of the decision pending Commission review.

(b) *Briefs and argument*. When the Commission reviews a decision under this section, the Commission may require that participants file briefs or present oral arguments on any issue.

(c) *Effect of review*. After completing review under this section, the Commission will issue a decision which is final for purposes of rehearing under Rule 713.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 375, 49 FR 21316, May 21, 1984; Order 575, 60 FR 4860, Jan. 25, 1995]

§ 385.713 Request for rehearing (Rule 713).

(a) *Applicability*. (1) This section applies to any request for rehearing of a final Commission decision or other final order, if rehearing is provided for by statute, rule, or order.

(2) For the purposes of rehearing under this section, a final decision in any proceeding set for hearing under subpart E of this part includes any Commission decision:

(i) On exceptions taken by participants to an initial decision;

(ii) When the Commission presides at the reception of the evidence;

(iii) If the initial decision procedure has been waived by consent of the participants in accordance with Rule 710;

(iv) On review of an initial decision without exceptions under Rule 712; and

(v) On any other action designated as a final decision by the Commission for purposes of rehearing.

(3) For the purposes of rehearing under this section, any initial decision under Rule 709 is a final Commission decision after the time provided for Commission review under Rule 712, if there are no exceptions filed to the decision and no review of the decision is initiated under Rule 712.

(b) *Time for filing; who may file*. A request for rehearing by a party must be filed not later than 30 days after issuance of any final decision or other final order in a proceeding.

(c) *Content of request*. Any request for rehearing must:

(1) State concisely the alleged error in the final decision or final order;

(2) Conform to the requirements in Rule 203(a), which are applicable to pleadings, and, in addition, include a separate section entitled ''Statement of Issues,'' listing each issue in a separately enumerated paragraph that includes representative Commission and court precedent on which the party is relying; any issue not so listed will be deemed waived; and

(3) Set forth the matters relied upon by the party requesting rehearing, if rehearing is sought based on matters not available for consideration by the Commission at the time of the final decision or final order.

(d) *Answers*. (1) The Commission will not permit answers to requests for rehearing.

(2) The Commission may afford parties an opportunity to file briefs or present oral argument on one or more issues presented by a request for rehearing.

(e) *Request is not a stay*. Unless otherwise ordered by the Commission, the filing of a request for rehearing does

not stay the Commission decision or order.

(f) *Commission action on rehearing.* Unless the Commission acts upon a request for rehearing within 30 days after the request is filed, the request is denied.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 375, 49 FR 21316, May 21, 1984; Order 575, 60 FR 4860, Jan. 25, 1995; 60 FR 16567, Mar. 31, 1995; Order 663, 70 FR 55725, Sept. 23, 2005; 71 FR 14642, Mar. 23, 2006]

§ 385.714 Certified questions (Rule 714).

(a) *General rule.* During any proceeding, a presiding officer may certify or, if the Commission so directs, will certify, to the Commission for consideration and disposition any question arising in the proceeding, including any question of law, policy, or procedure.

(b) *Notice.* A presiding officer will notify the participants of the certification of any question to the Commission and of the date of any certification. Any such notification may be given orally during the hearing session or by order.

(c) *Presiding officer's memorandum; views of the participants.* (1) A presiding officer should solicit, to the extent practicable, the oral or written views of the participants on any question certified under this section.

(2) The presiding officer must prepare a memorandum which sets forth the relevant issues, discusses all the views of participants, and recommends a disposition of the issues.

(3) The presiding officer must append to any question certified under this section the written views submitted by the participants, the transcript pages containing oral views, and the memorandum of the presiding officer.

(d) *Return of certified question to presiding officer.* If the Commission does not act on any certified question within 30 days after receipt of the certification under paragraph (a) of this section, the question is deemed returned to the presiding officer for decision in accordance with the other provisions of this subpart.

(e) *Certification not suspension.* Unless otherwise directed by the Commission or the presiding officer, certification under this section does not suspend the proceeding.

§ 385.715 Interlocutory appeals to the Commission from rulings of presiding officers (Rule 715).

(a) *General rule.* A participant may not appeal to the Commission any ruling of a presiding officer during a proceeding, unless the presiding officer under paragraph (b) of this section, or the motions Commissioner, under paragraph (c) of this section, finds extraordinary circumstances which make prompt Commission review of the contested ruling necessary to prevent detriment to the public interest or irreparable harm to any person.

(b) *Motion to the presiding officer to permit appeal.* (1) Any participant in a proceeding may, during the proceeding, move that the presiding officer permit appeal to the Commission from a ruling of the presiding officer. The motion must be made within 15 days of the ruling of the presiding officer and must state why prompt Commission review is necessary under the standards of paragraph (a) of this section

(2) Upon receipt of a motion to permit appeal under subparagraph (a)(1) of this section, the presiding officer will determine, according to the standards of paragraph (a) of this section, whether to permit appeal of the ruling to the Commission. The presiding officer need not consider any answer to this motion.

(3) Any motion to permit appeal to the Commission of an order issued under Rule 604, or appeal of a ruling under paragraph (a) or (b) of Rule 905, must be granted by the presiding officer.

(4) A presiding officer must issue an order, orally or in writing, containing the determination made under paragraph (b)(2) of this section, including the date of the action taken.

(5) If the presiding officer permits appeal, the presiding officer will transmit to the Commission:

(i) A memorandum which sets forth the relevant issues and an explanation of the rulings on the issues; and

(ii) the participant's motion under paragraph (b)(1) of this section and any answer permitted to the motion.

applicant. Such fact must be presented to the Office of the General Counsel as set forth in paragraph (d)(4) of this section.

(6) The request must be accompanied by the fee prescribed in § 381.405 of this chapter or by a petition for waiver pursuant to § 381.106 of this chapter.

(e) *Additional information.* The General Counsel may request additional information, documentation or legal analysis in connection with any request for any interpretation.

(f) *Referral of information.* Information submitted in a request for interpretation may be used by the Commission or its Staff in their official capacity. Any information received will be placed in a public file in the Commission's Office of Public Information.

(g) *The interpretation*—1) Except as provided in paragraph (g)(2) of this section, the General Counsel will provide a copy of his or her written interpretation of the NGPA or rule as applied to the act, transaction, or circumstance presented upon the person who made the request for the interpretation and upon persons named in the request as direct participants in the act, transaction, or circumstance.

(2) The General Counsel may determine not to issue an interpretation, in which case the person who made the request and direct participants as specified in the request will be notified in writing of the decision not to issue an interpretation, and the reason for the decision.

(3) Only those persons to whom an interpretation is specifically addressed and other persons who are named in the request, who have been informed by the applicant for an interpretation of the pendency of the request and who are direct participants in the act, transaction or circumstance presented, may rely upon it. The effectiveness of an interpretation depends entirely on the accuracy of the facts presented to the General Counsel. If a material or relevant fact has been misrepresented or omitted or if any material or relevant fact changes after an interpretation is issued or if the action taken differs from the facts presented in the request, the interpretation may not be relied upon by any person.

(4) An interpretation may be rescinded or modified prospectively at any time. A rescission or modification is effected by notifying persons entitled to rely on the interpretation at the address contained in the original request.

(5) Any interpretation based on the NGPA or a rule issued thereunder in effect at the time of issuance may be relied upon only to the extent such law or rule remains in effect.

(6) Except as provided in paragraphs (g)(3), (g)(4) and (g)(5) of this section, the Staff will not recommend any action to the Commission which is inconsistent with the position espoused in the interpretation. The interpretation of the General Counsel is not the interpretation of the Commission. An interpretation provided by the General Counsel is given without prejudice to the Commission's authority to consider the same or like question and to issue a declaratory order to take other action which has the effect of rescinding, revoking, or modifying the interpretation of the General Counsel.

(h) *Appeal.* There is no appeal to the Commission of an interpretation.

(i) *Interpretative rules.* Upon the petition of any person or upon its own motion, the Commission may publish in the FEDERAL REGISTER an interpretative rule regarding any question arising under the NGPA or a rule promulgated thereunder. Any person is entitled to rely upon an interpretative rule.

(j) *Applications for adjustments treated as requests for interpretations.* Except for the notification provisions of paragraph (d)(5) of this section, the provisions of this section apply to any petition for an adjustment which is deemed a request for an interpretation under Rule 1117. Notice to all parties to an adjustment proceeding under subpart K of this part that is deemed to be a request for an interpretation will be given under Rule 1117(d)(1).

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 394, 49 FR 35366, Sept. 7, 1984; Order 737, 75 FR 43405, July 26, 2010]

§ 385.1902 Appeals from action of staff (Rule 1902).

(a) Any staff action (other than a decision or ruling of presiding officer, as

defined in Rule 102(e)(1), made in a proceeding set for hearing under subpart E of this part) taken pursuant to authority delegated to the staff by the Commission is a final agency action that is subject to a request for rehearing under Rule 713 (request for rehearing).

(b) All appeals of staff action that were timely filed prior to December 3, 1990 and that had not been acted upon by the Commission on their substantive merits are deemed to be timely filed requests for rehearing of final agency action. All notices issued by the Commission prior to December 3, 1990 stating the Commission's intent to act on appeals of staff action such that they are not deemed denied by the expiration of a 30-day period after the filing of the appeal, are deemed to be orders granting rehearing of final agency action for the sole purpose of further consideration, unless the Commission issued an order on the substantive merits of the appeal prior to December 3, 1990. No later than January 2, 1991, persons who had timely filed appeals of staff action prior to December 3, 1990 which were pending before the Commission on that date may file additional pleadings to update or supplement those appeals.

[Order 530, 55 FR 50682, Dec. 10, 1990, as amended by Order 606, 64 FR 44405, Aug. 16, 1999]

§ 385.1903 Notice in rulemaking proceedings (Rule 1903).

Before the adoption of rule of general applicability or the commencement of hearing on such a proposed rulemaking, the Commission will cause general notice to be given by publication in the FEDERAL REGISTER, such notice to be published therein not less than 15 days prior to the date fixed for the consideration of the adoption of a proposed rule or rules or for the commencement of the hearing, if any, on the proposed rulemaking, except where a shorter period is reasonable and good cause exists therefor; *Provided however*, That:

(a) When the Commission, for good cause, finds it impracticable, unnecessary, or contrary to the public interest to give such notice, it may proceed with the adoption of rules without notice by incorporating therein a finding to such effect and a concise statement of the reasons therefor;

(b) Except when notice or hearing is required by statute, the Commission may issue at any time rules of organization, procedure or practice, or interpretative rules, or statements of policy, without notice or public proceedings; and

(c) This section is not to be construed as applicable to the extent that there may be involved any military, naval, or foreign affairs function of the United States, or any matter relating to the Commission's management or personnel, or to United States property, loans, grants, benefits, or contracts.

§ 385.1904 Copies of transcripts (Rule 1904).

The Commission will cause to be made a stenographic record of public hearings and such copies of the transcript thereof as it requires for its own purposes. Participants desiring copies of such transcript may obtain the same from the official reporter upon payment of the fees fixed therefor.

§ 385.1907 Reports of compliance (Rule 1907).

When any licensee, permittee, or any other person subject to the jurisdiction of the Commission is required to do or perform any act by Commission order, permit, or license provision, there must be filed with the Commission within 30 days following the date when such requirement became effective, a notice, under oath, stating that such requirement has been met or complied with; *Provided*, *however*, That the Commission, by rule or order, or by making specific provision therefor in a license or permit, may provide otherwise for the giving of such notice of compliance. Five conformed copies of such notice must be filed in lieu of the fourteen conformed copies required by Rule 2004 (copies of filings).

§ 1501.2 Apply NEPA early in the process.

Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts. Each agency shall:

(a) Comply with the mandate of section 102(2)(A) to ''utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment,'' as specified by § 1507.2.

(b) Identify environmental effects and values in adequate detail so they can be compared to economic and technical analyses. Environmental documents and appropriate analyses shall be circulated and reviewed at the same time as other planning documents.

(c) Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources as provided by section 102(2)(E) of the Act.

(d) Provide for cases where actions are planned by private applicants or other non-Federal entities before Federal involvement so that:

(1) Policies or designated staff are available to advise potential applicants of studies or other information foreseeably required for later Federal action.

(2) The Federal agency consults early with appropriate State and local agencies and Indian tribes and with interested private persons and organizations when its own involvement is reasonably foreseeable.

(3) The Federal agency commences its NEPA process at the earliest possible time.

§ 1501.3 When to prepare an environmental assessment.

(a) Agencies shall prepare an environmental assessment (§ 1508.9) when necessary under the procedures adopted by individual agencies to supplement these regulations as described in § 1507.3. An assessment is not necessary if the agency has decided to prepare an environmental impact statement.

(b) Agencies may prepare an environmental assessment on any action at any time in order to assist agency planning and decisionmaking.

§ 1501.4 Whether to prepare an environmental impact statement.

In determining whether to prepare an environmental impact statement the Federal agency shall:

(a) Determine under its procedures supplementing these regulations (described in § 1507.3) whether the proposal is one which:

(1) Normally requires an environmental impact statement, or

(2) Normally does not require either an environmental impact statement or an environmental assessment (categorical exclusion).

(b) If the proposed action is not covered by paragraph (a) of this section, prepare an environmental assessment (§ 1508.9). The agency shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments required by § 1508.9(a)(1).

(c) Based on the environmental assessment make its determination whether to prepare an environmental impact statement.

(d) Commence the scoping process (§ 1501.7), if the agency will prepare an environmental impact statement.

(e) Prepare a finding of no significant impact (§ 1508.13), if the agency determines on the basis of the environmental assessment not to prepare a statement.

(1) The agency shall make the finding of no significant impact available to the affected public as specified in § 1506.6.

(2) In certain limited circumstances, which the agency may cover in its procedures under § 1507.3, the agency shall make the finding of no significant impact available for public review (including State and areawide clearinghouses) for 30 days before the agency makes its final determination whether to prepare an environmental impact statement and before the action may begin. The circumstances are:

(i) The proposed action is, or is closely similar to, one which normally requires the preparation of an environmental impact statement under the procedures adopted by the agency pursuant to § 1507.3, or

(ii) The nature of the proposed action is one without precedent.

§ 1501.5 Lead agencies.

(a) A lead agency shall supervise the preparation of an environmental impact statement if more than one Federal agency either:

(1) Proposes or is involved in the same action; or

(2) Is involved in a group of actions directly related to each other because of their functional interdependence or geographical proximity.

(b) Federal, State, or local agencies, including at least one Federal agency, may act as joint lead agencies to prepare an environmental impact statement (§ 1506.2).

(c) If an action falls within the provisions of paragraph (a) of this section the potential lead agencies shall determine by letter or memorandum which agency shall be the lead agency and which shall be cooperating agencies. The agencies shall resolve the lead agency question so as not to cause delay. If there is disagreement among the agencies, the following factors (which are listed in order of descending importance) shall determine lead agency designation:

(1) Magnitude of agency's involvement.

(2) Project approval/disapproval authority.

(3) Expertise concerning the action's environmental effects.

(4) Duration of agency's involvement.

(5) Sequence of agency's involvement.

(d) Any Federal agency, or any State or local agency or private person substantially affected by the absence of lead agency designation, may make a written request to the potential lead agencies that a lead agency be designated.

(e) If Federal agencies are unable to agree on which agency will be the lead agency or if the procedure described in paragraph (c) of this section has not resulted within 45 days in a lead agency designation, any of the agencies or persons concerned may file a request with the Council asking it to determine which Federal agency shall be the lead agency.

A copy of the request shall be transmitted to each potential lead agency. The request shall consist of:

(1) A precise description of the nature and extent of the proposed action.

(2) A detailed statement of why each potential lead agency should or should not be the lead agency under the criteria specified in paragraph (c) of this section.

(f) A response may be filed by any potential lead agency concerned within 20 days after a request is filed with the Council. The Council shall determine as soon as possible but not later than 20 days after receiving the request and all responses to it which Federal agency shall be the lead agency and which other Federal agencies shall be cooperating agencies.

[43 FR 55992, Nov. 29, 1978; 44 FR 873, Jan. 3, 1979]

§ 1501.6 Cooperating agencies.

The purpose of this section is to emphasize agency cooperation early in the NEPA process. Upon request of the lead agency, any other Federal agency which has jurisdiction by law shall be a cooperating agency. In addition any other Federal agency which has special expertise with respect to any environmental issue, which should be addressed in the statement may be a cooperating agency upon request of the lead agency. An agency may request the lead agency to designate it a cooperating agency.

(a) The lead agency shall:

(1) Request the participation of each cooperating agency in the NEPA process at the earliest possible time.

(2) Use the environmental analysis and proposals of cooperating agencies with jurisdiction by law or special expertise, to the maximum extent possible consistent with its responsibility as lead agency.

(3) Meet with a cooperating agency at the latter's request.

(b) Each cooperating agency shall:

(1) Participate in the NEPA process at the earliest possible time.

(a) With respect to the Environmental Protection Agency, any proposed legislation, project, action or regulation as those terms are used in section 309(a) of the Clean Air Act (42 U.S.C. 7609).

(b) With respect to all other agencies, any proposed major federal action to which section 102(2)(C) of NEPA applies.

§ 1508.20 Mitigation.

Mitigation includes:

(a) Avoiding the impact altogether by not taking a certain action or parts of an action.

(b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.

(c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.

(d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.

(e) Compensating for the impact by replacing or providing substitute resources or environments.

§ 1508.21 NEPA process.

NEPA process means all measures necessary for compliance with the requirements of section 2 and title I of NEPA.

§ 1508.22 Notice of intent.

Notice of intent means a notice that an environmental impact statement will be prepared and considered. The notice shall briefly:

(a) Describe the proposed action and possible alternatives.

(b) Describe the agency's proposed scoping process including whether, when, and where any scoping meeting will be held.

(c) State the name and address of a person within the agency who can answer questions about the proposed action and the environmental impact statement.

§ 1508.23 Proposal.

Proposal exists at that stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated. Preparation of an environmental impact statement on a proposal should be timed (§ 1502.5) so that the final statement may be completed in time for the statement to be included in any recommendation or report on the proposal. A proposal may exist in fact as well as by agency declaration that one exists.

§ 1508.24 Referring agency.

Referring agency means the federal agency which has referred any matter to the Council after a determination that the matter is unsatisfactory from the standpoint of public health or welfare or environmental quality.

§ 1508.25 Scope.

Scope consists of the range of actions, alternatives, and impacts to be considered in an environmental impact statement. The scope of an individual statement may depend on its relationships to other statements (§§ 1502.20 and 1508.28). To determine the scope of environmental impact statements, agencies shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts. They include:

(a) Actions (other than unconnected single actions) which may be:

(1) Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:

(i) Automatically trigger other actions which may require environmental impact statements.

(ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.

(iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

(2) Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.

(3) Similar actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental

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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 10th day of May 2018, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system.

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