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**EN BANC ORAL ARGUMENT SCHEDULED FOR MARCH 31, 2020**

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**In the United States Court of Appeals  
for the District of Columbia Circuit**Nos. 17-1098, *et al.*

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

v.

FEDERAL ENERGY REGULATORY COMMISSION,  
*Respondent.*

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

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**REHEARING EN BANC BRIEF OF RESPONDENT  
FEDERAL ENERGY REGULATORY COMMISSION**

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## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

### A. Parties and Amici

The parties to the underlying agency proceedings and who have appeared before the Court are listed in Petitioners' Rule 28(a)(1) certificate. Amici briefs in support of Petitioners have been filed by:

(1) the States of Maryland, Delaware, Illinois, Minnesota, New Jersey, New York, Oregon, and Washington, the Commonwealths of Massachusetts and Pennsylvania, the District of Columbia, and the People of the State of Michigan;

(2) Affected Landowners William Limpert, Carlos B. Arostegui, Richard G. Averitt III, Sandra S. Averitt, Mill Ann Averitt, Richard G. Averitt IV, Carolyn Fischer, Anne A. Norwood, Kenneth W. Norwood, Hershel Spears, Nancy Kassam-Adams, Shahir Kassam-Adams, Robert C. Day, Darlene Spears, Quinn Robinson, Delwyn A. Dyer, Clifford A. Shaffer, Maury Johnson, the New Jersey Conservation Foundation, Catherine Holleran, Alisa Acosta, Stacey McLaughlin, Craig McLaughlin, William McKinley, Pamela Ordway, Neal C. Brown LLC Family, Toni Woolsey, Ron Schaaf, Deb Evans, the Evans Schaaf Family LLC, and the City of Oberlin; and

(3) Alliance for the Shenandoah Valley, Chesapeake Bay Foundation, Inc., Citizens for Pennsylvania's Future, Cowpasture River Preservation Association, Defenders of Wildlife, Delaware Riverkeeper Network, Food &

Water Watch, Friends of Buckingham, Friends of Nelson, Highlanders for Responsible Development, Mountain Watershed Association, Natural Resources Defense Council, Public Justice, Sound Rivers, Inc., Virginia Wilderness Committee, and Winyah Rivers Alliance.

The Commission also anticipates that the Edison Electric Institute and the Interstate Natural Gas Association of America will file amici briefs in support of Respondent.

B. Rulings Under Review

1. *Transcon. Gas Pipe Line Co., LLC*, 158 FERC ¶ 61,125 (2017) (Certificate Order), A80;
2. *Transcon. Gas Pipe Line Co., LLC*, Letter Order Granting Rehearings for Further Consideration (Mar. 13, 2017) (Tolling Order), A305;
3. *Transcon. Gas Pipe Line Co., LLC*, Letter Order Authorizing Certain Construction Activities (Sept. 15, 2017) (Construction Order), A324;
4. *Transcon. Gas Pipe Line Co., LLC*, Letter Order Granting Rehearings for Further Consideration (Oct. 17, 2017), A326; and
5. *Transcon. Gas Pipe Line Co., LLC*, 161 FERC ¶ 61,250 (2017) (Rehearing Order), A327.

C. Related Cases

This matter was initially addressed by this Court in the August 2, 2019 decision which denied the consolidated petitions for review. On September 16, 2019, Petitioners Hilltop Hollow Limited Partnership, Hilltop Hollow Limited Partnership, LLC, and Stephen D. Hoffman petitioned for rehearing *en banc*. The

Court granted that petition and vacated the underlying judgment in a December 5, 2019 order.

In addition, on October 30, 2018, the Third Circuit denied an appeal by Petitioners that challenged an order issued by the United States District Court for the Eastern District of Pennsylvania granting intervenor Transcontinental Gas Pipe Line Company, LLC a preliminary injunction authorizing immediate access to the rights-of-way necessary for construction and operation of the Atlantic Sunrise Project. *Transcon. Gas Pipe Line, Co., v. Permanent Easements for 2.14 Acres*, 907 F.3d 725 (3d Cir. 2018).

**TABLE OF CONTENTS**

	<b>PAGE</b>
INTRODUCTION .....	1
STATEMENT OF THE ISSUES.....	3
STATUTES AND REGULATIONS .....	4
STATEMENT OF THE CASE.....	4
I.    STATUTORY AND REGULATORY BACKGROUND.....	4
A.    The Natural Gas Act .....	4
B.    The Certificate Policy Statement .....	5
C.    Post-Certificate Matters .....	6
II   PROCEDURAL BACKGROUND.....	7
A.    The Commission’s Review Process.....	7
B.    The Certificate Order .....	9
C.    The Tolling Orders.....	10
D.    The Stay Denials .....	11
E.    The Eminent Domain Proceedings .....	12
F.    The Rehearing Orders .....	14
G.    The Panel’s Decision .....	15
SUMMARY OF ARGUMENT .....	17
ARGUMENT .....	19

I.	STANDARD OF REVIEW .....	19
II.	THE COMMISSION “ACTS UPON” APPLICATIONS FOR REHEARING WITHIN THE MEANING OF NATURAL GAS ACT SECTION 19(a) WHEN IT ISSUES A TOLLING ORDER.....	22
A.	The Language Of Natural Gas Act Section 19(a) Does Not Require A Final Decision On the Merits Within Thirty Days .....	23
1.	Every circuit to consider the issue has rejected Petitioners’ interpretation .....	24
2.	Interpreting “acts upon” to require action on the merits within thirty days is inconsistent with other language in section 19(a).....	26
3.	The Commission has statutory authority to issue tolling orders.....	27
B.	<i>California Company</i> Correctly Found That Practical Considerations Counsel Against Interpreting Natural Gas Act Section 19(a) To Impose A Thirty-Day Time Limit .....	28
1.	A thirty-day time limit is incompatible with the Commission’s task on rehearing .....	28
2.	A thirty-day rehearing time limit would create tension with the Commission’s statutory obligation to promptly address rate filings .....	31
3.	Continuing to interpret “acts upon” in section 19(a) to include action short of final action on the merits would allow the Commission to administer the Natural Gas Act (and Federal Power Act) as intended by Congress.....	32

C.	Congress Knows How To Specify Action On The Merits And Place Limits On the Use of Tolling Orders. It Chose Not To Do So In Section 19(a).....	33
1.	Congress has expressly conditioned judicial review on the Commission’s “failure to act on the merits” of rehearing requests in certain circumstances .....	33
2.	Congress knows how to limit the Commission’s time to consider a matter if it so desires .....	35
III.	THE COMMISSION’S USE OF TOLLING ORDERS DOES NOT POSE ANY CONSTITUTIONAL PROBLEMS.....	36
A.	There Is No Right To A Pre-Deprivation Hearing Before Property Is Taken Pursuant To Eminent Domain.....	37
1.	Homeowners’ caselaw is inapposite.....	37
2.	The concerns raised by the Environmental Associations do not establish a due process violation .....	40
B.	Even If A Pre-Deprivation Hearing Were Constitutionally Required, Homeowners Received Any Process Due In The FERC Proceedings .....	42
C.	There Is No Substantial Risk Of An Erroneous Deprivation .....	45
1.	The Commission’s thorough review process minimizes the risk of error.....	45
2.	There are procedures for interim relief and post-deprivation compensation.....	47
3.	Additional procedures would have costs.....	48
IV.	THE COMMISSION HAS REVISED ITS PROCEDURES TO ADDRESS THE CONCERNS IDENTIFIED BY THE COURT .....	49

V. THERE IS NO REASON TO REVISIT THE PANEL’S AFFIRMANCE OF THE COMMISSION’S NEED DETERMINATION.....52

A. Petitioners’ Market Need Arguments Are Not Properly Before The *En Banc* Court.....52

B. Petitioners Have Failed To Establish That The Certificate Policy Statement Is Arbitrary And Capricious .....53

1. Petitioners’ argument reflects a policy disagreement.....53

2. Policy questions raised by Commissioners do not establish that that the Certificate Policy Statement is arbitrary and capricious.....53

C. The Commission Reasonably Analyzed Whether There Was A Market Need For the Project .....55

CONCLUSION.....58



## TABLE OF AUTHORITIES

<b>COURT CASES:</b>	<b>PAGE</b>
<i>Adorers of the Blood of Christ v. FERC</i> , 897 F.3d 187 (3d Cir. 2018) .....	43
<i>Appalachian Power Co. v. EPA</i> , 135 F.3d 1396 (D.C. Cir. 1995).....	26, 37
<i>Appalachian Voices v. FERC</i> , No. 17-1271, 2019 WL 847199 (D.C. Cir. Feb. 19, 2019).....	30, 46, 54, 55
<i>Ariz. Corp. Comm’n v. FERC</i> , 397 F.3d 952 (D.C. Cir. 2005) .....	20
<i>Ark. La. Gas Co. v. Hall</i> , 453 U.S. 571 (1981).....	25
<i>Armstrong v. Manazo</i> , 380 U.S. 545 (1965).....	38
<i>ASARCO, Inc. v. FERC</i> , 777 F.2d 764 (D.C. Cir. 1985) .....	28, 33
<i>Bailey v. Anderson</i> , 326 U.S. 203 (1945) .....	38
* <i>Berkley v. Mountain Valley Pipeline, LLC</i> , 896 F.3d 624 (4th Cir. 2018), <i>cert. denied</i> , 139 S. Ct. 941 (2019).....	25, 41, 43
<i>Blumenthal v. FERC</i> , 613 F.3d 1142 (D.C. Cir. 2010).....	43
<i>B&amp;J Oil and Gas v. FERC</i> , 353 F.3d 71 (D.C. Cir. 2004) .....	53
<i>Boddie v. Connecticut</i> , 401 U.S. 371 (1971) .....	38
<i>Boerschig v. Trans-Pecos Pipeline, L.L.C.</i> , 872 F.3d 701 (5th Cir. 2017) .....	39, 40, 48
* <i>Cal. Co. v. FPC</i> , 411 F.2d 720 (D.C. Cir. 1969).....	17, 32, 33, 36

---

\* Cases chiefly relied upon are marked with an asterisk

<i>CFTC v. Schor</i> , 478 U.S. 833 (1986).....	35
<i>Chevron U.S.A., Inc. v. Nat. Res. Def. Council</i> , 467 U.S. 837 (1984).....	21
<i>Cities of Campbell and Thayer v. FERC</i> , 770 F.2d 1180 (D.C. Cir. 1985).....	32
<i>Citizens for Allegan Cnty., Inc. v. FPC</i> , 414 F.2d 1125 (D.C. Cir. 1969).....	42
<i>City of Arlington v. FCC</i> , 133 S. Ct. 1863 (2013).....	21
<i>City of Cincinnati v. Vester</i> , 281 U.S. 439 (1930).....	38
<i>City of Oberlin v. FERC</i> , 937 F.3d 599 (D.C. Cir. 2019).....	55
<i>Collier v. City of Springdale</i> , 733 F.2d 1311 (8th Cir. 1984).....	39
<i>Critical Mass Energy Project v. NRC</i> , 975 F.2d 871 (D.C. Cir. 1992).....	25, 36
<i>Del. Riverkeeper Network v. FERC</i> , 753 F.3d 1304 (D.C. Cir. 2014).....	46
<i>*Del. Riverkeeper Network v. FERC</i> , 895 F.3d 102 (D.C. Cir. 2018).....	17, 24, 37, 47
<i>Dent v. West Virginia</i> , 129 U.S. 114 (1889).....	37
<i>Dep't of State v. Washington Post Co.</i> , 456 U.S. 595 (1961).....	34
<i>Dominion Transmission, Inc. v. Summers</i> , 723 F.3d 238 (D.C. Cir. 2013).....	5
<i>E. Tenn. Nat. Gas Co. v. Sage</i> , 361 F.3d 808 (4th Cir. 2004).....	48, 49
<i>E.E.O.C. v. Abercrombie &amp; Fitch Stores, Inc.</i> , 135 S. Ct. 2028 (2105).....	41

<i>FERC v. Elec. Power Supply Ass’n</i> , 136 S. Ct. 760 (2016).....	19
<i>FPC v. Colo. Interstate Gas Co.</i> , 348 U.S. 492 (1955).....	30
<i>FPC v. Transcon. Gas Pipe Line Corp.</i> , 365 U.S. 1 (1961).....	46
* <i>Gen. Am. Oil Co. v. FPC</i> , 409 F.2d 597 (5th Cir. 1969).....	24
<i>In re Permian Basin Area Rate Cases</i> , 390 U.S. 747 (1968) .....	27
<i>Jackson Water Works Inc v. Pub. Util. Comm’n</i> , 793 F.2d 1090 (9th Cir. 1986).....	45
<i>Jama v. Immigration and Customs Enf’t</i> , 543 U.S. 335 (2005).....	36
<i>Joslin Mfg. Co. v. City of Providence</i> , 262 U.S. 668 (1923).....	39
<i>Kimball Laundry Co. v. United States</i> , 338 U.S. 1 (1949) .....	50
<i>Kimble v. Marvel Entm’t, LLC</i> , 135 S. Ct. 2401 (2015).....	42
* <i>Kokajko v. FERC</i> , 837 F.2d 524 (1st Cir. 1988).....	24, 25, 32
<i>Loretto v. Teleprompter Manhattan CATV Corp.</i> , 458 U.S. 419 (1982).....	38
<i>Matthews v. Eldridge</i> , 424 U.S. 319 (1976) .....	37, 45, 49
<i>Midcoast Interstate Transmission, Inc. v. FERC</i> , 198 F.3d 960 (D.C. Cir. 2000).....	14, 16
<i>Minisink Residents for Env’tl. Pres. &amp; Safety v. FERC</i> , 762 F.3d 97 (D.C. Cir. 2014).....	20, 46, 50, 53
<i>Montgomery v. Carter Cty.</i> , 226 F.3d 758 (6th Cir. 2000).....	39
<i>Monsanto Co. v. Geertson Seed Farms</i> , 561 U.S. 139 (2010) .....	40
<i>Moreau v. FERC</i> , 982 F.2d 556 (D.C. Cir. 1993) .....	17

<i>Myersville Citizens for a Rural Cmty, Inc. v. FERC</i> , 783 F.3d 1301 (D.C. Cir. 2015).....	20, 43, 46
<i>NAACP v. FPC</i> , 425 U.S. 662 (1976).....	4
<i>NLRB v. Bell Aerospace Co.</i> , 416 U.S. 267 (1974).....	35
<i>NO Gas Pipeline v. FERC</i> , 756 F.3d 764 (D.C. Cir. 2014).....	21, 46
<i>Nw. Pipeline Corp. v. FERC</i> , 863 F.2d 73 (D.C. Cir. 1988).....	30
<i>Okla Nat. Gas Co. v. FPC</i> , 257 F.2d 634 (D.C. Cir. 1958).....	20
<i>Phillips v. Comm’r</i> , 283 U.S. 589 (1931).....	37
<i>Power Co. of Am., L.P. v. FERC</i> , 245 F.3d 839 (D.C. Cir. 2001).....	57
<i>Presley v. City of Charlottesville</i> , 464 F.3d 480 (4th Cir. 2006).....	38
<i>Pub. Citizen v. FERC</i> , 839 F.3d 1165 (D.C. Cir. 2016).....	34
<i>Pub. Serv. Co. v. FERC</i> , 863 F.2d 1021 (D.C. Cir. 1988).....	29
<i>Pub. Serv. Comm’n v. FPC</i> , 543 F.2d 757 (D.C. Cir. 1974).....	33
<i>Reetz v. Michigan</i> , 188 U.S. 505 (1903).....	44
<i>Rex Realty Co. v. City of Cedar Rapids</i> , 322 F.3d 526 (8th Cir. 2003).....	39
<i>Save Our Sebesticook v. FERC</i> , 431 F.3d 379 (D.C. Cir. 2005).....	30
<i>S.C. Pub. Serv. Auth. v. FERC</i> , 762 F.3d 41 (D.C. Cir. 2014).....	22
<i>Sierra Club v. FERC</i> , 867 F.3d 1357 (D.C. Cir. 2017).....	46, 47
<i>Tenn. Gas Pipeline Co. v. FERC</i> , 871 F.2d 1099 (D.C. Cir. 1989).....	21

<i>Texas-Ohio Gas Co. v. FPC</i> , 207 F.2d 615 (D.C. Cir. 1953).....	26
<i>Transcon. Gas Pipe Line Co., LLC v. Permanent Easement of 2.59 Acres</i> , 709 F. App'x. 109 (3d Cir. 2017).....	44, 49
<i>Transcon. Gas Pipeline Co., LLC v. Permanent Easement for 2.14 Acres</i> , Civ. Action Nos. 17-715, <i>et al.</i> , 2017 WL 3624250 (E.D. Pa. Aug. 23, 2017).....	13, 48
<i>*Transcon. Gas Pipe Line Co., LLC v. Permanent Easement for 2.14 Acres</i> , 907 F.3d 725 (3d Cir. 2018), <i>cert. denied</i> , 139 S. Ct. 2639 (2019).....	14, 43, 44
<i>Twp. of Bordentown v. FERC</i> , 903 F.3d 234 (3d Cir. 2018).....	46
<i>United States v. 131.68 Acres</i> , 695 F.2d 872 (5th Cir. 1983).....	39
<i>United States v. Carmack</i> , 329 U.S. 230 (1946).....	38
<i>United States v. Dow</i> , 357 U.S. 17 (1958).....	48
<i>United States v. James Daniel Good Real Property</i> , 510 U.S. 43 (1933).....	38
<i>United States v. Naftalin</i> , 441 U.S. 768 (1979) .....	23
<i>Vt. Yankee Nuclear Power Corp. v. NRDC</i> , 435 U.S. 519 (1978).....	27
<i>WMATA v. One Parcel</i> , 514 F.2d 1350 (D.C. Cir. 1975).....	47
<i>Wolf v. McDonnell</i> , 418 U.S. 539 (1974) .....	37

**ADMINISTRATIVE CASES:**

<i>Algignis, Inc.</i> , 168 FERC ¶ 61,107 (2019).....	26
<i>Certificate of New Interstate Natural Gas Pipeline Facilities</i> , 88 FERC ¶ 61,227 (1999), <i>clarified</i> , 90 FERC ¶ 61,128 (2000), <i>further clarified</i> , 92 FERC ¶ 61,094 (2000).....	5, 6, 53
<i>Certification of New Intestate Natural Gas Pipeline Facilities</i> , 163 FERC ¶ 61,042 (2018).....	54
<i>Fla. Se. Connection</i> , 162 FERC ¶ 61,233 (2018) .....	47
<i>Fla. Se. Connection</i> , 164 FERC ¶ 61,099 (2019) .....	47
<i>Fla. Se. Connection</i> , 167 FERC ¶ 61,068 (2019) .....	42
<i>Mountain Valley Pipeline, LLC</i> , 161 FERC ¶ 61,043 (2017).....	54
<i>Mountain Valley Pipeline, LLC</i> , 163 FERC ¶ 61,197 (2018).....	29
<i>Rio Grande LNG LLC</i> , 170 FERC ¶ 61,046 (2020) .....	51
<i>Tenn. Gas Pipeline Co., LLC</i> , 153 FERC ¶ 61,215 (2016) .....	46
<i>Tenn. Gas Pipeline Co., LLC</i> , 156 FERC ¶ 61,007 (2016) .....	46
<i>Transcon. Gas Pipe Line Co.</i> , 158 FERC ¶ 61,125 (2017).....	7, 8, 9, 10, 29, 56
<i>Transcon. Gas Pipe Line Co.</i> , 160 FERC ¶ 61,042 (2017).....	11
<i>Transcon. Gas Pipe Line Co., LLC</i> , 161 FERC ¶ 61,250 (2017).....	14, 15, 23, 29, 41, 56, 57
<i>Transcon. Gas Pipe Line Co., LLC</i> , 162 FERC ¶ 61,192 (2018).....	15

**STATUTES:**Administrative Procedure Act

5 U.S.C. § 706(2)(A).....19

Federal Power Act

16 U.S.C. § 824b(a)(5).....35, 36

16 U.S.C. § 824d(e) .....32

16 U.S.C. § 824d(g)(2).....34

16 U.S.C. § 825l(a) .....24

16 U.S.C. § 825l(b) .....34

Natural Gas Act

15 U.S.C. § 717 .....5, 8

15 U.S.C. § 717c .....32

15 U.S.C. § 717f(e) .....5

15 U.S.C. § 717f(h) .....6, 7, 8

15 U.S.C § 717o .....27

15 U.S.C. § 717r(a) ..... 2, 3, 4, 7, 16, 18, 21, 22, 23, 26, 33

15 U.S.C. § 717r(b) .....7, 21, 57

15 U.S.C. § 717r(c) .....7, 19, 41, 49

**RULES AND REGULATIONS:**

18 C.F.R. § 385.713(f) .....23

Fed. R. Civ. P. 71.1 .....7

**GLOSSARY**

Br.	Petitioners' Joint Brief on Rehearing <i>En Banc</i> , filed Jan. 10, 2020
Certificate Order	<i>Transcontinental Gas Pipe Line Co., LLC</i> , 158 FERC ¶ 61,125 (2017), A80
Commission or FERC	Federal Energy Regulatory Commission
Construction Order	Letter Order, dated Sept. 15, 2017, A324
Envtl. Am. Br.	<i>En Banc</i> Brief of Alliance for the Shenandoah Valley, <i>et al.</i> , as Amici Curiae in Support of Petitioners, filed Jan. 17, 2020
Environmental Associations	Petitioners Allegheny Defense Project, Clean Air Council, Heartwood, Lancaster Against Pipelines, Lebanon Pipeline Awareness, Sierra Club, and Accokeek, Mattawoman, Piscataway Creeks Communities Council, Inc.
Homeowners	Petitioners Hilltop Hollow Limited Partnership, Hilltop Hollow Limited Partnership, LLC, and Stephen D. Hoffman
Land. Am. Br	<i>En Banc</i> Brief of Affected Landowners as Amici Curiae in Support of Petitioners, filed Jan. 17, 2020
NEPA	National Environmental Policy Act
Project	Atlantic Sunrise Project
Rehearing Order	<i>Transcontinental Gas Pipe Line Co., LLC</i> , 161 FERC ¶ 61,250 (2017), A327



State Am. Br.

Brief of Amici Curiae States of Maryland, Delaware, Illinois, Minnesota, New Jersey, New York, Oregon, and Washington, The Commonwealths of Massachusetts and Pennsylvania, the District of Columbia, and the People of the State of Michigan in Support of Petitioners, filed Jan. 17, 2020

Tolling Order

Order (Mar. 13, 2017), A305

Transco

Transcontinental Gas Pipeline Company

## INTRODUCTION

This case began as a wide-ranging challenge to a decision by the Federal Energy Regulatory Commission (FERC or Commission), after nearly three years of study, to authorize construction and operation of the Atlantic Sunrise Project (Project), an interstate pipeline designed to supply enough natural gas to meet the daily needs of more than 7 million American homes. The Project connects producing regions in Pennsylvania to markets in the mid-Atlantic and southeastern states. A unanimous panel of this Court rejected claims that the Commission improperly conducted its analysis under the National Environmental Policy Act (NEPA) and that it erred in finding a market need for the Project under the Natural Gas Act.

The Panel also rejected due process claims raised by Petitioners Hilltop Limited Partnership, LLC and Hilltop Hollow Limited Partnership (which maintain property owned by Gary and Michelle Erb), and by Stephen Hoffman (collectively, Homeowners). Homeowners argued that, in allowing construction to proceed while agency rehearing was pending, the Commission denied them the right to be heard as to whether any condemnation of their property via eminent domain for use in the Project satisfies the Fifth Amendment's public use requirement. The Panel noted that Homeowners did not contest that they were afforded a meaningful opportunity to be heard before the Commission, and explained that, so long as the

Commission's public-convenience-and-necessity determination is not legally deficient, it necessarily satisfies the Fifth Amendment's public use requirement. Panel Op. at 12, A389.

In a concurring opinion, Judge Millett took issue with the Commission's issuance of "tolling orders," which grant rehearing for the purpose of further consideration. Concurring Op. at 5-10, A394-99. Judge Millett questioned whether such orders are consistent with Natural Gas Act section 19(a), which provides that, "[u]nless the Commission acts upon the application for rehearing within thirty days," it may be "deemed to have been denied." 15 U.S.C. § 717r(a). She also questioned whether authorizing construction to commence while agency rehearing is pending comports with due process. Concurring Op. at 10-18, A399-407.

As explained below, the Commission's practice of issuing tolling orders is consistent with the language of 15 U.S.C. § 717r(a). Every circuit to consider the issue has found that the term "acts upon" in 15 U.S.C. § 717r(a) encompasses action short of a final resolution on the merits. Nor does the use of tolling orders in response to requests for rehearing from landowners pose any constitutional problems—there simply is no right to appellate review of a public use determination before property may be taken via eminent domain.

Nevertheless, the Commission is well-aware that the law can lead to harsh results. For its part, as explained below, the Commission has revamped its internal structure and processes to provide landowners facing the prospect of an eminent domain taking with a final decision on their rehearing requests within thirty days, if possible. While this reorganization will not eliminate complaints about delayed judicial review from all parties, the Commission has chosen to allocate its resources to ensure the speediest review for those litigants placed in the most vulnerable position by Commission decisions.

### **STATEMENT OF THE ISSUES**

In granting rehearing *en banc*, the Court directed the parties to address “the issues raised in Section II, Part C of the opinion and in the concurring opinion.” Order (Dec. 5, 2019). The issues thus presented for review are as follows:

1. Does the Commission “act upon” an application for rehearing within the meaning of 15 U.S.C. § 717r(a) when it issues a tolling order granting rehearing for further consideration on the merits.
2. Do Homeowners have a due process right to appellate review of the Commission’s decision to authorize the Atlantic Sunrise Project before their property is taken for use in the Project through separate eminent domain proceedings.

Petitioners also ask the Court to reexamine the Commission’s methodology for assessing the public need for interstate pipelines in general, and the Atlantic Sunrise Project in particular. Br. 42-56. The Commission believes this issue is beyond the scope of the Court’s grant of rehearing, but nevertheless addresses the following additional question:

3. Did the Commission reasonably determine there was a public need for the Project, when the record established that shippers had executed long-term agreements for all of the pipeline’s capacity and that there was a demand for natural gas in the mid-Atlantic and southeastern markets served by the Project.

## **STATUTES AND REGULATIONS**

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

## **STATEMENT OF THE CASE**

### **I. STATUTORY AND REGULATORY BACKGROUND**

#### **A. The Natural Gas Act**

Congress enacted the Natural Gas Act for the “principal purpose” of “encourage[ing] the orderly development of plentiful supplies of . . . natural gas at reasonable prices.” *NAACP v. FPC*, 425 U.S. 662, 669-70 (1976). The Act declares that “the business of transporting and selling natural gas for ultimate distribution to the public is affected with the public interest.” 15 U.S.C. § 717(a). To meet these aims, Congress vested the Commission with jurisdiction over the

transportation and wholesale sale of natural gas in interstate commerce. *Id.*

§§ 717(b), (c).

Before a company may construct a natural gas pipeline, it must obtain a “certificate of public convenience and necessity” from the Commission and “comply with all other federal, state, and local regulations not preempted by the” Act. *Dominion Transmission, Inc. v. Summers*, 723 F.3d 238, 240 (D.C. Cir. 2013). Under section 7(e) of the Act, the Commission “shall” issue a certificate if it determines that a proposed pipeline “is or will be required by the present or future public convenience and necessity.” 15 U.S.C. § 717f(e).

### **B. The Certificate Policy Statement**

The Commission’s Certificate Policy Statement sets forth the economic criteria it will consider in assessing whether a proposed facility is required by the public convenience and necessity. *Certificate of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999) (Certificate Policy Statement), *clarified*, 90 FERC ¶ 61,128 (2000), *further clarified*, 92 FERC ¶ 61,094 (2000). The initial question is whether the project can stand on its own financially through investment by the applicant and support from new customers who contract for service on the expanded capacity. 88 FERC at 61,746. If it can, the Commission then balances the “public benefits against the potential adverse consequences” of the proposal. *Id.* at 61,745. Adverse effects may include increased rates for

preexisting customers, degradation in service, unfair competition, or negative impact on the environment or landowners' property. *Id.* 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.* at 61,748. When a proposed project satisfies the requirements of the Certificate Policy Statement, the Commission then considers the potential environmental impacts and issues a decision on the application before it.

### **C. Post-Certificate Matters**

If the Commission grants a certificate of public convenience and necessity, the Natural Gas Act authorizes the certificate holder to exercise eminent domain authority if it “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[.]” 15 U.S.C. § 717f(h). The Act specifies that any such condemnation proceedings shall take place in the federal court for the district in which the property is located or in the relevant state court. *Id.* The manner of the condemnation hearing “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.” *Id.*; see also Fed. R. Civ. P. 71.1 (setting forth procedures for federal eminent domain actions).

If a party is dissatisfied with the Commission’s certificate determination, it may apply for rehearing. 15 U.S.C. § 717r(a). The application must “set forth specifically” the grounds for rehearing. *Id.* On rehearing, the Commission is authorized to “grant or deny” the request, “or to abrogate and modify its order[.]” *Id.* “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.” *Id.*

An application for agency rehearing is a prerequisite to judicial review, and only those objections raised on rehearing may be presented to the court of appeals. *Id.* § 717r(b). Congress specified that an application for rehearing or a petition for review does not “operate as a stay of the Commission’s order.” *Id.* § 717r(c). The Natural Gas Act thus expressly permits pipeline construction to proceed while rehearing is pending.

## **II. PROCEDURAL BACKGROUND**

### **A. The Commission’s Review Process**

The Commission began its pre-filing review of Transcontinental Gas Pipe Line Company, LLC’s (Transco) proposed Atlantic Sunrise Project in July 2014. *Transcon. Gas Pipe Line Co.*, 158 FERC ¶ 61,125, P 68 (2017) (Certificate Order), A108. The Project would provide firm transportation service for an additional 1.7



billion cubic feet of gas per day on Transco's system—enough to meet the annual needs of 7 million residential customers<sup>1</sup>—from northern Pennsylvania to Alabama, including markets along the system in Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, Georgia, and Alabama, and interconnects with existing pipelines serving the Florida market. *Id.* P 4, A81.

As part of its review process, the Commission notified nearly 2,500 interested parties of the Project. Four public scoping meetings were held in Pennsylvania, where 93 speakers provided comments. The Commission also received more than six hundred written comments from various interested parties. *See id.* PP 68-69, A108.

On March 31, 2015, Transco submitted its formal application for a certificate of public convenience and necessity under Natural Gas Act section 7(c). *Id.* P 1, A80. The Commission subsequently held multiple notice-and-comment periods and public meetings regarding the proposed Project. The Homeowners were active participants in this process, submitting at least nine comments to the Commission, which were among the 1,185 written comments, 296 oral comments,

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<sup>1</sup> See [https://www.eia.gov/dnav/ng/ng\\_cons\\_sum\\_a\\_EPG0\\_vrs\\_mmcf\\_a.htm](https://www.eia.gov/dnav/ng/ng_cons_sum_a_EPG0_vrs_mmcf_a.htm) (compiling annual end use natural gas consumption by state); [https://www.eia.gov/dnav/ng/ng\\_cons\\_num\\_a\\_EPG0\\_VN3\\_Count\\_a.htm](https://www.eia.gov/dnav/ng/ng_cons_num_a_EPG0_VN3_Count_a.htm) (compiling number of residential natural gas consumers by state).

and more than 900 letters that the Commission received and considered during its review. *Id.* PP 69, 72-75, A108-10.

Following the May 2016 issuance of its draft Environmental Impact Statement, the Commission received over 560 written comments, and more than 200 oral comments at public meetings held in Pennsylvania. *Id.* P 71, A109. These were considered and addressed in the final Environmental Impact Statement, issued in December 2016. *Id.* P 75, A110.

### **B. The Certificate Order**

On February 3, 2017, the Commission granted Transco a certificate of public convenience and necessity for the Project. The Commission found that there was a market need for the Project, as demonstrated by binding, long-term agreements with nine shippers for all of the Project's capacity. *Id.* PP 28-29, A91-92. That conclusion was buttressed by comments from two shippers and an end-use customer, who advised that the transportation service made available by the Project was necessary to meet end-use demand. A study submitted by an environmental advocacy group further reinforced the finding of a market demand for the Project in the mid-Atlantic and southeastern markets. *Id.* P 30, A92. The Commission balanced this demonstrated need against any potential adverse consequences and determined that the "public convenience and necessity" required approval of the

Project, subject to the conditions imposed to mitigate environmental impacts and other potential adverse effects. *Id.* P 33, JA94.

The Commission granted Transco's initial request to proceed with construction on February 23, 2017, after determining that all necessary conditions for the activities specified in Transco's request had been satisfied. *See* Letter Order (Feb. 23, 2017) (R.3973).<sup>2</sup> Additional notices to proceed were issued throughout 2017, including on September 15, 2017, when the Commission approved Transco's request to proceed with the construction of new, "greenfield" pipeline segments in Pennsylvania. *See* Letter Order (Sept. 15, 2017) (Construction Order), A324. The Project was placed in service in October 2018. *See* Notice (Oct. 9, 2018) (available at <https://www.ferc.gov/docs-filing/elibrary.asp> (Accession No. 20181009-5045)).

### **C. The Tolling Orders**

Numerous parties, including Homeowners and the Environmental Associations,<sup>3</sup> filed requests for rehearing of the Certificate Order. In response, the

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<sup>2</sup> Documents from the Commission's proceeding are available on the FERC E-Library system in Docket No. CP15-138-000 ([https://elibrary.ferc.gov/idmws/docket\\_search.asp](https://elibrary.ferc.gov/idmws/docket_search.asp))

<sup>3</sup> The Environmental Associations are Allegheny Defense Project, Clean Air Council, Heartwood, Lancaster Against Pipelines, Lebanon Pipeline Awareness, Sierra Club, and Accokeek, Mattawoman, Piscataway Creeks Communities Council, Inc.

Commission issued a tolling order within thirty days of the filing of the first such request. “In order to afford additional time for consideration of the matters raised” by those requests, the Commission “granted” rehearing for the “limited purpose of further consideration ....” Order (Mar. 13, 2017) (Tolling Order), A305. A similar tolling order was issued in response to the requests for rehearing of the Construction Order. *See* Order (Oct. 17, 2017), A326.

#### **D. The Stay Denials**

In February and March 2017, while rehearing was pending, certain parties, including Homeowners and the Environmental Associations, asked the Commission to stay the Certificate Order. The Commission denied the stay requests on August 31, 2017. *See Transcon. Gas Pipe Line Co.*, 160 FERC ¶ 61,042 (2017), A315. The Commission found, among other things, that the parties had failed to substantiate their claims of irreparable harm and that, in any event, a stay would substantially harm Transco because it had a limited window to comply with U.S. Fish and Wildlife tree clearing recommendations necessary to mitigate impacts on threatened and endangered species in the project area. *Id.* PP 7-11, 17-18, A317-20, 322-23.

On October 30, 2017, the Environmental Associations moved this Court for a stay pending judicial review of the Certificate Order. They argued, among other things, that Transco’s exercise of eminent domain and subsequent construction

activities would irreparably harm their landowner members. *See* Motion for Stay at 14-15 (Oct. 30, 2017). The Court denied that motion, finding that the movants had “not satisfied the stringent requirements for a stay pending court review.” *See* Order (Nov. 8, 2018).

Two month later, the Environmental Associations again asked the Court to stay the Certificate Order. *See* Motion for Stay (Jan. 16, 2018). They again argued that construction was causing irreparable harm to their members’ property and that a failure to stay construction could prevent effective relief from being granted. *Id.* at 1, 3. The Court again declined to stay the Project. *See* Order (Feb. 16, 2018).

#### **E. The Eminent Domain Proceedings**

The Erbs own a 72-acre property along Hilltop Drive in Conestoga, Pennsylvania. *See* Erb Comments (Nov. 15, 2015) (R.2485), A28. Mr. Hoffman owns a 112-acre property on Safe Harbor Road, in Millersville, Pennsylvania. *See* Motion to Intervene (Apr. 29, 2015) at 2 (R.1819) (available at <https://www.ferc.gov/docs-filing/elibrary.asp> (Accession No. 20150429-5503)). Operation of the Project required a permanent easement across 2.14 acres of the Erbs’ property and 2.02 acres of Mr. Hoffman’s property. (Slightly larger temporary easements were required for construction.)

After unsuccessful attempts to obtain the necessary rights-of-way, Transco initiated eminent domain proceedings against the Homeowners on February 15,

2017 in the United States District Court for the Eastern District of Pennsylvania.

Following extensive briefing and hearings, the district court, in an August 23, 2017 opinion, found that Transco had a right to condemn portions of Homeowners' property for Project-purposes and then granted a preliminary injunction authorizing immediate possession. *Transcon. Gas Pipeline Co., LLC v. Permanent Easement for 2.14 Acres*, Civ. Action Nos. 17-715, *et al.*, 2017 WL 3624250 (E.D. Pa. Aug. 23, 2017).

In so doing, the court viewed Homeowners' claim that they had not been afforded an opportunity to challenge whether the Project serves a public purpose as a collateral attack on the Certificate Order, over which the district court lacked jurisdiction. *Id.* at \*4. The court explained that, if it could consider that argument, it would reject it. "[Homeowners] received adequate due process at the FERC level" where they "participated in the pre-deprivation hearing, filed a request for rehearing at FERC, and filed a challenge to the FERC order in the United States Court of Appeals for the District of Columbia Circuit." *Id.* Moreover, "federal courts have found that, for purpose of a taking, due process only requires that reasonable notice and an opportunity to be heard is provided in the compensation stage of the proceeding." *Id.* at \*5.

The Third Circuit affirmed. In response to the Homeowners' claim that the district court proceedings deprived them of a meaningful opportunity to challenge

the Commission’s public use determination, the court of appeals noted, “[f]irst and most importantly, the [Homeowners] do not dispute that they had the opportunity to raise their concerns with FERC and did in fact do so; sought stays of the construction, which were denied; and sought rehearing ... [and] appealed to the D.C. Circuit Court[.]” *Transcon. Gas Pipe Line Co., LLC v. Permanent Easement for 2.14 Acres*, 907 F.3d 725, 740 (3d Cir. 2018), *cert. denied*, 139 S. Ct. 2639 (2019). The court went on to explain that Homeowners were fundamentally attacking the Certificate Order, which contained a finding that the Project was for a public use. *Id.* The Third Circuit held that it lacked jurisdiction to consider such a claim. *Id.*

#### **F. The Rehearing Orders**

On December 6, 2017, the Commission issued an order addressing the eleven requests for rehearing of the Certificate Order.<sup>4</sup> *Transcon. Gas Pipe Line Co.*, 161 FERC ¶ 61,250, P 33 (2017) (Rehearing Order), A327. In response to Homeowners’ claim that the Commission failed to adequately consider whether the Project satisfied the Fifth Amendment’s public use requirement, the Commission found that its “public convenience and necessity finding is equivalent to a ‘public use’ determination.” *Id.* P 33 (citing *Midcoast Interstate Transmission, Inc. v.*

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<sup>4</sup> From February 4, 2017 through August 9, 2017, the Commission lacked a quorum and, as a result, was unable to issue rehearing orders.

*FERC*, 198 F.3d 960, 973 (D.C. Cir. 2000)), A342. Having thus “determined that the Atlantic Sunrise Project is in the public convenience and necessity,” the Commission “was not required to make a separate finding that the project serves a ‘public use’ to allow the certificate holder to exercise eminent domain.” *Id.*

The Commission also rejected Homeowners’ contention that the issuance of a tolling order without a corresponding stay of the Certificate Order deprived them of a meaningful opportunity for judicial review. The “use of tolling orders has been found to be valid by the courts” (*id.* P 37, A344) and, in this case, was necessary so the Commission could “afford[] the multiple rehearing requests in this proceeding the careful consideration they are due.” *Id.* P 39, A346.

On March 1, 2018, the Commission denied rehearing of the Construction Order. *Transcon. Gas Pipe Line Co., LLC*, 162 FERC ¶ 61,192 (2018). No party sought appellate review of that order.

### **G. The Panel’s Decision**

On appeal, the panel addressed four consolidated petitions for review which argued that the Commission’s orders suffered from several substantive and procedural flaws. The panel rejected these claims, finding that the Commission properly conducted its environmental assessment under NEPA, appropriately found that there was a market need for the Project, as required by the Natural Gas Act, and afforded the parties due process.



With respect to the last issue, the Homeowners argued that the Commission's delay in acting on their rehearing request, while allowing construction to proceed, denied them an opportunity to be heard on whether Transco's taking of their property satisfied the public use requirement of the Fifth Amendment. Panel Op. at 11, A388. The panel explained that, so long as the Commission's determination under the Natural Gas Act that a project is required by the public convenience and necessity is not legally deficient, "it necessarily satisfies the Fifth Amendment's public-use requirement." *Id.* at 12 (citing *Midcoast*, 198 F.3d at 973), A389. And the Panel noted that Homeowners had neither "claim[ed] that they were deprived of a meaningful opportunity to be heard as part of the Commission's proceedings leading up to its issuance of the Certificate Order," nor made any effort to acknowledge, much less distinguish, *Midcoast. Id.*

Judge Millett's concurring opinion took issue with the Commission's practice of issuing tolling orders to enable it to address requests for rehearing, while at the same time allowing pipeline construction to proceed before a final ruling. Judge Millett asserted that Natural Gas Act section 19(a), 15 U.S.C. § 717r(a), should be read to impose a strict thirty-day time limit for the Commission to address the merits of requests for rehearing. Concurring Op. at 6 ("Congress ... gave the Commission 30 days to fish or cut bait"), A395. Judge

Millett acknowledged that this Court has, on multiple occasions, found that tolling orders are permissible under the Act. *Id.* (citing *Del. Riverkeeper Network v. FERC*, 895 F.3d 102, 113 (D.C. Cir. 2018); *Moreau v. FERC*, 982 F.2d 556, 564 (D.C. Cir. 1993); *Cal. Co. v. FPC*, 411 F.2d 720 (D.C. Cir. 1969)). She also noted that “[c]ircuit precedent has already rejected a due-process challenge to the Commission’s tolling orders.” *Id.* at 10 (citing *Del. Riverkeeper*, 895 F.3d at 112-13), A399. Judge Millett believed, however, that the potential harm to landowners stemming from delay in having their claims judicially reviewed counseled in favor of “a second look” at this precedent. *Id.* at 18, A407.

### SUMMARY OF ARGUMENT

The Commission understands that protracted administrative delay hinders regulatory certainty and postpones judicial review. In 2016, the Commission took initial steps to improve its rehearing process by creating a group of attorneys exclusively dedicated to rehearing orders, thereby removing the competing time demands of cases with other priorities.

The intense public interest in the Commission’s natural gas infrastructure proceedings—and the fairness concerns identified in Judge Millett’s concurrence—have led the Commission to conclude that further steps are necessary. Given the particularly unique interests of landowners in the path of pipelines, the Commission has committed and reorganized its resources to expedite

decisions on the merits of requests for rehearing that implicate landowner rights, with the aim of issuing merits orders within thirty days. While the Commission has determined that these reforms are necessary as a matter of policy, it believes that its practice of issuing tolling orders is consistent with the Natural Gas Act and the requirements of due process.

Every court to consider the issue has determined that the term “acts upon” in Natural Gas Act section 19(a), 15 U.S.C. § 717r(a), is not restricted to action on the merits. Such a construction is consistent with other language in section 19(a), the Commission’s responsibilities on rehearing, and its competing statutory command to give immediate attention to other matters. Moreover, in recent amendments to the Federal Power Act—which is read *in pari materia* with the Natural Gas Act—Congress expressly conditioned judicial review on the Commission’s “failure to act on the merits” and limited the use of tolling orders. Congress chose not to do so in Natural Gas Act section 19(a).

Nor does the issuance of tolling orders in landowner cases pose any constitutional problems. While there is no right to a pre-deprivation hearing when property is taken via eminent domain, Homeowners were afforded meaningful opportunity to be heard in the proceedings before the Commission. Pre-deprivation appellate review of that hearing is not a component of due process. (And here, the Court twice chose not to grant a stay of Project construction

pending judicial review.) In addition, the Commission's public-convenience-and-necessity determination was preceded by three years of analysis and was consistent with this Court's precedent. There is thus little risk of an erroneous deprivation. And there is an established body of law to compensate landowners in such situations. Finally, permitting the Commission's certificate orders to remain in effect during rehearing and judicial review is consistent with Congress's directive in Natural Gas Act section 19(c), 15 U.S.C. § 717r(c).

Petitioners' market need arguments are beyond the scope of the Court's grant of rehearing *en banc* and should be summarily rejected. In any event, Petitioners' call for the Court to direct a change in the Commission's policy for assessing market need is inconsistent with fundamental principles of judicial deference. And the Commission's market need finding in this case was consistent with a long line of precedent.

## ARGUMENT

### I. STANDARD OF REVIEW

Commission orders are reviewed under the Administrative Procedure Act's deferential "arbitrary and capricious" standard. 5 U.S.C. § 706(2)(A); *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016). Here, 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 Citizens for a Rural Cmty, Inc. v. FERC*, 783 F.3d 1301, 1308 (D.C. Cir. 2015) (internal quotations omitted).<sup>5</sup> 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.” *Id.*

The Commission’s factual findings are conclusive if supported by substantial evidence. *Minisink Residents for Env’tl. Pres. & Safety v. FERC*, 762 F.3d 97, 108 (D.C. Cir. 2014). Substantial evidence “requires more than a scintilla, but can be satisfied by something less than a preponderance of evidence.” *Id.* (internal quotations 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) (“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 that the agency administers, 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,

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<sup>5</sup> The State Amici’s call for a “more searching review” of the Commission public-convenience-and-necessity determination (State Am. Br. 14-15) ignores that the broad deference afforded that assessment is not an import from Takings Clause jurisprudence, but a recognition that Congress “delegate[d] to the Commission the power and duty to make that finding” based on its “expert knowledge.” *Okla. Nat. Gas Co. v. FPC*, 257 F.2d 634, 639 (D.C. Cir. 1958).

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).

Petitioners argue that the Commission’s construction of Natural Gas Act section 19(a), 15 U.S.C. § 717r(a), is not entitled to deference because that provision “bestows jurisdiction on the courts.” Br. 15. But section 19(a) does not confer jurisdiction on the courts; section 19(b) does, and it is not at issue in this case. *See* 15 U.S.C. § 717r(b) (“Any party to a proceeding under this chapter aggrieved by an order issued by the Commission ... may obtain a review of such order in the court of appeals”); *see also NO Gas Pipeline v. FERC*, 756 F.3d 764, 769 (D.C. Cir. 2014) (section 19(b) is a “jurisdictional grant” to the courts of appeal).

Section 19(a) addresses the *Commission’s* jurisdiction to entertain rehearing requests. It “confers upon the Commission the authority ‘to reconsider and correct its order until the time for judicial review has expired.’” *Tenn. Gas Pipeline Co. v. FERC*, 871 F.2d 1099, 1108 (D.C. Cir. 1989) (quoting *Pan-Am. Petroleum Co. v. FERC*, 322 F.2d 999, 1004 (D.C. Cir. 1963)). The Commission’s interpretation of

those portions of the Natural Gas Act which address its own jurisdiction are entitled to respect. *See S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 54 (D.C. Cir. 2014) (“court will defer to the Commission’s reasonable interpretation of statutory ambiguities concerning both the scope of its statutory authority and the application of that authority”); *see also* Part II.A.3, *infra* (discussing Commission’s delegated discretion to adopt rules of procedure that enable the agency to carry out its substantive responsibilities).

## **II. THE COMMISSION “ACTS UPON” APPLICATIONS FOR REHEARING WITHIN THE MEANING OF NATURAL GAS ACT SECTION 19(a) WHEN IT ISSUES A TOLLING ORDER.**

Under the Natural Gas Act, an application for agency rehearing is a prerequisite to judicial review. 15 U.S.C. § 717r(a). The Act specifies that, on rehearing, the Commission “shall have the power to grant or deny rehearing or to abrogate or modify its order without further hearing.” *Id.* “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.” *Id.*

Here, consistent with the language of section 19(a), 15 U.S.C. § 717r(a), the Commission “acted upon” the applications for rehearing within thirty days of their filing by issuing the Tolling Order, which “granted” “rehearing of the [Certificate Order] ... for the limited purpose of further consideration.” A305. This order was necessary in order to allow the Commission to give “the multiple rehearing

requests in this proceeding the careful consideration they [were] due.” Rehearing Order at P 39, A346. Had the Commission failed to issue the Tolling Order, the requests would have been deemed denied under the Commission’s regulations. *See* 18 C.F.R. § 385.713(f) (“Unless the Commission acts upon a request for rehearing within 30 days after the request is filed, the request is denied.”); *see also* 15 U.S.C. § 717r(a) (application “may be deemed to have been denied” if Commission does not act within thirty days).

Petitioners proffer various arguments as to why the Court should abandon its long-standing interpretation of section 19(a) and instead read “acts upon” to mean “acts on the merits.” Each is addressed below. But “[t]he short answer is that Congress did not write the statute that way.” *United States v. Naftalin*, 441 U.S. 768, 773 (1979).

**A. The Language Of Natural Gas Act Section 19(a) Does Not Require A Final Decision On The Merits Within Thirty Days.**

On its face, section 19(a), 15 U.S.C. § 717r(a), does not require a final rehearing decision on the merits within thirty days. Instead, the statute says that, unless the Commission “acts upon the application for rehearing” within thirty days, it “may be deemed to have been denied.” 15 U.S.C. § 717r(a). This Court has “long held” that the phrase “acts upon” means just what it says – that the Commission take some kind of action on the rehearing request within thirty days –



“not that it finally dispose of it.” *Del. Riverkeeper*, 895 F.3d at 113 (citing *Cal. Co.*, 411 F.2d at 722).

**1. Every circuit to consider the issue has rejected Petitioners’ interpretation.**

Petitioners assert that the “plain language” of section 19(a) requires that “acts upon” be read to mean “acts on the merits” (Br. 14) and that the repeated rejection of that interpretation was driven by blind adherence to this Court’s *California Company* decision. Br. 27. But this “plain language” claim fails. Every circuit to analyze the language of section 19(a) has independently concluded that it does not require the Commission to act on the merits within thirty days.

As the Fifth Circuit explained fifty years ago, “act” can mean one of two things: “(1) to grant or deny the motion [or] (2) finally to dispose of the merits.” *Gen. Am. Oil Co. v. FPC*, 409 F.2d 597, 599 (5th Cir. 1969). The court determined that “the first construction is the more reasonable” and thus found that the Federal Power Commission had “acted” when it issued a tolling order granting rehearing for further consideration. *Id.*

The First Circuit likewise found that the term “act” is broader than only resolving the merits of a rehearing request. In *Kokajko v. FERC*, 837 F.2d 524 (1st Cir. 1988), which addressed 16 U.S.C. § 825l(a), the identical rehearing provision

of the Federal Power Act,<sup>6</sup> the court of appeals found that “[t]he statutory language, ... although requiring FERC to ‘act’ upon the application for rehearing within thirty days, ... does not state, as the petitioner would have it, that FERC must ‘act on the merits’ within that time lest the application is deemed denied.” *Id.* at 525. Thus, the Commission “acted upon” a rehearing request within the meaning of the statute when it granted the request for the limited purpose of further consideration. *Id.*

In a recent pipeline case, the Fourth Circuit found that the Commission “acts upon” a rehearing request by issuing a tolling order which grants the request for further consideration. *Berkley v. Mountain Valley Pipeline, LLC*, 896 F.3d 624, 631 (4th Cir. 2018), *cert. denied*, 139 S. Ct. 941 (2019). Such orders are wholly consistent with the language of section 19(a), which “does not require a final decision within 30 days; it requires FERC to take *some kind of action* within 30 days for the petition to not be deemed denied by operation of law.” *Id.*

The unanimity among the circuits counsels against overruling this Court’s long-standing interpretation of section 19(a). *See Critical Mass Energy Project v.*

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<sup>6</sup> The Natural Gas Act and Federal Power Act are “in all material respects substantially identical,” and therefore cited interchangeably. *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981).

*NRC*, 975 F.2d 871, 875 (D.C. Cir. 1992) (*en banc*) (statutory interpretation from other circuits is relevant factor for *en banc* court to consider).

**2. Interpreting “acts upon” to require action on the merits within thirty days is inconsistent with other language in section 19(a).**

Petitioners insist that Natural Gas Act section 19(a) requires the Commission to address the merits of rehearing requests within thirty days “or else the rehearing request will be deemed to be denied.” Br. 13. But section 19(a) does not say that. It says that such requests “*may* be deemed to have been denied.” 15 U.S.C. § 717r(a). A statute’s use of the “the permissible ‘may’ rather than the mandatory ‘shall,’ ... suggests that Congress intends to confer some discretion on the agency.” *Appalachian Power Co. v. EPA*, 135 F.3d 1396, 1401 (D.C. Cir. 1995) (internal quotations omitted).

Here, section 19(a) vests the Commission with a discretionary tool to manage its docket. The Commission may deny rehearing requests by silence. *See, e.g., Algignis, Inc.*, 168 FERC ¶ 61,107 (2019) (“notice is hereby given that the request for rehearing was denied by operation of law.”). Alternatively, the Commission can, consistent with section 19(a), act on the merits beyond the purported “30-day time limit” (Br. 25), so long as it gives notice of this intent, a fact this Court has long recognized. *See Texas-Ohio Gas Co. v. FPC*, 207 F.2d 615, 616-17 (D.C. Cir. 1953) (“The Commission says that it has power to take

action ... after the thirty-day period has passed. If that is so – and we see no reason to the contrary – the Commission could take action as much as 100 or 200 days later.”).

**3. The Commission has statutory authority to issue tolling orders.**

At one point, Petitioners seem to concede “that FERC has the technical authority to issue tolling orders.” Br. 28. At another, they suggest that Congress did not provide the Commission such authority. Br. 14. For the avoidance of doubt, Natural Gas Act section 16 vests the Commission with the “power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out” its statutory obligations. 15 U.S.C. § 717o; *see, e.g., In re Permian Basin Area Rate Cases*, 390 U.S. 747, 776 (1968) (discussing 15 U.S.C. § 717o and finding that “the Commission’s broad responsibilities ... demand a generous construction of its statutory authority”). And here, the Commission found that issuance of the Tolling Order was necessary to carry out its rehearing responsibilities under the Act. Rehearing Order at P 39, A346; *see also Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 543 (1978) (“Absent constitutional constraints or extremely compelling circumstances the administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of

permitting them to discharge their multitudinous duties.”) (internal quotations omitted).

**B. California Company Correctly Found That Practical Considerations Counsel Against Interpreting Natural Gas Act Section 19(a) To Impose A Thirty-Day Time Limit.**

Petitioners’ contention that section 19(a) mandates that the Commission finally resolve all rehearing requests within thirty days fails to account for the purpose of the rehearing requirement, and the overall scheme of the statutes administered by FERC.

**1. A thirty-day time limit is incompatible with the Commission’s task on rehearing.**

Section 19(a)’s rehearing requirement is not a mere “requirement of exhaustion of remedies,” whereby the Commission is given a brief opportunity to correct glaring errors. *ASARCO, Inc. v. FERC*, 777 F.2d 764, 774 (D.C. Cir. 1985) (Scalia, J.). Rather, it serves as a mechanism for the Commission to carefully consider the arguments presented in order to resolve disputes or bring its expertise to bear on complex, technical matters before they are presented to the courts.

The “mandatory petition-for-rehearing requirement, with or without the additional requirement of raising the very objection urged on appeal, is virtually unheard-of, but both requirements happen to exist in all three of the major statutes administered by FERC.” *Id.* (citing Natural Gas Act, 15 U.S.C. § 717r, Natural Gas Policy Act, 15 U.S.C. § 3416, and Federal Power Act, 16 U.S.C. § 825l).

They are the product of “Congress’s intention to commit to FERC rather than to the judiciary the interpretation and application of the laws regarding” electric energy and natural gas in “proceedings ... [that] often involve multitudinous claims and parties.” *Pub. Serv. Co. v. FERC*, 863 F.2d 1021, 1023 (D.C. Cir. 1988) (statement of D.H. Ginsburg, J., concurring in denial of petition for rehearing *en banc*, joined by R.B. Ginsburg, Starr, Silberman, Buckley, Williams, and Sentelle, JJ.).

The Commission is often required to balance the interests of numerous stakeholders and render decisions that not only address challenging technical and economic matters, but also complex legal issues ranging far beyond the statutes it administers. This difficult task is vividly demonstrated in natural gas infrastructure proceedings, which require the Commission to apply a complex body of laws to various claims and parties. The Atlantic Sunrise proceeding here involved more than 125 intervenors. *See* Certificate Order at Appendix A, B, A152-59. Eleven separate requests for rehearing were filed, totaling 307 pages, and raising at least 16 distinct issues. *See* Rehearing Order at PP 3-5, A327-28.<sup>7</sup>

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<sup>7</sup> The Atlantic Sunrise proceeding was not an anomaly. The Mountain Valley Project involved more than 300 intervenors (*Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043, Appendix A, B (2017), A619-629), who filed 20 separate requests for rehearing (*see Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197, PP 2-3 (2018)). The Court subsequently affirmed the Commission’s certificate order, on all 16 issues presented for review (including a due process

Addressing requests for rehearing “calls for the application of technical knowledge and experience” in order to resolve “difficult problems of policy, accounting, economics,” and law. *FPC v. Colo. Interstate Gas Co.*, 348 U.S. 492, 501 (1955). This takes time. In the energy market matter referenced by the State Amici (at 16-18), the Commission recently received roughly 50 requests for rehearing. Each must be reviewed, considered, and addressed in a draft order that is subject to multiple levels of review, at both the staff and Commissioner levels. These processes are necessary for the Commission “to bring its knowledge and expertise to bear on an issue before it is presented to a generalist court.” *Nw. Pipeline Corp. v. FERC*, 863 F.2d 73, 78 (D.C. Cir. 1988); *see also Save Our Sebasticook v. FERC*, 431 F.3d 379, 382 (D.C. Cir. 2005) (“Even if it were very likely that the Commission would deny the rehearing petition, a reviewing court would at least have the benefit of the agency’s expert view of why it thought the petitioner’s arguments failed.”).

The Commission believes there is value in issuing explanatory orders on rehearing, apart from preparing its decisions for judicial review. First, arguments on rehearing are often different, or at least more nuanced, than those addressed in initial orders. Second, explanatory orders provide clarification to the affected

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issue). *Appalachian Voices v. FERC*, No. 17-1271, 2019 WL 847199 (D.C. Cir. Feb. 19, 2019).

parties and important guidance to the regulated community. And when the Commission acts in its primary role as an economic regulator, the impact of the rehearing period may be addressed through the Commission's authority to issue refunds with interest. Of course, there are instances where the intricacies of the energy markets counsel against providing retroactive relief on rehearing. *See* Env'tl. Am. Br. 22-25. But in those cases, thorough and considered rehearing orders are even more important given the complexities involved.

**2. A thirty-day rehearing time limit would create tension with the Commission's statutory obligation to promptly address rate filings.**

Interpreting Natural Gas Act section 19(a), and by necessary implication Federal Power Act section 313(a), to require a final resolution of all rehearing requests within thirty days would also create tension with the overall scheme of those statutes. While the Commission receives a significant number of rehearing requests—an average of 285 over the past three years—rehearing orders comprise only a limited percentage of the Commission's docket. Since 2015, that docket has produced an average of 1,122 orders annually (not including delegated letter orders issued by FERC staff).<sup>8</sup> In managing this caseload, Congress expressly directed

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<sup>8</sup> *See* <https://www.ferc.gov/docs-filing/dec-not/2019/jan.asp> (identifying orders issued between 2015 and 2019). This figure does not include 2017, where the Commission lacked a quorum for six months and issued 464 orders.



the Commission to give immediate attention to tariff filings concerning changes in rates and terms of service for the transmission and wholesale sale of electricity and natural gas.

Under Natural Gas Act section 4, 15 U.S.C. § 717c(d), and Federal Power Act section 205(d), 16 U.S.C. § 824d(e), such proposed changes go into effect automatically after thirty or sixty days unless the Commission otherwise orders. *See, e.g., Cities of Campbell and Thayer v. FERC*, 770 F.2d 1180, 1185 (D.C. Cir. 1985) (“under the § 205 process a proposed rate becomes effective 60 days after it is filed”). The Commission is thus “statutorily required to give preference and speedy consideration to questions concerning increased rates or charges for the transmission or sale of electric energy” and natural gas. *Kokajko*, 837 F.2d at 526.

**3. Continuing to interpret “acts upon” in section 19(a) to include action short of final action on the merits would allow the Commission to administer the Natural Gas Act (and Federal Power Act) as intended by Congress.**

The *California Company* court recognized the realities facing the Commission and reasonably found that interpreting Natural Gas Act section 19(a) to mandate action on the merits within thirty days would prevent the Commission “from giving careful and mature consideration to the multiple, and often clashing, arguments set out in applications for rehearing in complex cases such as this one.” *Cal. Co.*, 411 F.2d at 721. This would put the Court “in the awkward position of reviewing a decision which the agency for the best of reasons may be willing to

alter,” or at least further expound upon for the benefit of the public and the courts. *Id.*; see also *Pub. Serv. Comm’n v. FPC*, 543 F.2d 757, 774 n.116 (D.C. Cir. 1974) (“obvious purpose” of section 19(a) “is to afford the Commission the first opportunity to consider, and perhaps dissipate, issues which are headed for the courts”).

In light of the size and complexity of the Commission’s docket and its competing statutory obligations, interpreting section 19(a) to require action on the merits within thirty days would likely result in a significant percentage of rehearing requests being denied by silence. As a result, more disputes likely would move to the courts of appeal where they would have to be resolved without the benefit of the Commission’s further consideration. That is not what Congress intended. See *ASARCO*, 777 F.2d at 774 (finding that “[a]ccommodation is facilitated by” comprehensive rehearing orders, which help ensure that “FERC’s complex and multi-party proceedings ... [do not] overwhelm the system”).

- C. Congress Knows How To Specify Action On The Merits And Place Limits On The Use Of Tolling Orders. It Chose Not To Do So In Section 19(a).**
  - 1. Congress has expressly conditioned judicial review on the Commission’s “failure to act on the merits” of rehearing requests in certain circumstances.**

Petitioners argue that the Court should jettison its long-standing interpretation of Natural Gas Act section 19(a), 15 U.S.C. § 717r(a), and read it to

mean that, unless the Commission “acts on the merits” of a rehearing application within thirty days, it is denied by operation of law. But Congress knows how to expressly condition judicial review on the Commission’s failure to “act on the merits of a rehearing request.” It chose not to do so in section 19(a).

In an October 2018 amendment to the Federal Power Act, Congress addressed how to obtain judicial review of tariff filings in the event the Commission is deadlocked or lacks a quorum. Congress specified that, in such circumstances, if the Commission “fails to act on the merits of the rehearing request by the date that is 30 days after the date of the rehearing requests ... then the party may appeal.” 16 U.S.C. § 824d(g)(2).<sup>9</sup> The precise phrasing in this recent amendment is strong evidence that the more general phrase “acts upon the application” in Natural Gas Act section 19(a) (and Federal Power Act section 313(a)) should not be read to mean only “acts on the merits.” See *Dep’t of State v. Washington Post Co.*, 456 U.S. 595, 600 (1961) (specific terms are “benchmarks for measuring” the general term).

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<sup>9</sup> This amendment responds to the situation confronted in *Public Citizen v. FERC*, 839 F.3d 1165 (D.C. Cir. 2016), which held that a notice indicating a rate filing has gone into effect by operation of law due to a deadlock among the Commissioners is not a judicially reviewable “order” under Federal Power Act section 313(b), 16 U.S.C. § 825l(b).

Moreover, at the time of this amendment, Congress was well-aware of the Commission's long-standing interpretation of Natural Gas Act section 19(a) as permitting the issuance of tolling orders. *See* Br. 48 n.5 (citing July 2018 letter from Senators Warner and Kaine discussing Commission's interpretation of 15 U.S.C. § 717r(a) (A509)). Although Congress was contemplating ways to ensure prompt judicial review, it made no change to the rehearing provisions in the Natural Gas Act or the Federal Power Act. This "congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974); *see also CFTC v. Schor*, 478 U.S. 833, 846 (1986) (same).

**2. Congress knows how to limit the Commission's time to consider a matter if it so desires.**

The 2005 amendments to the Federal Power Act are also instructive. There, Congress directed the Commission to "grant or deny" within 180 days certain applications regarding changes in ownership of jurisdictional facilities or public utilities. 16 U.S.C. § 824b(a)(5). If it fails to do so, the application "shall be deemed granted," unless the Commission issues "an order tolling the time for acting on the application for not more than 180 days, at the end of which additional period the Commission shall grant or deny the application." *Id.*

By the time this amendment was enacted, the Commission had been issuing tolling orders in response to rehearing requests for more than 35 years. *See Cal.*

Co., 411 F.2d at 721 (noting, in 1969, the Commission’s “time honored interpretation”). Yet, Congress did not amend the rehearing sections of the Federal Power Act or Natural Gas Act to preclude the use of such orders. Instead, the practice was incorporated into 16 U.S.C. § 824b(a)(5), where Congress also demonstrated that it knew how to expressly limit the Commission’s time to review a matter if it so desired. *See Jama v. Immigration and Customs Enf’t*, 543 U.S. 335, 341 (2005) (“We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest.”).

Congressional action taken against the backdrop of the Commission’s long-standing practice of issuing tolling orders thus supports the Court’s interpretation of section 19(a) starting in *California Company*. *See Critical Mass Energy Project*, 975 F.2d at 876 (considering subsequent congressional action in determining whether *en banc* court should overturn long-standing precedent).

### **III. THE COMMISSION’S USE OF TOLLING ORDERS DOES NOT POSE ANY CONSTITUTIONAL PROBLEMS.**

Homeowners argue that their interpretation of Natural Gas Act section 19(a) must be adopted because, in cases raising eminent domain issues, tolling orders deprive parties of the right to “judicial review of FERC’s decision before their property [is] irrevocably taken.” Br. 20. While the Commission understands the

Homeowners' concerns and is working to improve its processes (*see* Part IV, *infra*), the Fifth Amendment does not guarantee a pre-deprivation hearing, much less appellate review of that hearing. And even if it did, Homeowners received all the process that was due in the FERC proceeding and the federal court condemnation proceeding.

**A. There Is No Right To A Pre-Deprivation Hearing Before Property Is Taken Pursuant To Eminent Domain.**

This Court has twice rejected the assertion that judicial review of the Commission's public-convenience-and-necessity determination before property may be taken by eminent domain is a right encompassed within the Fifth Amendment. Parties subject to eminent domain "will be entitled to a hearing" in the condemnation proceeding "that itself affords due process." *Del. Riverkeeper*, 895 F.3d at 110. "Due process requires no more in the context of takings where ... there is no right to a pre-deprivation hearing." *Id.* at 111; *accord Appalachian Voices*, 2019 WL 847199, at \*2.

**1. Homeowners' caselaw is inapposite.**

In arguing that these cases were wrongly decided, Homeowners rely upon general-purpose due process precedent.<sup>10</sup> But a taking via eminent domain is

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<sup>10</sup> *See* Br. 18 (citing *Matthews v. Eldridge*, 424 U.S. 319, 332 (1976) (termination of disability benefits); *Wolf v. McDonnell*, 418 U.S. 539 (1974) (loss of good-time credits); *Phillips v. Commissioner*, 283 U.S. 589 (1931) (determination of tax liability); *Dent v. West Virginia*, 129 U.S. 114 (1889)

different. “The government’s heightened interest in eminent domain and the unique safeguards surrounding takings necessarily affect any procedural due process analysis.” *Presley v. City of Charlottesville*, 464 F.3d 480, 489 (4th Cir. 2006).

The Supreme Court has long recognized that a valid government interest may justify postponement of an opportunity to be heard until after the taking of property. *See, e.g., Boddie v. Connecticut*, 401 U.S. 371, 378 (1971). The power of eminent domain is plainly a valid government interest. It is “essential to a sovereign government” and necessary to ensure that, with respect to public works, individual landowners cannot “subordinate the constitutional powers of Congress to [their] personal will.” *United States v. Carmack*, 329 U.S. 230, 236 (1946). Thus, the Supreme Court has consistently held that a property owner is not entitled to a hearing prior to being dispossessed of property via eminent domain. *See, e.g., Bailey v. Anderson*, 326 U.S. 203, 205 (1945) (“it has long been settled that due process does not require the condemnation of land to be in advance of its

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(medical licensing); *Armstrong v. Manazo*, 380 U.S. 545 (1965) (adoption proceedings)); *see also* Br. at 25 (*United States v. James Daniel Good Real Property*, 510 U.S. 43 (1933) (civil forfeiture proceedings)). None of the Takings cases that Homeowners do cite addresses the question of what process is due. *See* Br. 25 (citing *City of Cincinnati v. Vester*, 281 U.S. 439 (1930) (assessing whether declaration of public purpose comported with state law); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (installation of cable television equipment constituted a compensable taking)).

occupation by the condemning authority”); *Joslin Mfg. Co. v. City of Providence*, 262 U.S. 668, 678 (1923) (holding that city may take land “ex parte, without appeal or opportunity for hearing and decision by an impartial tribunal”).

Numerous circuit courts have reiterated that the Due Process Clause does not require the propriety of the taking to be determined at a pre-deprivation hearing. The Eighth Circuit, in *Collier v. City of Springdale*, 733 F.2d 1311 (8th Cir. 1984), explained that “it is well settled that a sovereign vested with the power of eminent domain may exercise that power consistent with the constitution without providing prior notice, hearing or compensation, so long as there exists an adequate mechanism for obtaining compensation.” *Id.* at 1314; *see also Rex Realty Co. v. City of Cedar Rapids*, 322 F.3d 526, 529 (8th Cir. 2003) (same); *Montgomery v. Carter Cty.*, 226 F.3d 758, 768-69 (6th Cir. 2000) (“In takings cases, post-deprivation process is sufficient.”); *United States v. 131.68 Acres*, 695 F.2d 872, 876 (5th Cir. 1983) (“The question on which issue is joined is whether the government may exercise its eminent domain power consistently with the Fifth Amendment by physically seizing property without any prior notice, hearing, or compensation. The answer to this question is yes.”).

The Fifth Circuit recently discussed the requirements of due process in the pipeline context in *Boerschig v. Trans-Pecos Pipeline, L.L.C.*, 872 F.3d 701 (5th Cir. 2017). The court upheld the denial of an injunction sought by a property



owner alleging that the condemnation of his property for a pipeline easement violated due process. The Texas statute at issue permitted the pipeline—after determining for itself that a taking was necessary (*id.* at 703)—to “enter the land immediately” following a preliminary property valuation by court-appointed appraisers and “before the courts hear the landowner’s challenge to the taking.” *Id.* at 707. With respect to the landowner’s claimed entitlement to a pre-deprivation hearing, the Fifth Circuit explained “[t]he Supreme Court and this court have repeatedly held that such ‘quick taking’ without a prior hearing is consistent with due process.” *Id.*

**2. The concerns raised by the Environmental Associations do not establish a due process violation.**

The Environmental Associations seek to bolster Homeowners’ interpretation of Natural Gas Act section 19(a) by claiming that the judicial review of their NEPA claims is unduly delayed. Br. 37. *See also* Env’tl. Am. Br. 7-16. They do not claim that the timeliness of judicial review of their NEPA claims violates the Due Process Clause. And, of course, the mere fact that NEPA claims are raised on review does not mean that enjoining the effectiveness of the underlying agency decision is appropriate. *See, e.g., Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 157 (2010) (disapproving cases that “presume that an injunction is the proper remedy for a NEPA violation”).

While the Environmental Associations assert the use of tolling orders is contrary to the “purpose and spirit” of NEPA (Br. 37), they cannot claim that the nearly three-year environmental review of the pipeline proposal failed to make all pertinent information available to the Commission and the public before a decision was made to approve the Project. *See* Br. 38. *See also* Panel Op. at 7-10 (rejecting NEPA claims), A384-87. Nor is the agency irrevocably committing any resources to a project while analyzing rehearing applications. Br. 38 (citing 40 C.F.R. §§ 1502.2(f), 1506.1(a)). And to the extent the pipeline begins construction, it is subject to the risk that the Commission or the courts will revise or reverse the Certificate Order. *See* Rehearing Order at P 100, A376.

Absent special circumstances, the Commission follows the Natural Gas Act’s directive to keep its orders in force during the pendency of agency rehearing and judicial review. *See* 15 U.S.C. § 717r(c); *see also Berkley*, 896 F.3d at 631 (“Congress contemplated construction would be allowed to continue while FERC reviews a petition for rehearing.”). The Environmental Associations’ belief that “public policies” should drive the Commission to balance the competing interests differently (Br. 36) does not bear upon the question of what Congress meant by the term “acts upon” in Natural Gas Act section 19(a). *See, e.g., E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2033 (2105) (“The problem with this approach is the one that inheres in most incorrect interpretations of

statutes: It asks us to add words to the law to produce what is thought to be a desirable result.”). Nor does it carry Petitioners’ burden to overcome the “enhanced force” of *stare decisis* in a case such as this where long-standing precedent interprets a statute. *Kimble v. Marvel Entm’t, LLC*, 135 S. Ct. 2401, 2404 (2015).

**B. Even If A Pre-Deprivation Hearing Were Constitutionally Required, Homeowners Received Any Process Due In The FERC Proceedings.**

The Commission’s role in analyzing pipeline proposals is not ministerial. It does not simply look through the application to ensure that all necessary information has been included. Instead, “the Commission serves as an adjudicator.” *Fla. Se. Connection*, 167 FERC ¶ 61,068, P 10 (2019). The Commission has “an active and independent duty to guard the public interest,” which may require the consideration of alternative proposals, or no action at all. *Citizens for Allegan Cnty., Inc. v. FPC*, 414 F.2d 1125, 1133 (D.C. Cir. 1969).

In order to carry out that duty, the Commission employs robust procedures to solicit and consider input from all stakeholders. Homeowners were given notice of the Project and its potential impact to their property, and they took advantage of the Commission’s procedures by (1) submitting comments during the environmental review process, (2) submitting comments on the draft Environmental Impact Statement (which were addressed in the final document),

(3) raising arguments on rehearing of the Certificate Order (which were addressed in the Rehearing Order), and (4) requesting a stay of the Certificate Order. *See supra* pp. 8-15; Concurring Op. at 2, A391; Br. 3-6. All of this process satisfied constitutional due process requirements. *See Myersville*, 783 F.3d at 1327 (“commenter ... who has ample time to comment on evidence before the deadline for rehearing is not deprived of a meaningful opportunity to challenge the evidence”); *Blumenthal v. FERC*, 613 F.3d 1142, 1145 (D.C. Cir. 2010) (opportunity to submit comments to FERC and have them considered satisfies due process).

The Landowner Amici argue this is insufficient because the Commission has declined to address issues of just compensation and the propriety of “quick take” procedures (*i.e.*, possession before a final determination of compensation). Land. Am. Br. 12-14. They ignore that the Homeowners also received due process in the condemnation proceedings where such issues are addressed. *See, e.g., Transcon. Gas Pipe Line*, 907 F.3d at 734-40 (addressing Homeowners’ constitutional objections to order of immediate possession).<sup>11</sup>

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<sup>11</sup> The Landowner Amici (at 19-24) also assert that tolling rehearing requests that raise constitutional claims denies due process because FERC lacks institutional competence to address those claims. The Fourth Circuit recently rejected the Amici’s argument that constitutional claims should not first be presented to the agency. *See Berkley*, 896 F.3d at 630-33 (citing *Thunder Basin Coal Co. v. Reich*, 510 U.S. 2000 (1994)); *see also Adorers of the Blood of Christ*

Homeowners suggest that only pre-deprivation appellate review can provide due process. But “[d]ue process is not necessarily judicial process.” *Reetz v. Michigan*, 188 U.S. 505, 507 (1903). Indeed, the Third Circuit has already addressed Homeowners’ claim that the underlying condemnation proceeding denied them due process by (1) declining to review the Commission’s public-convenience-and-necessity determination, and (2) permitting Transco to take their property before the appeal of the Certificate Order was resolved. “First, and most importantly, the Hilltop/Hoffman Landowners do not dispute that they had the opportunity to raise their concerns with FERC and did in fact do so; sought stays of the construction, which were denied; and sought rehearing, which was also denied .... The NGA explicitly provides that neither a request before FERC nor judicial review can stay the effectiveness of a FERC certificate.” *Transco. Gas Pipe Line Co.*, 907 F.3d at 740. The court went on to note that, in any event, any claims regarding the propriety of the Commission’s determination could only be brought in a petition to review the Certificate Order. *Id*; see *Transcon. Gas Pipe Line Co., LLC v. Permanent Easement of 2.59 Acres*, 709 F. App’x. 109, 112 (3d Cir. 2017) (“Because [landowner affected by the Project] received notice and the opportunity

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*v. FERC*, 897 F.3d 187, 195-97 (3d Cir. 2018) (involving religious expression claims).

to respond in the FERC proceedings and will have the opportunity to litigate just compensation in the District Court, [he] received the process he was due.”).

These holdings are consistent with precedent establishing that due process does not require pre-deprivation appellate review of administrative rulings. For instance, in *Jackson Water Works Inc v. Public Utility Commission*, 793 F.2d 1090 (9th Cir. 1986), the Ninth Circuit found that a party objecting to a taking via eminent domain was afforded due process by a hearing before the state public utilities commission, even though judicial review was only available through a “rarely granted” discretionary writ to the California Supreme Court. “When a full and fair adjudication on the merits is provided, due process does not require a state to provide appellate review.” *Id.* at 1097.

Homeowners’ only response is to say that they do not want to be “among hundreds of other parties” (Br. 21), but they “make no claim they were deprived of a meaningful opportunity to be heard as part of the Commission’s proceedings.” Panel Op. at 12, A389. Due process does not require more.

**C. There Is No Substantial Risk Of An Erroneous Deprivation.**

**1. The Commission’s thorough review process minimizes the risk of error.**

The fact that there is a minimal risk of an erroneous deprivation also counsels against finding that Homeowners have a right to pre-deprivation appellate review of the Certificate Order. *See Matthews v. Eldridge*, 424 U.S. 319, 335

(1976) (“dictates of due process generally requires consideration of ... the risk of an erroneous deprivation”).

The Commission devotes substantial time and resources to reviewing proposed interstate pipelines. As a result, its comprehensive orders and findings under the Natural Gas Act are usually upheld on appeal. *Cf. NO Gas Pipeline*, 756 F.3d at 770 (project sponsors generally pursue a certificate only after working through changes, adaptations, and amendments). This is particularly true with respect to challenges as to whether a project is required by the “public convenience and necessity,” the broad discretionary standard guiding the Commission’s Natural Gas Act review. *See, e.g., FPC v. Transcon. Gas Pipe Line Corp.*, 365 U.S. 1, 7 (1961) (Commission is “guardian of the public interest” and “entrusted with a wide range of discretionary authority” in issuing certificates).<sup>12</sup> Even in those rare cases where the Court has found fault with the Commission’s environmental review, the analyses were corrected and the projects went forward. *See Tenn. Gas Pipeline Co., LLC*, 153 FERC ¶ 61,215, *reh’g denied*, 156 FERC ¶ 61,007 (2016) (revising analysis on remand from *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304 (D.C.

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<sup>12</sup> *See also Appalachian Voices*, 2019 WL 847199, at \*1 (rejecting challenge to public-convenience-and-necessity determination); *Twp. of Bordentown v. FERC*, 903 F.3d 234, 262-63 (3d Cir. 2018) (same); *Sierra Club v. FERC*, 867 F.3d 1357, 1379 (D.C. Cir. 2017) (same); *Minisink*, 762 F.3d at 111 n.10 (same); *Myersville*, 783 F.3d at 1310-11 (same).

Cir. 2014), and finding no additional mitigation required);<sup>13</sup> *Fla. Se. Connection*, 162 FERC ¶ 61,233, *reh'g denied*, 164 FERC ¶ 61,099 (2019) (revising analysis on remand from *Sierra Club*, 867 F.3d 1357, and finding no additional mitigation required). (Neither pipeline was the subject of a second round of judicial review.)

**2. There are procedures for interim relief and post-deprivation compensation.**

The risk of an erroneous deprivation is further lessened by the existence of procedures that would allow courts to halt construction if found appropriate. First, a mandamus action under the All Writs Act could be filed to protect the integrity of future judicial review. *See Del. Riverkeeper*, 895 F.3d at 113. Second, landowners could seek a stay of condemnation proceedings until judicial review of FERC certificate orders is complete. *See supra* pp. 11-12 (explaining that Court twice denied motions to stay construction pending judicial review of the Certificate Order). To be sure, it is difficult to obtain these remedies. They are nonetheless available. *See WMATA v. One Parcel*, 514 F.2d 1350, 1352 (D.C. Cir. 1975) (“Had this court not stayed that order Metro would long since have taken possession and completed its borings.”).

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<sup>13</sup> It is thus misleading for the Environmental Amici to suggest that construction of the Northeast Upgrade Project at issue in the 2014 *Delaware Riverkeeper* case resulted in “damage” from a “deficient environmental analysis.” *Envtl. Am. Br.* 8.



There is also an established body of law to address situations where landowners are erroneously deprived of property. If a certificate of public convenience and necessity were vacated and a pipeline did not go forward, “the FERC-regulated gas company ... would be liable to the landowner for the time it occupied the land and for any damages resulting to the land and to fixtures and improvements, or for the cost of restoration.” *E. Tenn. Nat. Gas Co. v. Sage*, 361 F.3d 808, 826 (4th Cir. 2004); *see also Boerschig*, 872 F.3d at 705 (even though pipeline was complete, court of appeals could still offer “effective relief” by requiring the property to be returned and restored). As the Supreme Court explained, abandonment of a project “results in an alteration in the property interest taken – from full ownership to one of temporary use and occupation. In such cases compensation would be measured by the principles normally governing the taking of a right to use property temporarily.” *United States v. Dow*, 357 U.S. 17, 26 (1958); *see also Transcon.*, 2017 WL 3624250 at \*9 (finding, in the underlying condemnation proceeding, that “landowners would have legal recourse” in the “unlikely event” the Project did not go forward).

The Commission appreciates that it may be difficult to completely restore the land to its prior state. Nonetheless, the existing legal safeguards have led courts to conclude that landowners are “adequately protected when the condemnor

obtains immediate possession” under the eminent domain rights granted by the Natural Gas Act. *Sage*, 361 F.3d at 825.

### **3. Additional procedures would have costs.**

Precluding the Commission from issuing tolling orders would have costs. *See Matthews*, 424 U.S. at 335 (burdens of additional procedures must be considered). The immediate consequence would be less comprehensive, or perhaps even no, rehearing orders in many cases – particularly those involving complex issues. This, in turn, could lead to additional remands to the Commission (voluntary or court-ordered) to correct errors or omissions that would otherwise be rectified on rehearing.

And, of course, the logical extension of Petitioners’ argument is that no construction should be permitted to take place until appellate review is complete. This would contravene Congress’s mandate that requests for agency rehearing or petitions for judicial review not ordinarily “operate as a stay of the Commission’s order.” 15 U.S.C. § 717r(c). It would also delay the public benefits provided by pipelines. *See Transcon. Gas Pipe Line Co.*, 709 F. App’x. at 114 (public interest favors immediate possession of property); *Sage*, 361 F.3d at 830 (finding a “substantial public interest” associated with natural gas supply).

#### **IV. THE COMMISSION HAS REVISED ITS PROCEDURES TO ADDRESS THE CONCERNS IDENTIFIED BY THE COURT.**

“Given the choice, almost no one would want natural gas infrastructure built on their block.” *Minisink*, 762 F.3d at 100. But given the realities of the nation’s production capacity and energy demands, new facilities are required and must be built somewhere. And when the Commission makes the “tough judgment calls as to where,” individuals may be forced to part with property against their will. *Id.* While “the liability of all property to condemnation for the common good ... is part of the burden of common citizenship,” *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949), the Commission puts great effort into ensuring that its decisions are correct as a matter of law and policy and minimizing any adverse effects through appropriate mitigation conditions, before subjecting anyone to this burden.

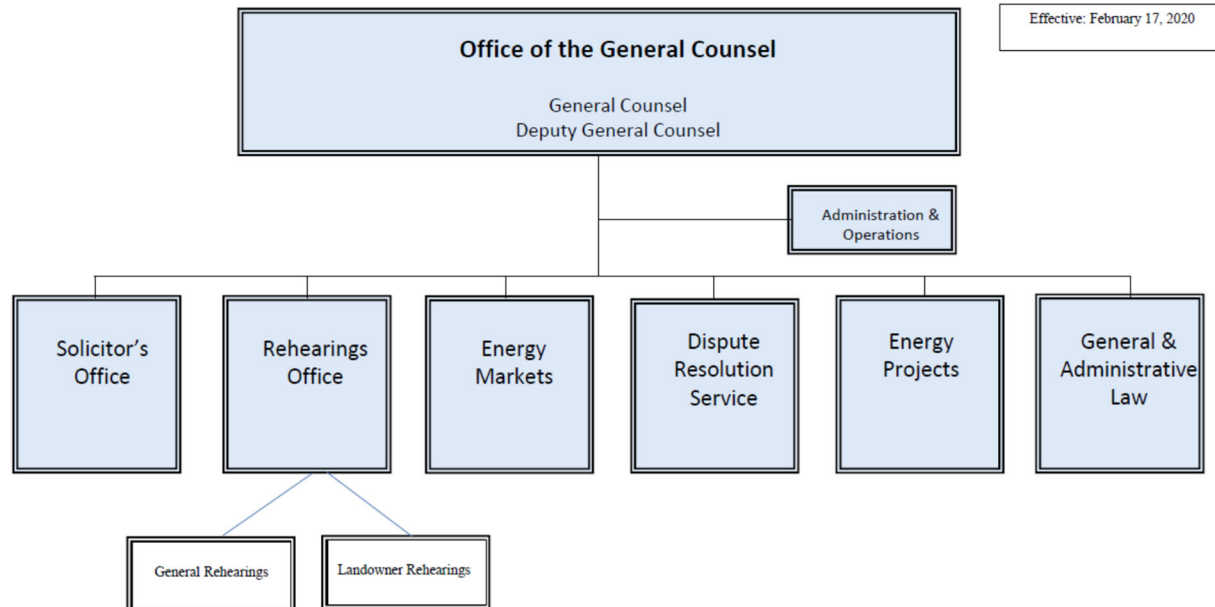
Nevertheless, the Commission’s certificate proceedings have become increasingly controversial over the past decade as natural gas has taken a preeminent place in the nation’s energy mix. In virtually every certificate proceeding, environmental associations, property rights advocates, governmental bodies, and others raise concerns about the Commission’s analysis.

The Commission recognizes the parties’ interest in meaningful judicial review and understands that it needs to adjust the manner in which it balances the competing demands of: (a) giving due consideration to all issues raised on

rehearing; (b) facilitating the timely and efficient completion of projects found to be in the public interest; and (c) affording affected parties the ability to obtain prompt judicial review. In September 2019, before rehearing *en banc* was granted and in response to the concerns raised by Judge Millett, Chairman Chatterjee announced that the Commission would expedite decisions on the merits of requests for rehearing of natural gas infrastructure orders that implicate landowner rights. The Commission reallocated resources to prioritize these matters with the aim of issuing orders on the merits of such requests within thirty days of their filing, thereby reducing or eliminating the need for tolling orders. *See Rio Grande LNG LLC*, 170 FERC ¶ 61,046 (2020) (comprehensive pipeline rehearing order, addressing a wide array of issues and statutes, issued 31 days after filing of first of several rehearing requests).

In January 2020, Chairman Chatterjee formally reorganized the Office of General Counsel to better address requests for rehearing. The rehearings group, formerly a sub-office within the Solicitor's Office, was elevated to a stand-alone section reporting directly to the General Counsel. The section will have a landowner group that will give first priority to landowner rehearing requests, and work on other items only when time permits. The Commission anticipates this will allow for more timely action on landowner requests for rehearing. *See Press*

Release (Jan. 31, 2020) (available at <https://www.ferc.gov/media/news-releases/2020/2020-1/01-31-20.pdf>).



**V. THERE IS NO REASON TO REVIST THE PANEL’S AFFIRMANCE OF THE COMMISSION’S NEED DETERMINATION.**

**A. Petitioners’ Market Need Arguments Are Not Properly Before The *En Banc* Court.**

Before the Panel, Petitioners argued that the Commission “violated” the Certificate Policy Statement’s long-standing methodology for evaluating market need by “rely[ing] entirely on the precedent agreements to demonstrate the public need for the Project.” *See* Joint Opening Brief, July 2, 2018, at 43, 46. That argument was succinctly rejected in the six sentences that comprise Part II.B of the Panel’s decision. Panel Op. at 10, A387.

Judge Millett’s concurrence expressed no concern with the Commission’s public-convenience-and-necessity analysis. Concurring Op. at 1, A390. And the

Court did not ask for briefing on that topic. *See* Order (Dec. 5, 2019) at 2 (directing parties to address “issues raised in Section II, Part C of the opinion and in the concurring opinion, including whether the Natural Gas Act ... authorizes ... tolling orders.”). The Court should summarily reject Petitioners’ belated efforts to revive their unsuccessful market need claim.

**B. Petitioners Have Failed To Establish That The Certificate Policy Statement Is Arbitrary And Capricious.**

**1. Petitioners’ argument reflects a policy disagreement.**

Under the Certificate Policy Statement, precedent agreements—*i.e.*, long-term agreements with shippers for a pipeline’s transportation capacity—are significant evidence of demand for a project. 88 FERC ¶ 61,227 at 61,748. And while the Certificate Policy Statement permits the consideration of other factors, the Commission may “assess a project’s benefits by looking ... [solely at] the market need reflected by the applicant’s existing contracts with shippers.” *Minisink*, 762 F.3d at 111. Petitioners contend this “practice can no longer be countenanced.” Br. 42.

This Court is not the proper forum to resolve Petitioners’ policy disagreement. It “would be flatly inconsistent with fundamental principles of judicial deference to agency expertise” for the court “to compel FERC to consider factors that [the Court] believe are in the public interest as [Petitioners] would have [the Court] do.” *B&J Oil and Gas v. FERC*, 353 F.3d 71, 76-77 (D.C. Cir. 2004).

Moreover, in April 2018, the Commission issued a notice of inquiry seeking input as to whether the Certificate Policy Statement should be revised. *See Certification of New Interstate Natural Gas Pipeline Facilities*, 163 FERC ¶ 61,042 (2018).

That docket remains under consideration.

**2. Policy questions raised by Commissioners do not establish that the Certificate Policy Statement is arbitrary and capricious.**

Petitioners point to statements some FERC Commissioners have made in other proceedings to support the claim that reliance on precedent agreements to establish market need is necessarily arbitrary and capricious. Br. 43-48. For instance, they cite Commissioner LaFleur's dissent in the *Mountain Valley* proceeding, which questioned, "as a policy matter[,] whether evidence other than precedent agreements should play a larger role" in the Commission's market need analysis. *See Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043 (2017) (LaFleur, Comm'r, dissenting), A646. Notwithstanding that policy debate, the Court found "FERC's conclusion that there is market need for the [Mountain Valley] Project [to be] reasonable and supported by substantial evidence, in the form of long-term precedent agreements for 100 percent of the Project's capacity." *Appalachian Voices*, 2019 WL 847199, at \*1.

Petitioners also point to Commissioner Glick's concerns in the Spire pipeline proceeding about contracts with affiliated shippers. Br. 47. No such

concerns were raised here and, in any event, the Court has found that there is nothing inherently wrong with basing a finding of market need upon affiliate contracts. *See Appalachian Voices*, 2019 WL 847199, at \*1 (Commission “reasonably explained that “[a]n affiliated shipper’s need for new capacity and its obligation to pay for such service under a binding contract are not lessened just because it is affiliated with the project sponsor”); *City of Oberlin v. FERC*, 937 F.3d 599, 606 (D.C. Cir. 2019) (same).

Petitioners’ failure to grapple with this Court’s precedent upholding the Commission’s market need analysis bars any claim that reliance upon precedent agreements is necessarily arbitrary and capricious.

**C. The Commission Reasonably Analyzed Whether There Was A Market Need For the Project.**

Petitioners cannot point to a single statement by any Commissioner taking issue with the finding of a market need for the Atlantic Sunrise Project. Instead, they complain that “FERC relied solely on the fact that Transco secured long-term commitments from other shippers” for 100% of the Project’s capacity. Br. 49. But Commission “did not stop there.” Panel Op. at 10, A387. “It also relied on comments by two shippers and one end-user, as well as a study submitted by one of the Environmental Associations, all of which reinforced the demand for natural gas shipments.” *Id.*



The study referenced by the Panel indicated that “pipelines like the proposed project may serve to aid in the delivery of lower-priced natural gas to higher-priced markets.” Certificate Order at P 28, A91; *see also* Rehearing Order at P 28, A339. Consistent with that conclusion, Washington Gas explained that the Project “will assist [it] in meeting the future firm natural gas requirements of its customers in a cost effective manner.” *See* Comment, Feb. 10, 2016 (R.2678), A45. Seneca Resources, a shipper, stated that its natural gas and electric consumers were reliant upon the gas it would transport through the Project. *See* Comment, Feb. 8, 2016 (R.2666), A43. Southern Company explained that it needed the Project’s transportation capacity for its generation facilities that serve retail and wholesale customers in the Southeast. Certificate Order at P 30, A92; *see* Rehearing Order at P 34 (explaining that public will benefit from increased reliability of supplies and upstream producers will benefit from access to additional markets), A343.

Petitioners, who repeatedly call for the Commission to consider more evidence in its demand analysis, do not like these particular pieces of evidence. Br. 52-53. Instead, they argue that the Commission should have found that the Project is not in the public interest because it will be used to export gas overseas. Br. 49-51. In support, Petitioners offer (1) a study that post-dates the Certificate and Rehearing Orders, and was not cited in briefing to the Panel, and (2) an argument based upon the Department of Energy’s export authorization order for

the Cove Point LNG facility which was not referenced in Petitioners' rehearing request or briefs. *See* 15 U.S.C. § 717r(b) (court may not consider objections not raised to the Commission on rehearing); *Power Co. of Am., L.P. v. FERC*, 245 F.3d 839, 845 (D.C. Cir. 2001) (arguments not made in opening brief waived).

In any event, the Commission did not ignore the evidence actually presented to it. The Commission determined that such evidence did not undermine the ultimate conclusion that the Project was designed to meet growing demand in the mid-Atlantic and southeastern markets and shippers had subscribed for all of the Project's capacity—*i.e.*, that it was required by the “public convenience and necessity.” *See* Rehearing Order at P 29, A340.<sup>14</sup> That conclusion was supported by substantial record evidence and should be upheld.

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<sup>14</sup> *See also* Final Environmental Impact Statement at 1-10 (acknowledging that Cabot has contracted to sell gas to a party that is a shipper at the Cove Point LNG export terminal, but noting that sale would occur “at the existing pipeline interconnection ... and not at the export terminal,” and that international marketplace is “just one of many possible markets served through interconnections with existing transmission pipeline infrastructure”). (R.3913) (available at <https://www.ferc.gov/docs-filing/elibrary.asp> (Accession No. 20161230-4002)).

## CONCLUSION

For the foregoing reasons, the petitions for review should be denied.

Respectfully submitted,

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February 10, 2020

# **ADDENDUM**

**STATUTES  
AND  
REGULATIONS**

**TABLE OF CONTENTS**

**STATUTES:**

Administrative Procedure Act

5 U.S.C. § 706.....1

Natural Gas Act

15 U.S.C. § 717.....2

15 U.S.C. § 717c.....4

15 U.S.C. § 717f.....6

15 U.S.C § 717o.....8

15 U.S.C. § 717r.....10

Federal Power Act

16 U.S.C. § 824b.....12

16 U.S.C. § 824d.....14

16 U.S.C. § 825l.....17

**RULES AND REGULATIONS:**

Fed. R. Civ. P. 71.1 .....19

18 C.F.R. § 385.713(f) .....24

**§ 703. Form and venue of proceeding**

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. 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. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 392; Pub. L. 94-574, §1, Oct. 21, 1976, 90 Stat. 2721.)

HISTORICAL AND REVISION NOTES

<i>Derivation</i>	<i>U.S. Code</i>	<i>Revised Statutes and Statutes at Large</i>
.....	5 U.S.C. 1009(b).	June 11, 1946, ch. 324, §10(b), 60 Stat. 243.

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

<i>Derivation</i>	<i>U.S. Code</i>	<i>Revised Statutes and Statutes at Large</i>
.....	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

<i>Derivation</i>	<i>U.S. Code</i>	<i>Revised Statutes and Statutes at Large</i>
.....	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

<i>Derivation</i>	<i>U.S. Code</i>	<i>Revised Statutes and Statutes at Large</i>
.....	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,

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

Ex. Ord. No. 10752, Feb. 12, 1958, 23 F.R. 973, provided:  
SECTION 1. The Secretary of the Interior is hereby designated and appointed as the agent of the President for the execution of all the powers and functions vested in the President by the act of February 22, 1935, 49 Stat. 30, entitled "An Act to regulate interstate and foreign commerce in petroleum and its products by prohibiting the shipment in such commerce of petroleum and its products produced in violation of State law, and for other purposes," as amended (15 U.S.C. 715 *et seq.*), except those vested in the President by section 4 of the act (15 U.S.C. 715c).

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

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

DWIGHT D. EISENHOWER.

**§ 715k. Saving clause**

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

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

**§ 715l. 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 of 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.
717a.	Definitions.
717b.	Exportation or importation of natural gas; LNG terminals.
717b-1.	State and local safety considerations.
717c.	Rates and charges.
717c-1.	Prohibition on market manipulation.
717d.	Fixing rates and charges; determination of cost of production or transportation.
717e.	Ascertainment of cost of property.
717f.	Construction, extension, or abandonment of facilities.
717g.	Accounts; records; memoranda.
717h.	Rates of depreciation.

Sec.	
717i.	Periodic and special reports.
717j.	State compacts for conservation, transportation, etc., of natural gas.
717k.	Officials dealing in securities.
717l.	Complaints.
717m.	Investigations by Commission.
717n.	Process coordination; hearings; rules of procedure.
717o.	Administrative powers of Commission; rules, regulations, and orders.
717p.	Joint boards.
717q.	Appointment of officers and employees.
717r.	Rehearing and review.
717s.	Enforcement of chapter.
717t.	General penalties.
717t-1.	Civil penalty authority.
717t-2.	Natural gas market transparency rules.
717u.	Jurisdiction of offenses; enforcement of liabilities and duties.
717v.	Separability.
717w.	Short title.
717x.	Conserved natural gas.
717y.	Voluntary conversion of natural gas users to heavy fuel oil.
717z.	Emergency conversion of utilities and other facilities.

**§ 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



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

**(b) State consultation**

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

- (1) the kind and use of the facility;
- (2) the existing and projected population and demographic characteristics of the location;
- (3) the existing and proposed land use near the location;
- (4) the natural and physical aspects of the location;
- (5) the emergency response capabilities near the facility location; and
- (6) the need to encourage remote siting.

**(c) Advisory report**

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

**(d) Inspections**

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

**(e) Emergency Response Plan**

(1) In any order authorizing an LNG terminal the Commission shall require the LNG terminal operator to develop an Emergency Response Plan. The Emergency Response Plan shall be prepared in consultation with the United States

Coast Guard and State and local agencies and be approved by the Commission prior to any final approval to begin construction. The Plan shall include a cost-sharing plan.

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

- (A) at the LNG terminal; and
- (B) in proximity to vessels that serve the facility.

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

REFERENCES IN TEXT

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

**§ 717c. Rates and charges**

**(a) Just and reasonable rates and charges**

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

**(b) Undue preferences and unreasonable rates and charges prohibited**

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

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

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

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

Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or

service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

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

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

**(f) Storage services**

(1) In exercising its authority under this chapter or the Natural Gas Policy Act of 1978 (15

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

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

(B) customers are adequately protected.

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

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

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

REFERENCES IN TEXT

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

AMENDMENTS

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

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

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

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

**§ 717c-1. Prohibition on market manipulation**

It shall be unlawful for any entity, directly or indirectly, to use or employ, in connection with the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance (as those terms are used in section 78j(b) of this title) in contravention of such rules and regula-

tions as the Commission may prescribe as necessary in the public interest or for the protection of natural gas ratepayers. Nothing in this section shall be construed to create a private right of action.

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

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

**(a) Decreases in rates**

Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

**(b) Costs of production and transportation**

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

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

**§ 717e. Ascertainment of cost of property**

**(a) Cost of property**

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

**(b) Inventory of property; statements of costs**

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

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

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

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

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

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

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

**(c) Certificate of public convenience and necessity**

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

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

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

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

(B) natural gas produced by such person.

**(d) Application for certificate of public convenience and necessity**

Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require.

**(e) Granting of certificate of public convenience and necessity**

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

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

(1) The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying

increased market demands in such service area without further authorization; and

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

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

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

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

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

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

AMENDMENTS

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

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

Subsec. (e). Pub. L. 95-617, §608(b)(2), substituted “subsection (c)(1)” for “subsection (c)”.

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

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

EFFECTIVE DATE OF 1988 AMENDMENT

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

“(c) REPORT.—Not later than 1 year after the date of enactment of this Act [Dec. 17, 2002], the Federal Energy Regulatory Commission shall prepare and submit to the Committee on Energy and Natural Resources of the Senate and the Committee on Energy and Commerce of the House of Representatives a report containing the results of the study conducted under subsection (a), including recommendations for addressing potential natural gas transmission and storage capacity problems in New England.”

#### **§ 717n. Process coordination; hearings; rules of procedure**

##### **(a) Definition**

In this section, the term “Federal authorization”—

(1) means any authorization required under Federal law with respect to an application for authorization under section 717b of this title or a certificate of public convenience and necessity under section 717f of this title; and

(2) includes any permits, special use authorizations, certifications, opinions, or other approvals as may be required under Federal law with respect to an application for authorization under section 717b of this title or a certificate of public convenience and necessity under section 717f of this title.

##### **(b) Designation as lead agency**

###### **(1) In general**

The Commission shall act as the lead agency for the purposes of coordinating all applicable Federal authorizations and for the purposes of complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

###### **(2) Other agencies**

Each Federal and State agency considering an aspect of an application for Federal authorization shall cooperate with the Commission and comply with the deadlines established by the Commission.

##### **(c) Schedule**

###### **(1) Commission authority to set schedule**

The Commission shall establish a schedule for all Federal authorizations. In establishing the schedule, the Commission shall—

(A) ensure expeditious completion of all such proceedings; and

(B) comply with applicable schedules established by Federal law.

###### **(2) Failure to meet schedule**

If a Federal or State administrative agency does not complete a proceeding for an approval that is required for a Federal authorization in accordance with the schedule established by the Commission, the applicant may pursue remedies under section 717r(d) of this title.

##### **(d) Consolidated record**

The Commission shall, with the cooperation of Federal and State administrative agencies and officials, maintain a complete consolidated record of all decisions made or actions taken by the Commission or by a Federal administrative agency or officer (or State administrative agency or officer acting under delegated Federal authority) with respect to any Federal authorization. Such record shall be the record for—

(1) appeals or reviews under the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.), provided that the record may be supplemented as expressly provided pursuant to section 319 of that Act [16 U.S.C. 1465]; or

(2) judicial review under section 717r(d) of this title of decisions made or actions taken of Federal and State administrative agencies and officials, provided that, if the Court determines that the record does not contain sufficient information, the Court may remand the proceeding to the Commission for further development of the consolidated record.

##### **(e) Hearings; parties**

Hearings under this chapter may be held before the Commission, any member or members thereof, or any representative of the Commission designated by it, and appropriate records thereof shall be kept. In any proceeding before it, the Commission in accordance with such rules and regulations as it may prescribe, may admit as a party any interested State, State commission, municipality or any representative of interested consumers or security holders, or any competitor of a party to such proceeding, or any other person whose participation in the proceeding may be in the public interest.

##### **(f) Procedure**

All hearings, investigations, and proceedings under this chapter shall be governed by rules of practice and procedure to be adopted by the Commission, and in the conduct thereof the technical rules of evidence need not be applied. No informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision, rule, or regulation issued under the authority of this chapter.

(June 21, 1938, ch. 556, §15, 52 Stat. 829; Pub. L. 109–58, title III, §313(a), Aug. 8, 2005, 119 Stat. 688.)

#### REFERENCES IN TEXT

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

The Coastal Zone Management Act of 1972, referred to in subsec. (d)(1), 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.

#### AMENDMENTS

2005—Pub. L. 109–58 substituted “Process coordination; hearings; rules of procedure” for “Hearings; rules of procedure” in section catchline, added subsecs. (a) to (d), and redesignated former subsecs. (a) and (b) as (e) and (f), respectively.

#### **§ 717o. Administrative powers of Commission; rules, regulations, and orders**

The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate

to carry out the provisions of this chapter. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this chapter; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

(June 21, 1938, ch. 556, §16, 52 Stat. 830.)

#### § 717p. Joint boards

##### (a) Reference of matters to joint boards; composition and power

The Commission may refer any matter arising in the administration of this chapter to a board to be composed of a member or members, as determined by the Commission, from the State or 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 Commis-

sion, 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 amended [28 U.S.C. 346, 347]” on authority of act June 25, 1948, ch. 646, 62 Stat. 869, the first section of which enacted Title 28, Judiciary and Judicial Procedure.

#### AMENDMENTS

2005—Subsec. (d). Pub. L. 109-58 added subsec. (d).  
1958—Subsec. (a). Pub. L. 85-791, §19(a), inserted sentence providing that until record in a proceeding has been filed in a court of appeals, Commission may modify or set aside any finding or order issued by it.

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

#### CHANGE OF NAME

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

### § 717s. Enforcement of chapter

#### (a) Action in district court for injunction

Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper district court of the United States, or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this chapter or any rule, regulation, or order thereunder,

and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices or concerning apparent violations of the Federal antitrust laws to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings.

#### (b) Mandamus

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

#### (c) Employment of attorneys by Commission

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

#### (d) Violation of market manipulation provisions

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

- (1) acting as an officer or director of a natural gas company; or
- (2) engaging in the business of—
  - (A) the purchasing or selling of natural gas; or
  - (B) the purchasing or selling of transmission services subject to the jurisdiction of the Commission.

(June 21, 1938, ch. 556, §20, 52 Stat. 832; June 25, 1948, ch. 646, §1, 62 Stat. 875, 895; Pub. L. 109-58, title III, §318, Aug. 8, 2005, 119 Stat. 693.)

#### CODIFICATION

The words “the District Court of the United States for the District of Columbia” in subsec. (a) following “district court of the United States” and in subsec. (b) following “district courts of the United States” omitted as superfluous in view of section 132(a) of Title 28, Judiciary and Judicial Procedure, which states that “There shall be in each judicial district a district court which shall be a court of record known as the United States District Court for the district”, and section 88 of title 28 which states that “The District of Columbia constitutes one judicial district”.

#### AMENDMENTS

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

### § 717t. General penalties

(a) Any person who willfully and knowingly does or causes or suffers to be done any act,



priate in the selection of a transmission route. If the transmission route approved by any State does not appear to be feasible and in the public interest, the Secretary shall encourage such State to review such route and to develop a route that is feasible and in the public interest. Any exercise by the Secretary of the power of eminent domain under this section shall be in accordance with other applicable provisions of Federal law. The Secretary shall provide public notice of his intention to acquire any right-of-way before exercising such power of eminent domain with respect to such right-of-way.

**(b) Permit**

Notwithstanding any transfer of functions under the first sentence of section 301(b) of the Department of Energy Organization Act [42 U.S.C. 7151(b)], no permit referred to in subsection (a)(1)(B) may be issued unless the Commission has conducted hearings and made the findings required under section 202(e) of the Federal Power Act [16 U.S.C. 824a(e)] and under the applicable execution order respecting the construction, operation, maintenance, or connection at the borders of the United States of facilities for the transmission of electric energy between the United States and a foreign country. Any finding of the Commission under an applicable executive order referred to in this subsection shall be treated for purposes of judicial review as an order issued under section 202(e) of the Federal Power Act.

**(c) Timely acquisition by other means**

The Secretary may not acquire any rights-of-way<sup>2</sup> under this section unless he determines that the holder or holders of a permit referred to in subsection (a)(1)(B) are unable to acquire such rights-of-way under State condemnation authority, or after reasonable opportunity for negotiation, without unreasonably delaying construction, taking into consideration the impact of such delay on completion of the facilities in a timely fashion.

**(d) Payments by permittees**

(1) The property interest acquired by the Secretary under this section (whether by eminent domain or other purchase) shall be transferred by the Secretary to the holder of a permit referred to in subsection (b) if such holder has made payment to the Secretary of the entire costs of the acquisition of such property interest, including administrative costs. The Secretary may accept, and expend, for purposes of such acquisition, amounts from any such person before acquiring a property interest to be transferred to such person under this section.

(2) If no payment is made by a permit holder under paragraph (1), within a reasonable time, the Secretary shall offer such rights-of-way to the original owner for reacquisition at the original price paid by the Secretary. If such original owner refuses to reacquire such property after a reasonable period, the Secretary shall dispose of such property in accordance with applicable provisions of law governing disposal of property of the United States.

<sup>2</sup>So in original. Probably should be "rights-of-way".

**(e) Federal law governing Federal lands**

This section shall not affect any Federal law governing Federal lands.

(Pub. L. 95-617, title VI, §602, Nov. 9, 1978, 92 Stat. 3164.)

CODIFICATION

Subsection (f), which required the Secretary to report annually to Congress on actions taken pursuant to this section, terminated, effective May 15, 2000, pursuant to section 3003 of Pub. L. 104-66, as amended, set out as a note under section 1113 of Title 31, Money and Finance. See, also, page 90 of House Document No. 103-7.

Section was enacted as part of the Public Utility Regulatory Policies Act of 1978, and not as part of the Federal Power Act which generally comprises this chapter.

DEFINITIONS

For definitions of terms used in this section, see section 2602 of this title.

**§ 824b. Disposition of property; consolidations; purchase of securities**

**(a) Authorization**

(1) No public utility shall, without first having secured an order of the Commission authorizing it to do so—

(A) sell, lease, or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission, or any part thereof of a value in excess of \$10,000,000;

(B) merge or consolidate, directly or indirectly, such facilities or any part thereof with those of any other person, by any means whatsoever;

(C) purchase, acquire, or take any security with a value in excess of \$10,000,000 of any other public utility; or

(D) purchase, lease, or otherwise acquire an existing generation facility—

(i) that has a value in excess of \$10,000,000; and

(ii) that is used for interstate wholesale sales and over which the Commission has jurisdiction for ratemaking purposes.

(2) No holding company in a holding company system that includes a transmitting utility or an electric utility shall purchase, acquire, or take any security with a value in excess of \$10,000,000 of, or, by any means whatsoever, directly or indirectly, merge or consolidate with, a transmitting utility, an electric utility company, or a holding company in a holding company system that includes a transmitting utility, or an electric utility company, with a value in excess of \$10,000,000 without first having secured an order of the Commission authorizing it to do so.

(3) Upon receipt of an application for such approval the Commission shall give reasonable notice in writing to the Governor and State commission of each of the States in which the physical property affected, or any part thereof, is situated, and to such other persons as it may deem advisable.

(4) After notice and opportunity for hearing, the Commission shall approve the proposed disposition, consolidation, acquisition, or change in control, if it finds that the proposed trans-

action will be consistent with the public interest, and will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company, unless the Commission determines that the cross-subsidization, pledge, or encumbrance will be consistent with the public interest.

(5) The Commission shall, by rule, adopt procedures for the expeditious consideration of applications for the approval of dispositions, consolidations, or acquisitions, under this section. Such rules shall identify classes of transactions, or specify criteria for transactions, that normally meet the standards established in paragraph (4). The Commission shall provide expedited review for such transactions. The Commission shall grant or deny any other application for approval of a transaction not later than 180 days after the application is filed. If the Commission does not act within 180 days, such application shall be deemed granted unless the Commission finds, based on good cause, that further consideration is required to determine whether the proposed transaction meets the standards of paragraph (4) and issues an order tolling the time for acting on the application for not more than 180 days, at the end of which additional period the Commission shall grant or deny the application.

(6) For purposes of this subsection, the terms “associate company”, “holding company”, and “holding company system” have the meaning given those terms in the Public Utility Holding Company Act of 2005 [42 U.S.C. 16451 et seq.].

(7)(A) Not later than 180 days after September 28, 2018, the Commission shall promulgate a rule requiring any public utility that is seeking to merge or consolidate, directly or indirectly, its facilities subject to the jurisdiction of the Commission, or any part thereof, with those of any other person, to notify the Commission of such transaction not later than 30 days after the date on which the transaction is consummated if—

(i) the facilities, or any part thereof, to be acquired are of a value in excess of \$1,000,000; and

(ii) such public utility is not required to secure an order of the Commission under paragraph (1)(B).

(B) In establishing any notification requirement under subparagraph (A), the Commission shall, to the maximum extent practicable, minimize the paperwork burden resulting from the collection of information.

#### **(b) Orders of Commission**

The Commission may grant any application for an order under this section in whole or in part and upon such terms and conditions as it finds necessary or appropriate to secure the maintenance of adequate service and the coordination in the public interest of facilities subject to the jurisdiction of the Commission. The Commission may from time to time for good cause shown make such orders supplemental to any order made under this section as it may find necessary or appropriate.

(June 10, 1920, ch. 285, pt. II, § 203, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 849; amend-

ed Pub. L. 109-58, title XII, § 1289(a), Aug. 8, 2005, 119 Stat. 982; Pub. L. 115-247, §§ 1, 2, Sept. 28, 2018, 132 Stat. 3152.)

#### AMENDMENT OF SUBSECTION (a)(1)(B)

*Pub. L. 115-247, §§ 1, 3, Sept. 28, 2018, 132 Stat. 3152, provided that, effective 180 days after Sept. 28, 2018, subsection (a)(1) of this section is amended by striking subparagraph (B) and inserting the following:*

*“(B) merge or consolidate, directly or indirectly, its facilities subject to the jurisdiction of the Commission, or any part thereof, with the facilities of any other person, or any part thereof, that are subject to the jurisdiction of the Commission and have a value in excess of \$10,000,000, by any means whatsoever;”.*

*See 2018 Amendment note below.*

#### REFERENCES IN TEXT

The Public Utility Holding Company Act of 2005, referred to in subsec. (a)(6), is subtitle F of title XII of Pub. L. 109-58, Aug. 8, 2005, 119 Stat. 972, which is classified principally to part D (§ 16451 et seq.) of subchapter XII of chapter 149 of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 15801 of Title 42 and Tables.

#### AMENDMENTS

2018—Subsec. (a)(1)(B), Pub. L. 115-247, § 1, added subpar. (B) and struck out former subpar. (B) which read as follows: “merge or consolidate, directly or indirectly, such facilities or any part thereof with those of any other person, by any means whatsoever;”.

Subsec. (a)(7), Pub. L. 115-247, § 2, added par. (7).

2005—Subsec. (a), Pub. L. 109-58 amended subsec. (a) generally. Prior to amendment, subsec. (a) read as follows: “No public utility shall sell, lease, or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission, or any part thereof of a value in excess of \$50,000, or by any means whatsoever, directly or indirectly, merge or consolidate such facilities or any part thereof with those of any other person, or purchase, acquire, or take any security of any other public utility, without first having secured an order of the Commission authorizing it to do so. Upon application for such approval the Commission shall give reasonable notice in writing to the Governor and State commission of each of the States in which the physical property affected, or any part thereof, is situated, and to such other persons as it may deem advisable. After notice and opportunity for hearing, if the Commission finds that the proposed disposition, consolidation, acquisition, or control will be consistent with the public interest, it shall approve the same.”

#### EFFECTIVE DATE OF 2018 AMENDMENT

Pub. L. 115-247, § 3, Sept. 28, 2018, 132 Stat. 3152, provided that: “The amendment made by section 1 [amending this section] shall take effect 180 days after the date of enactment of this Act [Sept. 28, 2018].”

#### EFFECTIVE DATE OF 2005 AMENDMENT

Pub. L. 109-58, title XII, § 1289(b), (c), Aug. 8, 2005, 119 Stat. 983, provided that:

“(b) EFFECTIVE DATE.—The amendments made by this section [amending this section] shall take effect 6 months after the date of enactment of this Act [Aug. 8, 2005].

“(c) TRANSITION PROVISION.—The amendments made by subsection (a) [amending this section] shall not apply to any application under section 203 of the Federal Power Act (16 U.S.C. 824b) that was filed on or before the date of enactment of this Act [Aug. 8, 2005].”

**§ 824c. Issuance of securities; assumption of liabilities****(a) Authorization by Commission**

No public utility shall issue any security, or assume any obligation or liability as guarantor, indorser, surety, or otherwise in respect of any security of another person, unless and until, and then only to the extent that, upon application by the public utility, the Commission by order authorizes such issue or assumption of liability. The Commission shall make such order only if it finds that such issue or assumption (a) is for some lawful object, within the corporate purposes of the applicant and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the applicant of service as a public utility and which will not impair its ability to perform that service, and (b) is reasonably necessary or appropriate for such purposes. The provisions of this section shall be effective six months after August 26, 1935.

**(b) Application approval or modification; supplemental orders**

The Commission, after opportunity for hearing, may grant any application under this section in whole or in part, and with such modifications and upon such terms and conditions as it may find necessary or appropriate, and may from time to time, after opportunity for hearing and for good cause shown, make such supplemental orders in the premises as it may find necessary or appropriate, and may by any such supplemental order modify the provisions of any previous order as to the particular purposes, uses, and extent to which, or the conditions under which, any security so theretofore authorized or the proceeds thereof may be applied, subject always to the requirements of subsection (a) of this section.

**(c) Compliance with order of Commission**

No public utility shall, without the consent of the Commission, apply any security or any proceeds thereof to any purpose not specified in the Commission's order, or supplemental order, or to any purpose in excess of the amount allowed for such purpose in such order, or otherwise in contravention of such order.

**(d) Authorization of capitalization not to exceed amount paid**

The Commission shall not authorize the capitalization of the right to be a corporation or of any franchise, permit, or contract for consolidation, merger, or lease in excess of the amount (exclusive of any tax or annual charge) actually paid as the consideration for such right, franchise, permit, or contract.

**(e) Notes or drafts maturing less than one year after issuance**

Subsection (a) shall not apply to the issue or renewal of, or assumption of liability on, a note or draft maturing not more than one year after the date of such issue, renewal, or assumption of liability, and aggregating (together with all other then outstanding notes and drafts of a maturity of one year or less on which such public utility is primarily or secondarily liable) not

more than 5 per centum of the par value of the other securities of the public utility then outstanding. In the case of securities having no par value, the par value for the purpose of this subsection shall be the fair market value as of the date of issue. Within ten days after any such issue, renewal, or assumption of liability, the public utility shall file with the Commission a certificate of notification, in such form as may be prescribed by the Commission, setting forth such matters as the Commission shall by regulation require.

**(f) Public utility securities regulated by State not affected**

The provisions of this section shall not extend to a public utility organized and operating in a State under the laws of which its security issues are regulated by a State commission.

**(g) Guarantee or obligation on part of United States**

Nothing in this section shall be construed to imply any guarantee or obligation on the part of the United States in respect of any securities to which the provisions of this section relate.

**(h) Filing duplicate reports with the Securities and Exchange Commission**

Any public utility whose security issues are approved by the Commission under this section may file with the Securities and Exchange Commission duplicate copies of reports filed with the Federal Power Commission in lieu of the reports, information, and documents required under sections 77g, 78l, and 78m of title 15.

(June 10, 1920, ch. 285, pt. II, § 204, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 850.)

## TRANSFER OF FUNCTIONS

Executive and administrative functions of Securities and Exchange Commission, with certain exceptions, transferred to Chairman of such Commission, with authority vested in him to authorize their performance by any officer, employee, or administrative unit under his jurisdiction, by Reorg. Plan No. 10 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out in the Appendix to Title 5, Government Organization and Employees.

**§ 824d. Rates and charges; schedules; suspension of new rates; automatic adjustment clauses****(a) Just and reasonable rates**

All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

**(b) Preference or advantage unlawful**

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

**(c) Schedules**

Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

**(d) Notice required for rate changes**

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

**(e) Suspension of new rates; hearings; five-month period**

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order

require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

**(f) Review of automatic adjustment clauses and public utility practices; action by Commission; "automatic adjustment clause" defined**

(1) Not later than 2 years after November 9, 1978, and not less often than every 4 years thereafter, the Commission shall make a thorough review of automatic adjustment clauses in public utility rate schedules to examine—

(A) whether or not each such clause effectively provides incentives for efficient use of resources (including economical purchase and use of fuel and electric energy), and

(B) whether any such clause reflects any costs other than costs which are—

(i) subject to periodic fluctuations and

(ii) not susceptible to precise determinations in rate cases prior to the time such costs are incurred.

Such review may take place in individual rate proceedings or in generic or other separate proceedings applicable to one or more utilities.

(2) Not less frequently than every 2 years, in rate proceedings or in generic or other separate proceedings, the Commission shall review, with respect to each public utility, practices under any automatic adjustment clauses of such utility to insure efficient use of resources (including economical purchase and use of fuel and electric energy) under such clauses.

(3) The Commission may, on its own motion or upon complaint, after an opportunity for an evidentiary hearing, order a public utility to—

(A) modify the terms and provisions of any automatic adjustment clause, or

(B) cease any practice in connection with the clause,

if such clause or practice does not result in the economical purchase and use of fuel, electric energy, or other items, the cost of which is included in any rate schedule under an automatic adjustment clause.

(4) As used in this subsection, the term "automatic adjustment clause" means a provision of a rate schedule which provides for increases or decreases (or both), without prior hearing, in rates reflecting increases or decreases (or both) in costs incurred by an electric utility. Such term does not include any rate which takes effect subject to refund and subject to a later determination of the appropriate amount of such rate.

**(g) Inaction of Commissioners****(1) In general**

With respect to a change described in subsection (d), if the Commission permits the 60-

day period established therein to expire with-out issuing an order accepting or denying the change because the Commissioners are divided two against two as to the lawfulness of the change, as a result of vacancy, incapacity, or recusal on the Commission, or if the Commission lacks a quorum—

(A) the failure to issue an order accepting or denying the change by the Commission shall be considered to be an order issued by the Commission accepting the change for purposes of section 825(a) of this title; and

(B) each Commissioner shall add to the record of the Commission a written statement explaining the views of the Commissioner with respect to the change.

## (2) Appeal

If, pursuant to this subsection, a person seeks a rehearing under section 825(a) of this title, and the Commission fails to act on the merits of the rehearing request by the date that is 30 days after the date of the rehearing request because the Commissioners are divided two against two, as a result of vacancy, incapacity, or recusal on the Commission, or if the Commission lacks a quorum, such person may appeal under section 825(b) of this title.

(June 10, 1920, ch. 285, pt. II, §205, as added Aug. 26, 1935, ch. 687, title II, §213, 49 Stat. 851; amended Pub. L. 95-617, title II, §§207(a), 208, Nov. 9, 1978, 92 Stat. 3142; Pub. L. 115-270, title III, §3006, Oct. 23, 2018, 132 Stat. 3868.)

### AMENDMENTS

2018—Subsec. (g). Pub. L. 115-270 added subsec. (g).

1978—Subsec. (d). Pub. L. 95-617, §207(a), substituted “sixty” for “thirty” in two places.

Subsec. (f). Pub. L. 95-617, §208, added subsec. (f).

### STUDY OF ELECTRIC RATE INCREASES UNDER FEDERAL POWER ACT

Section 207(b) of Pub. L. 95-617 directed chairman of Federal Energy Regulatory Commission, in consultation with Secretary, to conduct a study of legal requirements and administrative procedures involved in consideration and resolution of proposed wholesale electric rate increases under Federal Power Act, section 791a et seq. of this title, for purposes of providing for expeditious handling of hearings consistent with due process, preventing imposition of successive rate increases before they have been determined by Commission to be just and reasonable and otherwise lawful, and improving procedures designed to prohibit anti-competitive or unreasonable differences in wholesale and retail rates, or both, and that chairman report to Congress within nine months from Nov. 9, 1978, on results of study, on administrative actions taken as a result of this study, and on any recommendations for changes in existing law that will aid purposes of this section.

## § 824e. Power of Commission to fix rates and charges; determination of cost of production or transmission

### (a) Unjust or preferential rates, etc.; statement of reasons for changes; hearing; specification of issues

Whenever the Commission, after a hearing held upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or

sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.

### (b) Refund effective date; preferential proceedings; statement of reasons for delay; burden of proof; scope of refund order; refund orders in cases of dilatory behavior; interest

Whenever the Commission institutes a proceeding under this section, the Commission shall establish a refund effective date. In the case of a proceeding instituted on complaint, the refund effective date shall not be earlier than the date of the filing of such complaint nor later than 5 months after the filing of such complaint. In the case of a proceeding instituted by the Commission on its own motion, the refund effective date shall not be earlier than the date of the publication by the Commission of notice of its intention to initiate such proceeding nor later than 5 months after the publication date. Upon institution of a proceeding under this section, the Commission shall give to the decision of such proceeding the same preference as provided under section 824d of this title and otherwise act as speedily as possible. If no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. In any proceeding under this section, the burden of proof to show that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential shall be upon the Commission or the complainant. At the conclusion of any proceeding under this section, the Commission may order refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, practice, or contract which the Commission orders to be thereafter observed and in force: *Provided*, That if the proceeding is not concluded within fifteen months after the refund effective date and if the Commission determines at the conclusion of the proceeding that the proceeding was not resolved within the fifteen-month period primarily because of dilatory behavior by the public utility, the Commission may order re-

Commission, including the generation, transmission, distribution, and sale of electric energy by any agency, authority, or instrumentality of the United States, or of any State or municipality or other political subdivision of a State. It shall, so far as practicable, secure and keep current information regarding the ownership, operation, management, and control of all facilities for such generation, transmission, distribution, and sale; the capacity and output thereof and the relationship between the two; the cost of generation, transmission, and distribution; the rates, charges, and contracts in respect of the sale of electric energy and its service to residential, rural, commercial, and industrial consumers and other purchasers by private and public agencies; and the relation of any or all such facts to the development of navigation, industry, commerce, and the national defense. The Commission shall report to Congress the results of investigations made under authority of this section.

(June 10, 1920, ch. 285, pt. III, §311, as added Aug. 26, 1935, ch. 687, title II, §213, 49 Stat. 859.)

#### § 825k. Publication and sale of reports

The Commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and is authorized to sell at reasonable prices copies of all maps, atlases, and reports as it may from time to time publish. Such reasonable prices may include the cost of compilation, composition, and reproduction. The Commission is also authorized to make such charges as it deems reasonable for special statistical services and other special or periodic services. The amounts collected under this section shall be deposited in the Treasury to the credit of miscellaneous receipts. All printing for the Federal Power Commission making use of engraving, lithography, and photolithography, together with the plates for the same, shall be contracted for and performed under the direction of the Commission, under such limitations and conditions as the Joint Committee on Printing may from time to time prescribe, and all other printing for the Commission shall be done by the Director of the Government Publishing Office under such limitations and conditions as the Joint Committee on Printing may from time 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; amend-

ed 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.

#### § 825l. 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.)

CODIFICATION

In subsec. (b), "section 1254 of title 28" substituted for "sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347)" on authority of act June 25, 1948, ch. 646, 62 Stat. 869, the first section of which enacted Title 28, Judiciary and Judicial Procedure.

AMENDMENTS

2005—Subsec. (a). Pub. L. 109-58 inserted "electric utility," after "Any person," and "to which such person," and substituted "brought by any entity unless such entity" for "brought by any person unless such person".

1958—Subsec. (a). Pub. L. 85-791, §16(a), inserted sentence to provide that Commission may modify or set aside findings or orders until record has been filed in court of appeals.

Subsec. (b). Pub. L. 85-791, §16(b), in second sentence, substituted "transmitted by the clerk of the court to" for "served upon", substituted "file with the court" for

"certify and file with the court a transcript of", and inserted "as provided in section 2112 of title 28", and in third sentence, substituted "jurisdiction, which upon the filing of the record with it shall be exclusive" for "exclusive jurisdiction".

CHANGE OF NAME

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

**§ 825m. Enforcement provisions**

**(a) Enjoining and restraining violations**

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

**(b) Writs of mandamus**

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

**(c) Employment of attorneys**

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

**(d) Prohibitions on violators**

In any proceedings under subsection (a), the court may prohibit, conditionally or unconditionally, and permanently or for such period of time as the court determines, any individual who is engaged or has engaged in practices constituting a violation of section 824u of this title (and related rules and regulations) from—

(1) acting as an officer or director of an electric utility; or

(2) engaging in the business of purchasing or selling—

(A) electric energy; or

(B) transmission services subject to the jurisdiction of the Commission.

**Rule 71**

## FEDERAL RULES OF CIVIL PROCEDURE

86

party fails to comply within the time specified, the court may order the act to be done—at the disobedient party’s expense—by another person appointed by the court. When done, the act has the same effect as if done by the party.

(b) **VESTING TITLE.** If the real or personal property is within the district, the court—instead of ordering a conveyance—may enter a judgment divesting any party’s title and vesting it in others. That judgment has the effect of a legally executed conveyance.

(c) **OBTAINING A WRIT OF ATTACHMENT OR SEQUESTRATION.** On application by a party entitled to performance of an act, the clerk must issue a writ of attachment or sequestration against the disobedient party’s property to compel obedience.

(d) **OBTAINING A WRIT OF EXECUTION OR ASSISTANCE.** On application by a party who obtains a judgment or order for possession, the clerk must issue a writ of execution or assistance.

(e) **HOLDING IN CONTEMPT.** The court may also hold the disobedient party in contempt.

(As amended Apr. 30, 2007, eff. Dec. 1, 2007.)

**Rule 71. Enforcing Relief For or Against a Nonparty**

When an order grants relief for a nonparty or may be enforced against a nonparty, the procedure for enforcing the order is the same as for a party.

(As amended Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 2007, eff. Dec. 1, 2007.)

## TITLE IX. SPECIAL PROCEEDINGS

**Rule 71.1. Condemning Real or Personal Property**

(a) **APPLICABILITY OF OTHER RULES.** These rules govern proceedings to condemn real and personal property by eminent domain, except as this rule provides otherwise.

(b) **JOINDER OF PROPERTIES.** The plaintiff may join separate pieces of property in a single action, no matter whether they are owned by the same persons or sought for the same use.

(c) **COMPLAINT.**

(1) *Caption.* The complaint must contain a caption as provided in Rule 10(a). The plaintiff must, however, name as defendants both the property—designated generally by kind, quantity, and location—and at least one owner of some part of or interest in the property.

(2) *Contents.* The complaint must contain a short and plain statement of the following:

(A) the authority for the taking;

(B) the uses for which the property is to be taken;

(C) a description sufficient to identify the property;

(D) the interests to be acquired; and

(E) for each piece of property, a designation of each defendant who has been joined as an owner or owner of an interest in it.

(3) *Parties.* When the action commences, the plaintiff need join as defendants only those persons who have or claim an interest in the property and whose names are then known. But before any hearing on compensation, the plaintiff must add as



defendants all those persons who have or claim an interest and whose names have become known or can be found by a reasonably diligent search of the records, considering both the property's character and value and the interests to be acquired. All others may be made defendants under the designation "Unknown Owners."

(4) *Procedure*. Notice must be served on all defendants as provided in Rule 71.1(d), whether they were named as defendants when the action commenced or were added later. A defendant may answer as provided in Rule 71.1(e). The court, meanwhile, may order any distribution of a deposit that the facts warrant.

(5) *Filing; Additional Copies*. In addition to filing the complaint, the plaintiff must give the clerk at least one copy for the defendants' use and additional copies at the request of the clerk or a defendant.

(d) PROCESS.

(1) *Delivering Notice to the Clerk*. On filing a complaint, the plaintiff must promptly deliver to the clerk joint or several notices directed to the named defendants. When adding defendants, the plaintiff must deliver to the clerk additional notices directed to the new defendants.

(2) *Contents of the Notice*.

(A) *Main Contents*. Each notice must name the court, the title of the action, and the defendant to whom it is directed. It must describe the property sufficiently to identify it, but need not describe any property other than that to be taken from the named defendant. The notice must also state:

- (i) that the action is to condemn property;
- (ii) the interest to be taken;
- (iii) the authority for the taking;
- (iv) the uses for which the property is to be taken;
- (v) that the defendant may serve an answer on the plaintiff's attorney within 21 days after being served with the notice;
- (vi) that the failure to so serve an answer constitutes consent to the taking and to the court's authority to proceed with the action and fix the compensation; and
- (vii) that a defendant who does not serve an answer may file a notice of appearance.

(B) *Conclusion*. The notice must conclude with the name, telephone number, and e-mail address of the plaintiff's attorney and an address within the district in which the action is brought where the attorney may be served.

(3) *Serving the Notice*.

(A) *Personal Service*. When a defendant whose address is known resides within the United States or a territory subject to the administrative or judicial jurisdiction of the United States, personal service of the notice (without a copy of the complaint) must be made in accordance with Rule 4.

(B) *Service by Publication*.

- (i) A defendant may be served by publication only when the plaintiff's attorney files a certificate stating that the attorney believes the defendant cannot be personally served, because after diligent inquiry within

**Rule 71.1**

## FEDERAL RULES OF CIVIL PROCEDURE

88

the state where the complaint is filed, the defendant's place of residence is still unknown or, if known, that it is beyond the territorial limits of personal service. Service is then made by publishing the notice—once a week for at least 3 successive weeks—in a newspaper published in the county where the property is located or, if there is no such newspaper, in a newspaper with general circulation where the property is located. Before the last publication, a copy of the notice must also be mailed to every defendant who cannot be personally served but whose place of residence is then known. Unknown owners may be served by publication in the same manner by a notice addressed to “Unknown Owners.”

(ii) Service by publication is complete on the date of the last publication. The plaintiff's attorney must prove publication and mailing by a certificate, attach a printed copy of the published notice, and mark on the copy the newspaper's name and the dates of publication.

(4) *Effect of Delivery and Service.* Delivering the notice to the clerk and serving it have the same effect as serving a summons under Rule 4.

(5) *Amending the Notice; Proof of Service and Amending the Proof.* Rule 4(a)(2) governs amending the notice. Rule 4(l) governs proof of service and amending it.

(e) APPEARANCE OR ANSWER.

(1) *Notice of Appearance.* A defendant that has no objection or defense to the taking of its property may serve a notice of appearance designating the property in which it claims an interest. The defendant must then be given notice of all later proceedings affecting the defendant.

(2) *Answer.* A defendant that has an objection or defense to the taking must serve an answer within 21 days after being served with the notice. The answer must:

(A) identify the property in which the defendant claims an interest;

(B) state the nature and extent of the interest; and

(C) state all the defendant's objections and defenses to the taking.

(3) *Waiver of Other Objections and Defenses; Evidence on Compensation.* A defendant waives all objections and defenses not stated in its answer. No other pleading or motion asserting an additional objection or defense is allowed. But at the trial on compensation, a defendant—whether or not it has previously appeared or answered—may present evidence on the amount of compensation to be paid and may share in the award.

(f) AMENDING PLEADINGS. Without leave of court, the plaintiff may—as often as it wants—amend the complaint at any time before the trial on compensation. But no amendment may be made if it would result in a dismissal inconsistent with Rule 71.1(i)(1) or (2). The plaintiff need not serve a copy of an amendment, but must serve notice of the filing, as provided in Rule 5(b), on every affected party who has appeared and, as provided in Rule 71.1(d), on

every affected party who has not appeared. In addition, the plaintiff must give the clerk at least one copy of each amendment for the defendants' use, and additional copies at the request of the clerk or a defendant. A defendant may appear or answer in the time and manner and with the same effect as provided in Rule 71.1(e).

(g) **SUBSTITUTING PARTIES.** If a defendant dies, becomes incompetent, or transfers an interest after being joined, the court may, on motion and notice of hearing, order that the proper party be substituted. Service of the motion and notice on a nonparty must be made as provided in Rule 71.1(d)(3).

(h) **TRIAL OF THE ISSUES.**

(1) *Issues Other Than Compensation; Compensation.* In an action involving eminent domain under federal law, the court tries all issues, including compensation, except when compensation must be determined:

(A) by any tribunal specially constituted by a federal statute to determine compensation; or

(B) if there is no such tribunal, by a jury when a party demands one within the time to answer or within any additional time the court sets, unless the court appoints a commission.

(2) *Appointing a Commission; Commission's Powers and Report.*

(A) *Reasons for Appointing.* If a party has demanded a jury, the court may instead appoint a three-person commission to determine compensation because of the character, location, or quantity of the property to be condemned or for other just reasons.

(B) *Alternate Commissioners.* The court may appoint up to two additional persons to serve as alternate commissioners to hear the case and replace commissioners who, before a decision is filed, the court finds unable or disqualified to perform their duties. Once the commission renders its final decision, the court must discharge any alternate who has not replaced a commissioner.

(C) *Examining the Prospective Commissioners.* Before making its appointments, the court must advise the parties of the identity and qualifications of each prospective commissioner and alternate, and may permit the parties to examine them. The parties may not suggest appointees, but for good cause may object to a prospective commissioner or alternate.

(D) *Commission's Powers and Report.* A commission has the powers of a master under Rule 53(c). Its action and report are determined by a majority. Rule 53(d), (e), and (f) apply to its action and report.

(i) **DISMISSAL OF THE ACTION OR A DEFENDANT.**

(1) *Dismissing the Action.*

(A) *By the Plaintiff.* If no compensation hearing on a piece of property has begun, and if the plaintiff has not acquired title or a lesser interest or taken possession, the plaintiff may, without a court order, dismiss the action as to that property by filing a notice of dismissal briefly describing the property.

(B) *By Stipulation.* Before a judgment is entered vesting the plaintiff with title or a lesser interest in or possession

**Rule 72**

## FEDERAL RULES OF CIVIL PROCEDURE

90

of property, the plaintiff and affected defendants may, without a court order, dismiss the action in whole or in part by filing a stipulation of dismissal. And if the parties so stipulate, the court may vacate a judgment already entered.

(C) *By Court Order*. At any time before compensation has been determined and paid, the court may, after a motion and hearing, dismiss the action as to a piece of property. But if the plaintiff has already taken title, a lesser interest, or possession as to any part of it, the court must award compensation for the title, lesser interest, or possession taken.

(2) *Dismissing a Defendant*. The court may at any time dismiss a defendant who was unnecessarily or improperly joined.

(3) *Effect*. A dismissal is without prejudice unless otherwise stated in the notice, stipulation, or court order.

(j) DEPOSIT AND ITS DISTRIBUTION.

(1) *Deposit*. The plaintiff must deposit with the court any money required by law as a condition to the exercise of eminent domain and may make a deposit when allowed by statute.

(2) *Distribution; Adjusting Distribution*. After a deposit, the court and attorneys must expedite the proceedings so as to distribute the deposit and to determine and pay compensation. If the compensation finally awarded to a defendant exceeds the amount distributed to that defendant, the court must enter judgment against the plaintiff for the deficiency. If the compensation awarded to a defendant is less than the amount distributed to that defendant, the court must enter judgment against that defendant for the overpayment.

(k) CONDEMNATION UNDER A STATE'S POWER OF EMINENT DOMAIN. This rule governs an action involving eminent domain under state law. But if state law provides for trying an issue by jury—or for trying the issue of compensation by jury or commission or both—that law governs.

(l) COSTS. Costs are not subject to Rule 54(d).

(As added Apr. 30, 1951, eff. Aug. 1, 1951; amended Jan. 21, 1963, eff. July 1, 1963; Apr. 29, 1985, eff. Aug. 1, 1985; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 25, 1988, eff. Aug. 1, 1988; Pub. L. 100-690, title VII, §7050, Nov. 18, 1988, 102 Stat. 4401; Apr. 22, 1993, eff. Dec. 1, 1993; Mar. 27, 2003, eff. Dec. 1, 2003; Apr. 30, 2007, eff. Dec. 1, 2007; Mar. 26, 2009, eff. Dec. 1, 2009.)

**Rule 72. Magistrate Judges: Pretrial Order**

(a) NONDISPOSITIVE MATTERS. When a pretrial matter not dispositive of a party's claim or defense is referred to a magistrate judge to hear and decide, the magistrate judge must promptly conduct the required proceedings and, when appropriate, issue a written order stating the decision. A party may serve and file objections to the order within 14 days after being served with a copy. A party may not assign as error a defect in the order not timely objected to. The district judge in the case must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law.

**Federal Energy Regulatory Commission****§ 385.713**

(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

**§ 385.714**

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

**18 CFR Ch. I (4–1–19 Edition)**

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.

## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g) and Circuit Rule 32(e), I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,942 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

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

/s/ Robert M. Kennedy

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February 10, 2020

**CERTIFICATE OF SERVICE**

I hereby certify that, on February 10, 2020, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Robert M. Kennedy  
Robert M. Kennedy  
Senior Attorney