Nos. 22-1101, 22-1171, 22-1256 & 22-1273 (consolidated)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ALABAMA MUNICIPAL DISTRIBUTORS GROUP, ET AL.,
PETITIONERS,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

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

OPENING BRIEF OF MUNICIPAL PETITIONERS

James R. Choukas-Bradley
Joshua L. Menter
Randolph Lee Elliott
MCCARTER & ENGLISH, LLP
1301 K Street, NW
Suite 1000 West
Washington, DC 20005
Tel: (202) 753-3400
jchoukasbradley@mccarter.com
jmenter@mccarter.com
relliott@mccarter.com

Attorneys for Alabama Municipal Distributors Group, Austell Gas System, The Southeast Alabama Gas District, and Municipal Gas Authority of Georgia

December 22, 2022

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

The following parties appeared in the agency proceeding below:

Alabama Municipal Distributors Group
Algonquin Gas Transmission, LLC
Alliance Pipeline L.P.
American Gas Association
Antero Resources Corporation
Atmos Energy Corporation
Austell Gas System
Big Sandy Pipeline, LLC
Bobcat Gas Storage
Center for Liquefied Natural Gas
CenterPoint Energy Resources Corp.
ConocoPhillips Company
Direct Energy Business Marketing, LLC
Dominion Energy South Carolina, Inc.
Duke Energy of Ohio, Inc.
Duke Energy Kentucky, Inc.
East Tennessee Natural Gas, LLC
ExxonMobil Upstream Oil & Gas Co., a division of Exxon Mobil Corporation
Garden Banks Gas Pipeline, LLC
Gulfstream Natural Gas System, L.L.C.
Healthy Gulf
Maritimes & Northeast Pipeline, L.L.C.
Market Hub Partners Holding, LLC
Mississippi Canyon Gas Pipeline, LLC
Municipal Gas Authority of Georgia
National Grid Gas Delivery Companies
Natural Gas Supply Association (DC)
Nautilus Pipeline Company, L.L.C.
New Jersey Natural Gas Company
NEXUS Gas Transmission, LLC
NJR Energy Services Company
Piedmont Natural Gas Company, Inc.
PSEG Energy Resources & Trade LLC

Sabal Trail Transmission, LLC
Saltville Gas Storage Company L.L.C.
Shell Beach Partners, L.L.C
Shell Energy North America (US), L.P.
Sierra Club
Southeast Supply Header, LLC
Southern Company Services, Inc.
Southern Natural Gas Company, L.L.C.
Steckman Ridge, LP
Tennessee Gas Pipeline Company, L.L.C.
Texas Eastern Transmission, LP
The Southeast Alabama Gas District
Venture Global Plaquemines LNG, LLC.

The following parties and amici have appeared in this Court:

Alabama Municipal Distributors Group
Austell Gas System
The Southeast Alabama Gas District
Municipal Gas Authority of Georgia
Sierra Club
Healthy Gulf
Federal Energy Regulatory Commission
Tennessee Gas Pipeline Company, L.L.C.
Southern Natural Gas Company, L.L.C.
Venture Global Plaquemines LNG, L.L.C.

B. Ruling Under Review

Tennessee Gas Pipeline Company, L.L.C., FERC Docket Nos. CP20-50-000 & CP20-51-000, Order Issuing Certificates & Approving Abandonment, 178 FERC ¶ 61,199 (Mar. 25, 2022)

Tennessee Gas Pipeline Company, L.L.C., FERC Docket Nos. CP20-50-001 & CP20-51-001, Order Addressing Arguments Raised on Rehearing, 180 FERC ¶ 61,205 (Sept. 29, 2022)

C. Related Cases

There are no related cases. This case has not previously been before this court or any other court.

/s/ Joshua L. Menter

Joshua L. Menter
McCARTER & ENGLISH, LLP
1301 K Street, NW
Suite 1000 West
Washington, DC 20005
Tel: (202) 753-3400
jmenter@mccarter.com

December 22, 2022

TABLE OF CONTENTS

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES i
TABLE OF CONTENTS iv
TABLE OF AUTHORITIES v
GLOSSARY ix
JURISDICTION 1
ISSUES PRESENTED FOR REVIEW 2
STATUTES AND REGULATIONS 3
STATEMENT OF THE CASE 3
A. The Regulatory Context 3
B. The Proceedings Below 6
SUMMARY OF ARGUMENT 8
STANDING 9
ARGUMENT 13
A. Standard Of Review 13
B. The Commission's Ruling Is Arbitrary and Capricious and Contravenes the Commission's Statutory Duty To Determine Just and Reasonable Rates 14
1. The Commission does not justify its departure from its own established precedents and policy. 17
2. The Commission never responds to the fact that its ruling to require no lease-revenue crediting would require designing Southern's rates to substantially over-collect costs in contravention of FERC's duty to establish just and reasonable rates. 24
3. The Commission nowhere provides a response to the demonstration that the failure to credit lease payments is unjustified where the lessor and lessee are affiliates. 29
CONCLUSION 33
CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS 35
STATUTORY ADDENDUM 36

TABLE OF AUTHORITIES

Page(s)

Court Cases

Ala. Mun. Distributors Group v. FERC,
312 F.3d 470 (D.C. Cir. 2002)....12

Allegheny Def. Project v. FERC,
964 F.3d 1 (D.C. Cir. 2020) (en banc)....1, 10

ANR Pipeline Co. v. FERC,
771 F.2d 507 (D.C. Cir. 1985)....12

BP Energy Co. v. FERC,
828 F.3d 959 (D.C. Cir. 2016)....10

City of Charlottesville v. FERC,
774 F.2d 1205 (D.C. Cir. 1985)....5

City of Clarksville v. FERC,
888 F.3d 477 (D.C. Cir. 2018)....10

FCC v. Fox Television Stations, Inc.,
556 U.S. 502 (2009)....14, 24

K N Energy, Inc. v. FERC,
968 F.2d 1295 (D.C. Cir. 1992)....4

Lujan v. Defs. of Wildlife,
504 U.S. 555 (1992)....10

Mo. Pub. Serv. Comm'n v. FERC,
337 F.3d 1066 (D.C. Cir. 2003)....4

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,
463 U.S. 29 (1983)....13, 23

N.C. Utils. Comm'n v. FERC,
42 F.3d 659 (D.C. Cir. 1994)....4

Nat'l Fuel Gas Supply Corp. v. FERC,
468 F.3d 831 (D.C. Cir. 2006) 3, 4

North Carolina v. FERC,
913 F.3d 148 (D.C. Cir. 2019) 13

PNGTS Shippers' Group v. FERC,
592 F.3d 132 (D.C. Cir. 2010) 12

Sacramento Mun. Util. Dist. v. FERC,
616 F.3d 520 (D.C. Cir. 2010) 14

Sierra Club v. EPA,
292 F.3d 895 (D.C. Cir. 2002) 10

Sw. Airlines Co. v. FERC,
926 F.3d 851 (D.C. Cir. 2019) 14

Tenn. Gas Pipeline Co. v. FERC,
867 F.2d 688 (D.C. Cir. 1989) 14

Teva Pharms. USA, Inc. v. Sebelius,
595 F.3d 1303 (D.C. Cir. 2010) 10, 11

United Distribution Cos. v. FERC,
88 F.3d 1105 (D.C. Cir. 1996) 3

Vill. of Bensenville v. FAA,
376 F.3d 1114 (D.C. Cir. 2004) 10

W. Deptford Energy, LLC v. FERC,
766 F.3d 10 (D.C. Cir. 2014) 14, 24

Williston Basin Interstate Pipeline Co. v. FERC,
165 F.3d 54 (D.C. Cir. 1999) 5

Administrative Cases

Columbia Gas Transmission Corp.,
26 FERC ¶ 61,034 (1984) 25

Gulf S. Pipeline Co.,
119 FERC ¶ 61,281 (2007) 16, 17, 18, 19, 20, 23, 24

N. Nat. Gas Co.,
129 FERC ¶ 61,159 (2009), *reh'g denied*, 130 FERC ¶ 61,134 (2010)...............5

Nat. Gas Pipeline of Am.,
118 FERC ¶ 61,211 (2007)............. 15, 16, 17, 18, 19, 20, 21, 22, 23, 27, 28, 33

Portland Nat. Gas Transp. Sys.,
142 FERC ¶ 61,198 (2013)...25

Pub. Serv. Comm'n v. Nat'l Fuel Gas Supply Corp.,
115 FERC ¶ 61,299 (2006)...5

Rockies Express Pipeline LLC,
119 FERC ¶ 61,069 (2007)............. 15, 16, 17, 18, 19, 20, 21, 22, 23, 27, 28, 33

S. Nat. Gas Co.,
163 FERC ¶ 61,161 (2018)...11

Federal Statutes

Administrative Procedure Act, 5 U.S.C.
§ 706(2)(A) 13
§ 706(2)(E)..14

Natural Gas Act, 15 U.S.C.
§ 717...3
§ 717(b)...1, 3
§ 717c...3
§ 717c(a) 3
§ 717c(c) 4
§ 717c(d) 4
§ 717c(e) 4
§ 717d...3
§ 717d(a) 4
§ 717f 1, 3
§ 717r(a)..1
§ 717r(b)...2, 10, 14

Regulations

18 C.F.R. § 154.312 (2021) 4

18 C.F.R. § 284.10 (2021) 24

Other Authorities

Cost Recovery Mechanisms for Modernization of Nat. Gas Facilities, 151 FERC ¶ 61,047 (2015) 25

FERC, *Cost-of-Service Rates Manual* (June 1999) 5

Inquiry into Alleged Anticompetitive Pracs. Related to Mktg. Affiliates of Interstate Pipelines, Order No. 497, FERC Stats. & Regs. ¶ 30,820 (1988), *order on reh'g*, Order No. 497-A, FERC Stats & Regs. ¶ 30,868 (1989), *order extending sunset date*, Order No. 497-B, FERC Stats. & Regs. ¶ 30,908 (1990), *order extending sunset date*, Order No. 497-C, FERC Stats. & Regs. ¶ 30,934 (1991), *reh'g denied*, Order No. 497-D, 58 FERC ¶ 61,139 (1992), *aff'd in relev. part sub nom. Tenneco Gas v. FERC*, 969 F.2d 1187 (D.C. Cir. 1992). 32

Interstate & Intrastate Nat. Gas Pipelines; Rate Changes Relating to Fed. Income Tax Rate, Order No. 849, 164 FERC ¶ 61,031 (2018), *reh'g denied*, Order No. 849-A, 167 FERC ¶ 61,051 (2019), *modified on other grounds,* Order No. 849-B, 175 FERC ¶ 61,141 (2021) 5

Regul. of Nat. Gas Pipelines After Partial Wellhead Decontrol, Order No. 436, FERC Stats. & Regs. ¶ 30,665, *order on reh'g*, Order No. 436-A, FERC Stats. & Regs. ¶ 30,675 (1985), *modified*, Order No. 436-B, FERC Stats. & Regs. ¶ 30,688, *reh'g denied*, Order No. 436-C, 34 FERC ¶ 61,404, *reh'g denied*, Order No. 436-D, 34 FERC ¶ 61,405, *reconsideration denied*, Order No. 436-E, 34 FERC ¶ 61,403 (1986), *aff'd in relev. part sub nom. Associated Gas Distribs. v. FERC*, 824 F.2d 981 (D.C. Cir. 1987). 25

Regul. of Short-Term Nat. Gas Transp. Servs. & Regul. of Interstate Nat. Gas Transp. Services, Order No. 637, FERC Stats. & Regs. ¶ 31,091, *order on reh'g*, Order No. 637-A, FERC Stats. & Regs. ¶ 31,099, *order on reh'g*, Order No. 637-B, 92 FERC ¶ 61,062 (2000), *aff'd in part and remanded in part sub nom. Interstate Nat. Gas Ass'n of Am. v. FERC,* 285 F.3d 18 (D.C. Cir. 2002). 25, 26

GLOSSARY

Certificate Order	*Tennessee Gas Pipeline Company, L.L.C.*, FERC Docket Nos. CP20-50-000 & CP20-51-000, Order Issuing Certificates & Approving Abandonment, 178 FERC ¶ 61,199 (Mar. 25, 2022), R. 210
Commission or FERC	Federal Energy Regulatory Commission
Municipal Petitioners	Alabama Municipal Distributors Group Austell Gas System The Southeast Alabama Gas District Municipal Gas Authority of Georgia
NGA	Natural Gas Act, 15 U.S.C. §§ 717–717z
Protest	Protest of the Alabama Municipal Distributors Group, Austell Gas System, The Southeast Alabama Gas District & Municipal Gas Authority of Georgia (Mar. 13, 2020), R. 49
R.	Item in the Certified Index to the Record
Rehearing Order	*Tennessee Gas Pipeline Company, L.L.C.*, FERC Docket Nos. CP20-50-001 & CP20-51-001, Order Addressing Arguments Raised on Rehearing, 180 FERC ¶ 61,205 (Sept. 29, 2022), R. 217
Rehearing Request	Request for Rehearing of Alabama Municipal Distributors Group, Austell Gas System, The Southeast Alabama Gas District & Municipal Gas Authority of Georgia (Apr. 25, 2022), R. 212
Southern	Southern Natural Gas Company, L.L.C.
Tennessee Gas	Tennessee Gas Pipeline Company, L.L.C.

JURISDICTION

In the proceedings below, the Federal Energy Regulatory Commission (FERC or Commission) issued certificates of public convenience and necessity pursuant to section 7 of the Natural Gas Act (NGA), 15 U.S.C. § 717f, on March 25, 2022, authorizing Tennessee Gas Pipeline Company, L.L.C., (Tennessee Gas) to construct, acquire, and operate certain interstate natural gas pipeline facilities, and authorizing Southern Natural Gas Company, L.L.C., (Southern) to construct and abandon by lease to Tennessee Gas certain other such facilities. R. 210. *Tenn. Gas Pipeline Co.*, 178 FERC ¶ 61,199 (2022) (Certificate Order). The Commission had jurisdiction under section 1(b) of the NGA, 15 U.S.C. § 717(b). The Alabama Municipal Distributors Group, Austell Gas System, The Southeast Alabama Gas District, and Municipal Gas Authority of Georgia (collectively, the "Municipal Petitioners"), which FERC had permitted to intervene as parties to its proceedings, timely requested rehearing of that order on April 25, 2022. R. 212 (Rehearing Request). *See id.* § 717r(a). On May 26, 2022, FERC issued a notice of denial of rehearing by operation of law and providing for further consideration. R. 215. *See Allegheny Def. Project v. FERC*, 964 F.3d 1 (D.C. Cir. 2020) (en banc); 15 U.S.C. § 717r(a) (unless FERC "acts upon" a rehearing request within 30 days after it is filed, the request "may be deemed to have been denied"). The Municipal Petitioners timely petitioned for review in No. 22-1101 on June 7, 2022.

See 15 U.S.C. § 717r(b). On September 29, 2022, FERC issued an order modifying the Certificate Order's discussion but sustaining its result. R. 217. *Tenn. Gas Pipeline Co.*, 180 FERC ¶ 61,205 (2022) (Rehearing Order). The Municipal Petitioners timely petitioned for review in No. 22-1173 on October 26, 2022. This Court has jurisdiction under section 19(b) of the NGA, 15 U.S.C. § 717r(b). The Commission's orders are final and dispose of all issues below.

ISSUES PRESENTED FOR REVIEW

1. Whether FERC provided a reasonable explanation for departing from controlling FERC precedent and established policy requiring a natural gas pipeline company leasing its capacity to credit the lease revenues against its costs when determining the rates charged to its customers.

2. Whether FERC's refusal to require the crediting of the pipeline's capacity lease revenues against its cost of service, when this refusal will establish rates that are designed to substantially over-collect the pipeline's costs, contravened FERC's statutory duty to require that the pipeline's rates are just and reasonable.

3. Whether FERC's refusal to require the crediting of the pipeline's capacity lease revenues against its cost of service was arbitrary and capricious when FERC disregarded the fact that the lease revenues were determined by the lessor and an affiliated lessee with an obvious incentive to maximize the lessor's profits.

STATUTES AND REGULATIONS

Sections 1, 4, 5, and 7 of the NGA, 15 U.S.C. §§ 717, 717c, 717d & 717f, are in an addendum to the brief.

STATEMENT OF THE CASE

A. The Regulatory Context

The "fundamental purpose" of the NGA "is to protect natural gas consumers from the monopoly power of natural gas pipelines."[1] Section 1(b) of the NGA gives FERC jurisdiction over the transportation of natural gas in interstate commerce and natural-gas companies engaged in such transportation.[2] Section 4(a) of the NGA provides that "[a]ll rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation … of natural gas subject to the jurisdiction of the Commission … shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful."[3] To enable FERC to enforce this mandate, section 4 requires a natural-gas company to file its rates and any changes in its rates with FERC, which has authority to suspend the effectiveness of the change

---

[1] *Nat'l Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 833 (D.C. Cir. 2006). *See also United Distribution Cos. v. FERC*, 88 F.3d 1105, 1122 (D.C. Cir. 1996) (federal regulation of natural-gas industry is "designed to curb pipelines' potential monopoly power over gas transportation.").

[2] 15 U.S.C. § 717(b).

[3] 15 U.S.C. § 717c(a).

for up to five months, allow the change to go into effect subject to refund, and conduct a hearing to determine whether the changed rate is just and reasonable.[4] Section 5 of the NGA gives FERC the authority, on complaint or on its own motion, to order a change in a natural-gas company's existing rates if it finds they are "unjust, unreasonable, unduly discriminatory, or preferential."[5]

Although the NGA does not prescribe a particular method for establishing just and reasonable rates, FERC traditionally has reviewed rates based on the costs the pipeline incurs to provide its services.[6] Thus, to implement its statutory responsibilities, FERC has adopted extensive regulations setting forth detailed requirements to determine just and reasonable pipeline rates under a cost-based standard.[7] While a pipeline rate proceeding may involve numerous complicated issues requiring sophisticated judgments, the ultimate test is straightforward: Are the pipeline's rates designed to allow the pipeline to collect its "revenue requirement," i.e., its total projected costs in providing all its services, including a

[4] 15 U.S.C. § 717c(c), (d), (e).

[5] 15 U.S.C. § 717d(a).

[6] *See, e.g.*, *Nat'l Fuel Gas Supply Corp. v. FERC*, 468 F.3d at 834–35; *Mo. Pub. Serv. Comm'n v. FERC*, 337 F.3d 1066, 1071 (D.C. Cir. 2003); *N.C. Utils. Comm'n v. FERC*, 42 F.3d 659, 661 (D.C. Cir. 1994); *K N Energy, Inc. v. FERC*, 968 F.2d 1295, 1300–01 (D.C. Cir. 1992).

[7] 18 C.F.R. § 154.312 (2021).

reasonable return?[8] Accordingly, section 4 of the NGA enables a pipeline to file for an increase in rates if it believes its existing rates do not allow the pipeline to collect its revenue requirement, and section 5 authorizes FERC to order a decrease in rates if the pipeline's existing rates allow it to collect revenues exceeding its revenue requirement.[9]

---

[8] *See, e.g.*, *Williston Basin Interstate Pipeline Co. v. FERC*, 165 F.3d 54, 56–57 (D.C. Cir. 1999); *City of Charlottesville v. FERC*, 774 F.2d 1205, 1217 (D.C. Cir. 1985). *See generally* FERC, *Cost-of-Service Rates Manual* 43 (June 1999), https://www.ferc.gov/sites/default/files/2020-08/cost-of-service-manual.pdf (noting an essential step for determining just and reasonable rates is a "revenue check" where the overall revenues for the pipeline should equal its costs in providing service, which costs are also referred to as the pipeline's revenue requirement). *See also Interstate & Intrastate Nat. Gas Pipelines; Rate Changes Relating to Fed. Income Tax Rate,* Order No. 849, 164 FERC ¶ 61,031 at P 10 (2018) ("As required by … the Commission's regulations, interstate natural gas pipelines generally have stated rates for their services, which are approved in a rate proceeding under NGA sections 4 [for a rate increase] or 5 [for a rate decrease] and remain in effect until changed in a subsequent NGA section 4 [rate increase] or 5 [rate decrease] proceeding. The stated rates are designed to provide the pipeline the opportunity to recover all components of the pipeline's cost of service …." (footnotes omitted)), *reh'g denied*, Order No. 849-A, 167 FERC ¶ 61,051 (2019), *modified on other grounds,* Order No. 849-B, 175 FERC ¶ 61,141 (2021).

[9] There are many examples of FERC orders initiating a section 5 investigation to seek to determine whether a pipeline's existing rates are over-collecting the pipeline's costs and, hence, unjust and unreasonable. *See, e.g.*, *N. Natural Gas Co*., 129 FERC ¶ 61,159 at PP 6–7 (2009) (establishing section 5 investigation to determine whether existing rates of a natural gas pipeline should be decreased based on a preliminary determination that the total revenue for the involved pipeline exceeded its cost of service, and ordered the pipeline to prepare a cost and revenue study the agency requires under 18 C.F.R. § 154.312 to justify proposed rate increases under NGA Section 4), *reh'g denied*, 130 FERC ¶ 61,134 at P 1 (2010) (finding pipeline may be substantially over-recovering its cost of service "thereby causing [pipeline's] existing rates to be unjust and unreasonable"); *Pub.*

B. The Proceedings Below

The orders under review approved two related applications filed in separate proceedings at FERC. Docket No. CP20-50 involved an application by Tennessee Gas to construct and operate pipeline facilities to provide new firm transportation service to Venture Global Plaquemines LNG, LLC ("Venture Global"). Docket No. CP20-51 involved a companion application by Southern to construct facilities that would provide additional transportation capacity on its system that Southern proposed to lease to its affiliate Tennessee Gas for 20 years, which capacity Tennessee Gas would use to provide a portion of its proposed transportation service to Venture Global. R. 4. The Municipal Petitioners' appeal involves only Southern's application in Docket No. CP20-51.

In the Certificate Order, R. 210 at PP 24–28, 47, 69, FERC approved Southern's proposed construction of facilities and capacity lease over several objections by the Municipal Petitioners in their Protest. R. 49. The Municipal Petitioners requested rehearing of FERC's ruling on one rate issue. R. 212.

That ruling stemmed from the uncontested fact that Southern would receive revenues from its lease with Tennessee Gas that substantially exceed Southern's

---

Serv. Comm'n v. Nat'l Fuel Gas Supply Corp., 115 FERC ¶ 61,299 at P 37 (2006) (on complaint, FERC requires pipeline to file cost and revenues study as part of investigation to determine whether pipeline is recovering revenues substantially in excess of costs).

costs for that lease. By Southern's own calculations, such excess revenues approximate $21 million during the first three years, without considering the over-collection during the remainder of the 20-year term of the lease. R. 4, Southern Appl., Ex. N, sheet 2.[10] Because Southern would receive lease revenues greatly in excess of its costs, the Municipal Petitioners requested that FERC require that a credit be recognized for the lease revenues when determining in future rate proceedings Southern's rates for other customers to avoid an over-collection of costs. R. 49, Protest at 7-8.

The Commission acknowledged that Southern's lease revenues would exceed its costs for the lease. R. 210, Certificate Order at P 61; R. 217, Rehearing Order at P 22. But FERC ruled that there would be no credit for these substantial excess revenues in future determinations of Southern's cost-of-service rates for its other customers. R. 210, Certificate Order at P 63; R. 217, Rehearing Order at PP 17–25. The Municipal Petitioners seek review of that ruling.

[10] Southern showed on that sheet that for the first three years of the lease, the total cost is $84,540,941 and the total revenue $105,465,924, resulting in an annual over-recovery of $20,924,983. Southern Appl., Ex. N, sheet 2. Tennessee Gas will pay Southern a fixed monthly lease payment of $2,929,609, plus a volumetric fuel rate for fuel usage and lost and unaccounted-for gas. R. 210, Certificate Order, P 16.

SUMMARY OF ARGUMENT

This is a straightforward case. The issue is whether Southern's cost-based transportation rates must be designed so that Southern will substantially over-collect its costs. The orders under review require that result.

As noted, under cost-based ratemaking FERC sets rates so the pipeline will receive revenues up to the projected costs the company incurs to provide all its services, no more nor less. Yet, in the proceedings below, FERC ruled that the lease revenues greatly in excess of the lease costs (i.e., revenues not associated with any costs) cannot be considered in any future rate case. As a mathematical certainty, the failure to credit these revenues will guarantee that rates determined in future Southern rate cases will be designed to substantially over-collect the pipeline's costs.

Importantly, prior to the orders under review—and in directly applicable circumstances involving lease transactions—FERC repeatedly ruled precisely the opposite: that established FERC policy ***required*** that in rate proceedings the pipeline credit the lease revenues against its costs. The obvious intent and purpose of these repeated rulings and this established FERC policy is to protect against cost over-collection.

The orders under review provide no credible justification for FERC departing from its precedents, changing established FERC policy, and requiring

instead that Southern's rates will be designed to substantially over-collect costs. The orders are premised on an interpretation of FERC decisions that is clearly incorrect. The orders also rely on prior FERC decisions that involve the pricing of lease transactions; these decisions are clearly irrelevant, as confirmed by FERC's prior orders.

The various rationales used by FERC boil down to the proposition that if a pipeline leases its capacity at rates that over-collect costs, FERC will establish rates for the pipeline's customers that are designed to pass on that over-collection (i.e., the lease revenues in excess of costs) to the pipeline. Judicial acceptance of such rationales would create a pernicious precedent, inviting regulated pipelines to enter into lease transactions to substantially over-collect their costs.

Finally, FERC's ruling requiring the pipeline lessor to pass on the over-collection of its costs to its customers is unjustified where, as here, the lease rate is determined by the lessor and lessee who are affiliates and, thus, have an obvious incentive to maximize profits of the lessor.

STANDING

Any party to a proceeding under the NGA that is "aggrieved" by a FERC order may petition for review of that order in this Court after FERC acts on its

request for rehearing before FERC.[11] A party is aggrieved only if it meets the constitutional requirements for standing.[12] To demonstrate constitutional standing, a petitioner must establish that it has suffered (1) an injury in fact that is (2) fairly traceable to the challenged agency action and (3) likely to be redressed by a favorable judicial decision.[13] For purposes of the standing inquiry, the Court "assume[s]" that a petitioner "will eventually win the relief [it] seeks."[14]

The Municipal Petitioners' standing is "self-evident."[15] First, they have sustained an injury in fact that is "concrete" and "imminent."[16] In that regard, this Court has ruled that a showing of impending harm that is effectively certain is sufficient to meet these standards, even if that harm will not occur immediately.[17]

---

[11] 15 U.S.C. § 717r(b). *See Allegheny Def. Project v. FERC*, 964 F.3d at 4.

[12] *City of Clarksville v. FERC*, 888 F.3d 477, 481 (D.C. Cir. 2018).

[13] *Id.; BP Energy Co. v. FERC*, 828 F.3d 959, 963 (D.C. Cir. 2016). *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992).

[14] *BP Energy*, 828 F.3d at 963 (cleaned up).

[15] *Sierra Club v. EPA*, 292 F.3d 895, 899–900 (D.C. Cir. 2002).

[16] *Lujan*, 504 U.S. at 560 (cleaned up).

[17] *Teva Pharms. USA, Inc. v. Sebelius*, 595 F.3d 1303, 1313–15 (D.C. Cir. 2010). *See id.* at 1314 ("We have . . . allowed a party to challenge in advance an agency policy adopted via adjudication when the prospect of impending harm was effectively certain."); *Vill. of Bensenville v. FAA*, 376 F.3d 1114, 1119 (D.C. Cir. 2004) (municipalities sustain injury-in-fact that is not conjectural or hypothetical from final FAA order allowing airport owner to begin collecting fee 13 years in future). *Cf. Lujan*, 504 U.S. at 565 n.2 (alleged injury is not too speculative for standing purposes if "the injury is certainly impending" (cleaned up)).

All of the Municipal Petitioners are transportation customers on Southern's pipeline system, except one who is an agent of those customers. R. 11–14 (Pet'rs' Mots. to Intervene). The Certificate Order makes clear what rate policy FERC will apply and what the rate effect on customers on Southern's system will be when Southern files revised rates for its system customers (or FERC investigates those rates) throughout the 20-year term of the capacity lease with Tennessee Gas: The Commission will exclude the substantial capacity lease revenues above Southern's costs in determining Southern's cost-of-service transportation rates for its system customers, which inarguably will result in substantially higher rates for those customers. The Certificate Order requires the leased facilities to be in service within two years of the order—or by March 25, 2024. R. 210 at 46-47 (Ordering Paragraph (E)(1)). Under a settlement agreement approved by FERC, Southern is required to file revised rates to be effective no later than September 1, 2024.[18] Thus, the Municipal Petitioners can "point[ ] to a particular imminent application of the disputed agency policy …, the firmness of which is not in dispute …."[19]

---

[18] *See* Stipulation and Agreement, Docket No. RP18-556-000, art. V(J) (Mar. 12, 2018), https://elibrary.ferc.gov/eLibrary/filelist?accession_Number=20180312-5110&optimized=false; *S. Nat. Gas Co.*, 163 FERC ¶ 61,161 (2018) (letter order approving settlement)

[19] *Teva Pharms.*, 595 F.3d at 1313.

These facts distinguish this case from challenges of FERC certificate orders that left the determination of the disputed rate question to the pipeline's next rate case.[20] Because FERC has ruled with finality that the lease revenues exceeding the lease costs will be excluded in establishing Southern's system transportation rates, the Municipal Petitioners' injury-in-fact is "unavoidable" absent judicial review in this case.[21]

The Municipal Petitioners also meet the remaining two prongs of the standing test. Their injury is fairly traceable to FERC's rate-policy determination in the present case, and ordering the relief sought—granting the petition for review, vacating FERC's determination that no credit of lease revenues above costs will be required, and remanding for FERC to act in conformity with its duty to establish just and reasonable rates—would redress the Municipal Petitioners' imminent injury.

---

[20] *See PNGTS Shippers' Group v. FERC*, 592 F.3d 132, 138 (D.C. Cir. 2010) (next rate case presented only "conceivable but not imminent effect on shipper's rates" where "how FERC would respond and what the resulting effect on shippers' rates would be are both speculative"); *Ala. Mun. Distributors Group v. FERC*, 312 F.3d 470, 473 (D.C. Cir. 2002) (finding no injury-in-fact sufficient to establish standing to challenge FERC orders that "do not resolve or even tackle the issue of what discount adjustment, if any, the Commission should allow").

[21] *ANR Pipeline Co. v. FERC*, 771 F.2d 507, 516 (D.C. Cir. 1985).

ARGUMENT

A. Standard Of Review

The Court reviews FERC's orders under the Administrative Procedure Act, which obliges the Court to reverse agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[22] Under this standard, FERC must "examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made."[23] Its action is arbitrary and capricious if it "has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[24]

In particular, when FERC changes policy, it must "acknowledge" this departure from its precedents and either provide a basis "to distinguish them" or

---

[22] 5 U.S.C. § 706(2)(A). *See, e.g.*, *North Carolina v. FERC*, 913 F.3d 148, 150 (D.C. Cir. 2019).

[23] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (cleaned up).

[24] *Id.*

"explain its apparent rejection of their approach."[25] While reviewing courts "defer to the Commission's interpretation of its own precedent, the Commission cannot depart from those rulings without providing a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored."[26] Thus, "a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy."[27]

To the extent FERC's orders rely on findings of fact, they may be set aside if not supported by substantial evidence.[28]

B. The Commission's Ruling Is Arbitrary and Capricious and Contravenes the Commission's Statutory Duty To Determine Just and Reasonable Rates.

The instant appeal involves only one issue—whether FERC adequately justified its ruling to prevent a credit for the substantial excess lease revenues when determining rates for the lessor pipeline's customers. As shown below, the FERC ruling must be reversed for each of three reasons: the ruling (1) departs without

---

[25] *Tenn. Gas Pipeline Co. v. FERC*, 867 F.2d 688, 692 (D.C. Cir. 1989). *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *Sw. Airlines Co. v. FERC*, 926 F.3d 851, 856 (D.C. Cir. 2019).

[26] *W. Deptford Energy, LLC v. FERC*, 766 F.3d 10, 17 (D.C. Cir. 2014) (cleaned up).

[27] *FCC v. Fox Television Stations, Inc.*, 556 U.S. at 515.

[28] *See Sacramento Mun. Util. Dist. v. FERC*, 616 F.3d 520, 529 (D.C. Cir. 2010); 15 U.S.C. § 717r(b); 5 U.S.C. § 706(2)(E).

reasonable explanation from prior precedents and established FERC policy; (2) contravenes FERC's fundamental obligation to establish cost-based rates; and (3) is unjustified when, as here, the lease rate is determined by the lessor and lessee who are affiliates and, thus, have the obvious incentive to maximize profits of the lessor.

The FERC rulings on crediting are not extensive. The ruling in the Certificate Order is set forth in one paragraph. R. 210, P 63. The ruling in the Rehearing Order is set forth in paragraphs 17 to 25. R. 217, PP 17–25.

The Certificate Order. In their Protest, the Municipal Petitioners raised a number of issues, including the issue that is the subject of the instant appeal: if, arguendo, Southern's proposed lease price to Tennessee Gas is deemed just and reasonable, the Commission must credit the lease payments Southern receives from Tennessee Gas in determining the rates of Southern's existing customers as required by (1) directly relevant FERC precedents in *Natural Gas Pipeline of America*[29] and *Rockies Express Pipeline LLC*[30] that there must be crediting of

---

[29] *Nat. Gas Pipeline of Am.*, 118 FERC ¶ 61,211 (2007), https://elibrary.ferc.gov/eLibrary/filelist?accession_Number=20070315-3061&optimized=false.

[30] *Rockies Express Pipeline LLC*, 119 FERC ¶ 61,069 (2007), https://elibrary.ferc.gov/eLibrary/filelist?accession_Number=20070419-3097&optimized=false.

revenues from lease payments and (2) FERC's basic mandate to ensure that rates for Southern's other customers are cost-based and thus just and reasonable.[31]

The Certificate Order responds only to the first argument. In doing so, FERC acknowledges that its precedents in *Natural* and *Rockies Express* required lease revenues to be credited against a pipeline's cost of service but asserts that FERC had established a new policy in *Gulf South Pipeline Co.*[32] that, according to FERC, justified departure from those precedents.[33] The Certificate Order does not show how this new policy prevented Southern from over-collecting its costs, however, stating only that the new policy requires that "during the term of the lease of capacity from Southern to Tennessee Gas, Southern will not be permitted to roll the costs of the leased capacity into its system rates," which protects shippers "if the lease transaction terminates early, and assures that the lessor is fully at risk for all the lease capacity that is constructed."[34]

The Rehearing Order. The Municipal Petitioners sought rehearing on three separate grounds: (1) the Certificate Order's reliance on the *Gulf South* decision

---

[31] R. 49, Protest at 7–8.

[32] *Gulf S. Pipeline Co.*, 119 FERC ¶ 61,281 (2007), https://elibrary.ferc.gov/eLibrary/filelist?accession_Number=20070618-3022&optimized=false.

[33] R. 210, Certificate Order at P 63.

[34] *Id.*

was ill-founded and did not justify departure from established precedent;[35] (2) the failure to provide a credit for excess lease revenues would require setting rates designed to provide substantial cost over-recovery, contrary to FERC's obligation to establish just-and-reasonable cost-based rates, which obligation is reflected in numerous FERC regulations and decisions;[36] and (3) the failure to require a credit for excess lease revenues is unjustified when the lease rate was determined by the lessor and lessee who are affiliated and, thus, have an obvious incentive to maximize the profits of the lessor pipeline.[37]

In the Rehearing Order, FERC rejects these arguments based on rationales that are clearly wrong.

1. The Commission does not justify its departure from its own established precedents and policy.

The Commission's principal rationale for its ruling is that the *Gulf South* decision reversed established policy set forth in *Rockies Express* and *Natural* that lease revenues must be credited.[38]

---

[35] R. 212 at PP 5–7.

[36] R. 212 at PP 7–9.

[37] R. 212 at PP 9–11.

[38] R. 210, P 63; R. 217, P 18.

Yet, the *Gulf South* order does not in any way state that FERC was changing that policy. The *Gulf South* ruling cited in the Certificate Order and Rehearing Order is, in full, as follows (footnote citations omitted):

> Gulf South shall treat the capacity lease as an operating lease for accounting purposes. Gulf South is directed to record the monthly receipts in Account 489.2, *Revenues from Transportation of Gas of others Through Transmission Facilitie*s. We have authorized similar accounting treatment for transportation capacity lease agreements in other cases. Further, during the term of the lease with Texas Gas, Gulf South will not be allowed to reflect in its system rates any of the costs (*i.e,* the fully-allocated cost of service, including actual fuel costs) associated with the leased capacity.[[39]]

In the above ruling there is no reference to the *Natural* or *Rockies Express* decisions. Nor is there any reference to a new policy on crediting of lease revenues. Nor is there any statement of what the new policy was—that there can be no longer a crediting of these revenues.[40]

---

[39] 119 FERC ¶ 61,281 at P 42.

[40] In the above quotation, FERC directs Gulf South, as the lessor pipeline, to record monthly receipts in Account 489.2, but that was a standard FERC directive that was, for example, set forth in the *Natural* decision that nevertheless required crediting of lease payments. *See Natural,* 118 FERC ¶ 61,211 at P 17. In that same quote, FERC notes that the lessor pipeline would not be allowed to reflect lease costs in system rates, but as demonstrated *infra*, that was the identical situation in *Rockies Express*, where the costs of the lease were not included in its system rates.

Notably, FERC issued *Gulf South* only two months after *Rockies Express* and three months after *Natural*.[41] The FERC rationale that it established a new policy in *Gulf South* overruling its recent, repeated precedents—when the *Gulf South* decision itself does not even set forth the change in policy—is not credible. In other words, in its orders below, FERC creates a new policy never mentioned, much less established in *Gulf South*.

While the Rehearing Order notes the Municipal Petitioners' argument—that there is nothing in the *Gulf South* order that established a new policy reversing the existing policy set forth in *Natural* and *Rockies Express*[42]—the Rehearing Order nowhere responds to it. Instead, the Rehearing Order sets forth a series of irrelevant and incorrect arguments.

First, FERC argues that in *Natural* and *Rockies Express*, "the Commission required the lessor pipeline credit lease revenues toward the calculation of a rate to be paid by other shippers on its system."[43] Yet, that is precisely what the Municipal Petitioners sought in the proceedings below—that FERC require a credit when determining the rates of Southern's other customers. The Rehearing Order

[41] *Natural* was issued on March 15, 2007, *Rockies Express* on April 19, 2007, and *Gulf South* on June 18, 2007.

[42] R. 217 at P 19.

[43] R. 217 at P 20.

then seeks to distinguish the *Natural* and *Rockies Express* orders from the situation involved in the proceedings below—that in *Natural*, the lessor abandoned the facilities underlying the lease, and that in *Rockies Express*, the credit was given for the new incremental rates for the project shipper and not for the rates of existing customers.[44]

These are manufactured distinctions without substance. In either case, a credit was required in establishing the rates to the non-lease customers to prevent an over-collection of costs—the very situation here. Moreover, as the Certificate Order acknowledges, the *Natural* and *Rockies Express* decisions were directly relevant; the ***sole*** reason FERC provides for not following those precedents is that it supposedly changed its policy in *Gulf South* to require that a credit not be provided for lease revenues.[45]

Second, the Rehearing Order repeats the rationale of the Certificate Order that in *Gulf South* FERC changed its crediting policy. According to both the Certificate Order and Rehearing Order, as of the time of *Natural* and *Rockies Express*, FERC required that lease costs be included in the pipeline's rates for other services, but in *Gulf South* FERC changed that policy by excluding lease

[44] R. 217 at P 20.

[45] R. 210 at P 63.

costs in the pipeline's rates.[46] As noted above, the Certificate Order then posits that the change in policy on exclusion of lease costs somehow compensated for changing its prior policy and precedent that the lessor pipeline must credit lease revenues in future rate cases.[47]

Yet, contrary to FERC's assertion that the lease costs were included in the rates for other pipeline services as of the time of *Natural* and *Rockies Express*, as noted in the Rehearing Request,[48] the *Rockies Express* order explicitly recognized the opposite—that "***none*** of the costs of the proposed project [to be built to provide capacity to the lease] are included in the rates of [the lessor pipeline's] existing customers."[49] Thus, as noted in *Rockies Express* and the Rehearing Request, the exclusion of such costs in the rates of the existing customers already provided protection against existing customers subsidizing the costs of the lease.[50] Accordingly, the rulings in the Certificate Order and Rehearing Order that there was a quid (excluding lease costs from existing rates) that justified the quo (requiring the elimination of the credit for lease revenues) are inarguably wrong.

---

[46] R. 210 at P 63; R. 217 at P 18.

[47] R. 210 at P 63

[48] R. 212 at 3.

[49] *Rockies Express*, 119 FERC ¶ 61,069 at P 36 (emphasis added).

[50] *Id.*; R. 212 at 7 n.17.

Third, the Rehearing Order invokes FERC's policy on capacity lease pricing, which, FERC argues, the Municipal Petitioners misunderstand, and provides FERC a basis for rejecting the request to credit lease revenues.[51] This rationale is deficient for two reasons. First, in contending that FERC should credit lease revenues, the Municipal Petitioners did not question FERC's policy on the pricing of capacity leases, a completely separate issue in this proceeding. The rationales FERC cites relating to that policy are clearly irrelevant.

Second, and more importantly, the FERC orders in *Natural* and *Rockies Express* applied FERC's capacity lease pricing policy and yet provided for the crediting of lease revenues—inarguably demonstrating that such crediting is entirely consistent with FERC's policy on how it will price capacity leasing arrangements.

In *Rockies Express*, FERC first found that the proposed lease and its pricing were consistent with FERC policy on lease arrangements.[52] However, as a separate matter, FERC in the next sentence then ruled that the lessor pipeline would be required to credit the revenues of the lease to the lessor's cost of service

[51] R. 217 at PP 21–22.

[52] *Rockies Express*, 119 FERC ¶ 61,069 at PP 41–42.

(the basis for developing the remaining rates) "as required by Commission policy."[53]

Similarly, in *Natural*, FERC found that the proposed lease and its pricing were consistent with its policy on lease arrangements and yet also explicitly directed that the lease revenues be "available as a credit against Natural's cost of service in any future rate case."[54]

In sum, the Certificate Order explicitly acknowledges the *Rockies Express* and *Natural* precedents required crediting of lease revenues.[55] The sole reason set forth in the Certificate Order for rejecting a lease credit is the incorrect rationale that in *Gulf South* FERC changed its policy that it would no longer credit revenues from lease transaction. The Rehearing Order's additional arguments—invoking FERC's policy on the pricing of capacity leases—are an irrelevant distraction.

The Commission's action refusing to require the crediting of Southern's excess lease revenues against the pipeline's costs is thus arbitrary and capricious. The Commission did not "articulate a satisfactory explanation for its action" and, indeed, "entirely failed to consider an important aspect of the problem."[56]

---

[53] *Id*. at P 42; *see also id.* at P 36.

[54] *Natural*, 118 FERC ¶ 61,211 at PP 15–17.

[55] R. 210 at P 63.

[56] *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (cleaned up).

Moreover, FERC departed from its precedents and prior established policy without distinguishing them or providing a reasoned analysis for changing its crediting policy.[57]

2. The Commission never responds to the fact that its ruling to require no lease-revenue crediting would require designing Southern's rates to substantially over-collect costs in contravention of FERC's duty to establish just and reasonable rates.

Even assuming, arguendo, that FERC is correct that the orders under review properly followed FERC precedent in *Gulf South* to no longer credit lease revenues, the orders should be reversed, otherwise FERC would set rates for Southern designed to greatly over-collect its costs. In their Rehearing Request, the Municipal Petitioners demonstrated that substantial over-collection contravenes FERC's fundamental mandate to determine just-and-reasonable cost-based rates, as is clearly reflected in relevant FERC regulations and numerous precedents.[58]

Section 284.10 of FERC's pipeline transportation regulations[59] sets forth the basic requirements for "any rate charged for transportation service under subparts B and G." Southern provides transportation to the Municipal Petitioners and other customers under Subpart G. The Commission has repeatedly ruled that the

---

[57] *FCC v. Fox Television*, 556 U.S. at 515; *W. Deptford Energy*, 766 F.3d at 17.

[58] R. 212 at 7–8.

[59] 18 C.F.R. § 284.10 (2021)

purpose of those regulations is to ensure that the just and reasonable rates for such transportation determined in rate proceedings will be set so that the pipeline is allowed to recover its projected costs, no more nor less, i.e., its "revenue requirement."[60]

In Order No. 436, one of the fundamental FERC orders of general applicability for pipeline rate-making, FERC repeatedly confirmed this principle—that rates must be cost based and must be designed in rate cases to allow the pipeline to recover its costs.[61]

In Order No. 637, another fundamental FERC order of general applicability for pipeline rate-making, FERC restated the above principle in stressing that the pipeline can recover only the costs of its investment in facilities.[62] Moreover, in

---

[60] *See, e.g.*, *Portland Nat. Gas Transp. Sys.*, 142 FERC ¶ 61,198 at P 154 (2013); *Cost Recovery Mechanisms for Modernization of Nat. Gas Facilities*, 151 FERC ¶ 61,047 at P 11 (2015) (policy statement).

[61] *Regul. of Nat. Gas Pipelines After Partial Wellhead Decontrol*, Order No. 436, FERC Stats. & Regs. ¶ 30,665 at 31,535, *order on reh'g*, Order No. 436-A, FERC Stats. & Regs. ¶ 30,675 at 31,674 (1985), *modified*, Order No. 436-B, FERC Stats. & Regs. ¶ 30,688, *reh'g denied*, Order No. 436-C, 34 FERC ¶ 61,404, *reh'g denied*, Order No. 436-D, 34 FERC ¶ 61,405, *reconsideration denied*, Order No. 436-E, 34 FERC ¶ 61,403 (1986), *aff'd in relev. part sub nom. Associated Gas Distribs. v. FERC*, 824 F.2d 981 (D.C. Cir. 1987).

[62] *Regul. of Short-Term Nat. Gas Transp. Servs. & Regul. of Interstate Nat. Gas Transp. Servs.*, Order No. 637, FERC Stats. & Regs. ¶ 31,091 at 31,287, n.125 (2000), *order on reh'g*, Order No. 637-A, FERC Stats. & Regs. ¶ 31,099 (2000), *order on reh'g*, Order No. 637- B, 92 FERC ¶ 61,062 (2000), *aff'd in part & remanded in part sub nom. Interstate Nat. Gas Ass'n. of Am. v. FERC*, 285 F.3d 18 (D.C. Cir. 2002). *See also Columbia Gas Transmission Corp.*, 26 FERC ¶ 61,034

Order No. 637, FERC provided specific, concrete examples that rates must be designed to allow a pipeline to recover its costs, no more nor less.[63]

By denying the Municipal Petitioners' request that there be a credit of the excess lease revenues, FERC ensures precisely the opposite result—the ruling guarantees that rates will be designed for Southern substantially to over-collect its costs, under Southern's own calculation, by approximately $21 million in the first three years of the lease alone.[64]

In the Rehearing Order, FERC nowhere contests that fact. Instead, the Rehearing Order in its words "summarily den[ies]"[65] the demonstration based on two rationales, both of which are clearly wrong.

First, the Rehearing Order argues that the Certificate Order already had rejected the Municipal Petitioners' arguments, although in fact the Certificate

---

at 61,100 (1984) (FERC has the duty to ensure that rates are set so that ratepayers bear only the necessary and reasonable costs of service).

[63] Order No. 637, FERC Stats. & Regs. ¶ 31,091 at 31,292–93. There, FERC provides for innovative rate designs that would allow a pipeline's transportation rates to vary based on the length of a customer's contract with the pipeline (time-differentiated rates) and whether the customers would take service during peak or off-peak periods (peak/off peak rates). In each case, FERC set forth mechanisms to ensure that in the aggregate those rates would be designed to recover its costs, no more nor less.

[64] R. 4, Southern App., Ex. N, sheet 2. *See supra note* 10.

[65] R. 217 at P 23.

Order addressed a different issue—"why the Commission views ***pricing*** for lease capacity differently than rates for transportation service."[66]

Here, FERC engages again in distraction. The rulings made in the Certificate Order were in response to a separate issue also raised in the Municipal Petitioners' Protest—the pricing of lease transactions. The Municipal Petitioners did not raise that issue in their Rehearing Request, and it is irrelevant to the sole issue raised in that request as well as the instant appeal—which is, assuming that FERC is correct on how lease transactions are priced, FERC's directive not to credit lease revenues requires that Southern's rates will be designed to substantially over-collect its costs.

Moreover, as demonstrated above, the *Natural* and *Rockies Express* decisions applied FERC's capacity lease pricing policy and yet also required crediting of lease revenues. These precedents demonstrate that crediting of lease revenues is not inconsistent with FERC's lease pricing policy.

Second, the Rehearing Order seeks to dispense with the Municipal Petitioners' detailed demonstration that FERC's regulations and its fundamental orders on rate regulation unambiguously and repeatedly require that rates be designed to recover the pipeline's costs, no more nor less. The Commission

[66] R. 217 at P 25 (emphasis added).

acknowledges the regulations and orders, but rules that they are irrelevant as they pertain to rate contracts, not lease arrangements.[67]

Here again, FERC engages in distraction, this time by an obviously incorrect shift in focus. The rates relevant to this issue ***are*** the rates for Southern's other customers—those who are not involved with the lease arrangement, such as the Municipal Petitioners, who have contracts with Southern and whose rates are required to be determined by FERC on a cost basis, i.e., designed so that Southern neither over- or under-collects its costs.

Moreover, FERC's rationale is plainly inconsistent with its decisions in *Natural* and *Rockies Express*. Those decisions also involved a lease transaction but, as required by FERC's established policy, ruled that the lessor pipeline must provide a credit in rate cases to those not involved in the lease transactions. Here as well, the Municipal Petitioners, along with numerous others, ***are*** the pipeline's other customers—those customers not involved in the lease arrangement.

The ill-founded invocation by FERC of its lease pricing policies cannot justify the principle it would establish for Southern's rates charged to its existing customers—that these rates must be designed ***to prevent an over-collection*** of costs, ***except*** when Southern leases capacity at a price in excess of its costs, when

---

[67] R. 217 at P 25.

Southern's rates to existing customers must be designed ***to require an over-collection*** of costs. That principle makes no sense.

Moreover, as the Municipal Petitioners demonstrated in their Request for Rehearing, the principle would establish a precedent that would have obvious, potentially egregious effects.[68] A pipeline often has a choice to lease capacity or provide firm transportation service. As noted, when a pipeline provides firm services, all its costs and revenues must be taken into account in determining its rates. By creating an exception for pipeline leases from this basic requirement, the new precedent provides a huge incentive for a pipeline to lease capacity at rates exceeding the costs of the lease so that it can over-recover its costs. The potential for cost over-collection throughout the regulated pipeline industry is obvious.

3. The Commission nowhere provides a response to the demonstration that the failure to credit lease payments is unjustified where the lessor and lessee are affiliates.

Finally, the Commission's orders also entirely fail to consider another important aspect of the problem. As the Municipal Petitioners demonstrated in the proceedings below, the failure of FERC to credit lease revenues is a particularly inappropriate departure from FERC rate-making precedent and policy when, as

[68] R. 212 at 9.

here, the pipeline has leased capacity to an affiliate.[69] Under FERC's leasing policy, the only standard for the pricing of the lease is that the lease rate must be less than or equal to the lessor pipeline's firm transportation rate—and even that standard may be waived, and in fact was waived in the proceedings below.[70] The rate is otherwise entirely determined by the negotiations between the lessor and the lessee.

In this context, the new FERC precedent established in this case provides the affiliates with the incentive to allow the lessor to charge rates exceeding costs. While that excess, cost-free revenue is collected by the lessor Southern, it is ultimately passed on to the common parent of the affiliates, in this case, Kinder Morgan, Inc.[71] Indeed, the facts of this proceeding amply demonstrate this incentive, where Southern and its affiliate Tennessee Gas agreed to rates that produce approximately $21 million of cost-free profit in the first three years alone.

The Rehearing Order acknowledges the argument, but summarily rejects it based on the rationale that the Municipal Petitioners were repeating an argument they had made in their Protest that FERC had rejected in the Certificate Order and yet, according to the Rehearing Order, they did not identify any errors in FERC's

[69] R. 212 at 9–11.

[70] R. 210 at P 61.

[71] The Certificate Order notes this common ownership. R. 210 at P 6.

consideration of that argument in the Certificate Order.[72] The Rehearing Order then rejects these same arguments for the reasons set forth in the Certificate Order.[73]

Here, too, the FERC ruling and rationale are plainly wrong. The Certificate Order rejected the Municipal Petitioners' argument on the basis that the Municipal Petitioners' prior pleadings had not presented any evidence that the pricing of the lease arrangement was untoward or otherwise affected by the affiliated arrangement of the lessor, Southern, and its affiliated lessee, Tennessee Gas.[74] The Municipal Petitioners' Rehearing Request involved another issue—whether a credit should be given for the lessor's receipt of the lease revenues.

More importantly, the Rehearing Request specifically demonstrated that there was no need for any evidence given the presumption—required by FERC and judicial precedents—that transactions between affiliates are different from arm's-length transactions and require different treatment and standards than FERC gives to arm's-length transactions.[75]

---

[72] R. 217 at PP 23–24.

[73] R. 217 at P 24.

[74] R. 210 at P 62.

[75] R. 212 at 9–11.

For example, in Order No. 497, FERC set forth detailed standards of conduct and reporting requirements intended to protect against possible abuses intended to prevent preferential treatment of an affiliated marketer by an interstate pipeline in the provision of its transportation services. In promulgating the regulation, FERC rejected the contention by pipelines that the standards were unnecessary.[76] As FERC stated:

> The Commission is concerned with a transaction conducted on a pipeline that benefits the pipeline or the corporate group of which it is a part. In such a transaction, there is an economic incentive for the pipeline to favor the transaction. ***Any affiliate of a pipeline can conduct a transaction which benefits the pipeline or the corporate group of which it is a part***.[[77]]

This is obviously true here, where Southern and Tennessee Gas have agreed to a rate for a lease transaction substantially in excess of costs which excess—as required by the FERC ruling—will result in rates designed to ensure a massive Southern cost over-recovery. As this Court in reviewing Order No. 497 simply but

---

[76] *Inquiry into Alleged Anticompetitive Pracs. Related to Mktg. Affiliates of Interstate Pipelines*, Order No. 497, FERC Stats. & Regs. ¶ 30,820 at 31,128 (1988), *order on reh'g*, Order No. 497-A, FERC Stats & Regs. ¶ 30,868 (1989), *order extending sunset date*, Order No. 497-B, FERC Stats. & Regs. ¶ 30,908 (1990), *order extending sunset date*, Order No. 497-C, FERC Stats. & Regs. ¶ 30,934 (1991), *reh'g denied*, Order No. 497-D, 58 FERC ¶ 61,139 (1992), *aff'd in relev. part sub nom. Tenneco Gas v. FERC*, 969 F.2d 1187 (D.C. Cir. 1992).

[77] Order No. 497, FERC Stats. & Regs. ¶ 30,820 at 31,130 (emphasis added).

incisively stated, "a pipeline has an obvious incentive to favor its own marketing affiliate; profits to the affiliate are profits to the pipeline."[78]

The Rehearing Order does not provide ***any*** response to these arguments by the Municipal Petitioners.

Against this backdrop, the ruling in the orders under review that ensures substantial cost over-recovery is an unexplained departure from cost-based rate-making standards and precedent that cannot be justified. As demonstrated, even for arm's-length transactions, such as in *Rockies Express* and *Natural*, FERC has required crediting of revenues to protect against cost over-recovery. The fact that the lessor and lessee are part of a corporate family that may alone determine the lease rate no matter how excessive provides a separate compelling reason—as set forth in numerous FERC orders—for requiring a credit of lease revenues, an argument to which FERC provides no response.

CONCLUSION

The Commission's orders should be vacated to the extent they proscribe the crediting of revenues from the Tennessee Gas lease in determining Southern's cost of service in establishing its rates to its system customers.

---

[78] *Tenneco Gas*, 969 F.2d at 1202.

Respectfully submitted,

/s/ Joshua L. Menter

James R. Choukas-Bradley
Joshua L. Menter
Randolph Lee Elliott
MCCARTER & ENGLISH, LLP
1301 K Street, NW
Suite 1000 West
Washington, DC 20005
Tel: (202) 753-3400
jchoukasbradley@mccarter.com
jmenter@mccarter.com
relliott@mccarter.com

Attorneys for Alabama Municipal Distributors Group, Austell Gas System, The Southeast Alabama Gas District, and Municipal Gas Authority of Georgia

December 22, 2022

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1), this document contains 7,578 words.

2. This document 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 document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Size 14 Times New Roman.

/s/ Joshua L. Menter

Joshua L. Menter
MCCARTER & ENGLISH, LLP
1301 K Street, NW
Suite 1000 West
Washington, DC 20005
Tel: (202) 753-3400
jmenter@mccarter.com

December 22, 2022

STATUTORY ADDENDUM

Table of Contents

1. Natural Gas Act, sec. 1, 15 U.S.C. § 717 .... A-1

2. Natural Gas Act, sec. 4, 15 U.S.C. § 717c A-2

3. Natural Gas Act, sec. 5, 15 U.S.C. § 717d A-3

4. Natural Gas Act, sec. 7, 15 U.S.C. § 717f... A-3

§ 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.

§ 717c. Rates and charges

(a) Just and reasonable rates and charges

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

(b) Undue preferences and unreasonable rates and charges prohibited

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

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

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

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

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

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

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

(f) Storage services

(1) In exercising its authority under this chapter or the Natural Gas Policy Act of 1978 (15 U.S.C. 3301 et seq.), the Commission may authorize a natural gas company (or any person that will be a natural gas company on completion of any proposed construction) to provide storage and storage-related services at market-based rates for new storage capacity related to a specific facility placed in service after August 8, 2005, notwithstanding the fact that the company is unable to demonstrate that the company lacks market power, if the Commission determines that—

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

(B) customers are adequately protected.

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

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

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

REFERENCES IN TEXT

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

AMENDMENTS

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

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

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

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

§ 717c–1. Prohibition on market manipulation

It shall be unlawful for any entity, directly or indirectly, to use or employ, in connection with the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance (as those terms are used in section 78j(b) of this title) in contravention of such rules and regulations as the Commission may prescribe as necessary in the public interest or for the protection of natural gas ratepayers. Nothing in this section shall be construed to create a private right of action.

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

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

(a) Decreases in rates

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

(b) Costs of production and transportation

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

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

§ 717e. Ascertainment of cost of property

(a) Cost of property

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

(b) Inventory of property; statements of costs

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

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

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

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

Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served

by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

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

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

(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.

USCA Case #22-1101 Document #1978715 Filed: 12/22/2022 Page 51 of 52

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

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

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

AMENDMENTS

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

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

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

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

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

EFFECTIVE DATE OF 1988 AMENDMENT

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

TRANSFER OF FUNCTIONS

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

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25 and D.C. Cir. Rule 25, I hereby certify that on this date I have electronically filed the foregoing document with the Clerk of the Court using the Court's CM/ECF system. Counsel for all parties have consented to electronic service, and service has been made by the Court's CM/ECF system on all attorneys of record and all registered participants.

/s/ Randolph Lee Elliott

Randolph Lee Elliott
McCarter & English, LLP
1301 K Street, NW
Suite 1000 West
Washington, DC 20005
Tel: (202) 753-3400
relliott@mccarter.com

December 22, 2022