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

REPLY BRIEF OF MUNICIPAL PETITIONERS

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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
FERC Br.	Brief for Respondent Federal Energy Regulatory Commission (Feb. 22, 2023)
Intervenors Br.	Brief of Respondent-Intervenors Southern Natural Gas Company, L.L.C., Tennessee Gas Pipeline Company, L.L.C., and Venture Global Plaquemines LNG, LLC (Mar. 8, 2023)
Municipals Br.	Brief of Municipal Petitioners (Dec. 22, 2022)
Municipals	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
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	Tennessee Gas Pipeline Company, L.L.C.

SUMMARY OF ARGUMENT

The Municipals' appeal arises from Federal Energy Regulatory Commission (FERC) orders authorizing Southern Natural Gas Company, L.L.C. (Southern) to lease pipeline capacity to its affiliate Tennessee Gas Pipeline Company, L.L.C. (Tennessee). FERC approved a lease price that exceeds Southern's lease costs. Municipals do not challenge the lease authorization or lease price, but only FERC's ruling that Southern's excess lease revenues will not be credited against Southern's costs when FERC determines Southern's future rates for its non-lease transporation customers such as Municipals.

Established law requires FERC to consider all costs to be incurred and revenues to be realized by Southern in determining Southern's just-and-reasonable, cost-based rates. The challenged ruling upsets that balance: by excluding Southern's lease costs and (higher) lease revenues from consideration in future rate cases, these rulings require that Southern's rates be designed to overcollect Southern's total costs.

Municipals assert three independent reasons why the Court should set aside FERC's ruling. Neither FERC nor Southern/Tennessee overcome these arguments.[1]

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[1] Intervenor Plaquemines LNG does not join Southern and Tennessee's arguments on these issues. *See* Intervenors Br. at 5 n.1.

First, FERC's failure to require the crediting of excess lease revenues contravenes its statutory obligation to require that a pipeline's rates be designed to recover 100% of its total costs, no more no less. In the only two FERC orders on point, FERC accomplished this by requiring the pipeline to credit lease revenues against its cost of service. Neither FERC nor Southern and Tennessee deny that Southern will be able to over-recover its costs. They instead defend FERC's ruling with factually and legally unsupported arguments and impermissible post hoc rationalizations for FERC's action.[2]

Second, FERC did not justify its departure from its own policy and precedents. In response, FERC and Southern/Tennessee point to language in FERC's orders below, which acknowledged these precedents and their policy to require crediting lease revenues but claimed that a later FERC order had changed that policy and ended this requirement. In fact, the later FERC order did not address whether a pipeline must credit lease revenues against its costs and did not announce a change in FERC policy. Neither FERC nor Southern/Tennessee dispute that. Instead, they cite other FERC orders, not relied on by FERC below; but these orders likewise did not address the revenue-crediting requirement.

[2] *Michigan v. EPA*, 576 U.S. 743, 758 (2015); *SEC v. Chenery Corp.*, 318 U.S. 80, 87-88 (1943); *Calpine Corp. v. FERC*, 702 F.3d 41, 46 (D.C. Cir. 2012) ("agency decisions may not be affirmed on grounds not actually relied upon by the agency").

Finally, even assuming *arguendo* that there was a new policy proscribing all revenue crediting, it is predicated on a rationale that is inarguably wrong—as confirmed by FERC's brief—and cannot justify the departure from the established policy reflected in FERC's prior orders.

Third, FERC's orders did not adequately address the uncontested and signifcant fact that Southern and Tennessee are affiliates with an obvious incentive to the maximize profits of their common parent. FERC and Southern/Tennessee argue that the parties' affiliation is irrelevant, but they fail to show how FERC's orders considered the fact that, absent a crediting of Southern's excess lease revenues, Southern will be able to over-recover its costs.

These specific deficiencies in FERC's orders should not obscure the unreasonableness of FERC's ruling that its revenue-crediting policy treats Southern's leases differently from the pipeline's other services, with the result that Southern's rates for non-lease customers, which ordinarily are designed to ***prevent*** an over-collection of costs, will be designed to ***require*** an over-collection when Southern leases capacity at a price exceeding the lease costs. Neither FERC nor Southern/Tennessee deny that if Southern instead provided firm transportation service to its affiliate Tennessee, Southern would have been required to reconcile its total costs and revenues. By creating an exception for pipeline leases, and by ignoring the parties' affiliate relationship, FERC's orders create a perverse

incentive for a pipeline to evade cost-based regulation by leasing capacity to affiliates at above-cost rates.[3]

Finally, contrary to Intervenors' suggestion, the Court should vacate FERC's orders with respect to their unsustainable ruling on the revenue-crediting requirement.

ARGUMENT

A. FERC and Southern/Tennessee do not show how FERC's ruling comports with its statutory obligation to establish just and reasonable rates.

FERC's ruling that Southern's transportation rates will be determined without crediting Southern's excess lease revenues from Tennessee will result in rates designed to substantially over-collect Southern's costs, in contravention of FERC's duty to establish just and reasonable rates. As Municipals demonstrated in their brief:

- Under section 4 of the Natural Gas Act (NGA),[4] FERC is required to determine rates that are just and reasonable, and to implement that obligation FERC requires that these rates be cost-based.[5]

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[3] *See* Municipals Br. at 28-29.

[4] 15 U.S.C. § 717c (2018).

[5] Municipals Br. at 3-4.

- A basic purpose of cost-based ratemaking is to ensure that a pipeline's rates in total are designed to enable the pipeline to recover its total cost of service—no more, no less—as explained in numerous FERC orders, including major rulemakings and regulations, and in FERC's cost-based ratemaking handbook.[6]
- FERC's ruling that Southern's rates will be established without crediting Southern's excess lease revenues requires that Southern's rates be designed to over-recover Southern's total cost of service by a massive amount—$7 million for each of the first three years of the lease's 20-year term.[7]

In their briefs, FERC and Southern/Tennessee studiously ignore these demonstrations. Instead, they mischaracterize Municipals' positions, make factually or legally unsupported arguments, and advance impermissible post hoc rationalizations for FERC's ruling.

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[6] Municipals Br. at 3-5 & nn.8-9; 24-26. While the rates designed for a pipeline may yield revenues that over- or under-collect its actual costs, FERC requires that "when the pipeline files its next rate case, the pipeline rates will be designed to collect 100% of its just and reasonable cost of service." *Portland Nat. Gas Transp. Sys.,* 142 FERC ¶ 61,198 at P 154 (2013).

[7] The lease revenues would exceed costs by approximately $7 million in each of the first three years of the lease. Municipals Br. at 7, n.10. Failing to credit this excess-cost revenue would require an over-recovery of that amount when Southern designs its system customers' cost-based transportation rates. *Id.* at 9.

Thus, FERC argues that it lacked authority to change Municipals' existing rates in the proceeding below, which was conducted under section 7 of the NGA[8] and concerned only the proposed rates for the lease.[9] Southern/Tennessee make similar arguments,[10] contending that the only way existing rates can be changed is in a rate proceeding under section 4 or section 5 of the NGA.[11]

But FERC's orders did not claim it lacked authority to require revenue crediting; it declined to do so as an exercise of agency discretion and policy.[12] Moreover, these arguments mischaracterize the relief requested below. Municipals did not request an immediately effective crediting of excess lease revenues to reduce their existing rates, but rather asked for revenue crediting in future rate proceedings—i.e., where the substantive and procedural requirements of NGA Sections 4 and 5 would apply.[13] There was nothing impermissible about Municipals' requesting in the section 7 proceedings below that FERC require

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[8] 15 U.S.C. § 717f (2018).

[9] FERC Br. at 89.

[10] Intervenors Br. at 28-30.

[11] 15 U.S.C. § 717d (2018).

[12] R. 210, Certificate Order, P 63; R. 217, Rehearing Order, PP 20-22.

[13] *See* Municipals Br. at 7 ("Municipal Petitioners requested that FERC require that a credit be recognized … in future rate proceedings"); *id.* at 8 ("the failure to credit [excess lease revenues] … will guarantee that rates determined in future Southern rate proceedings will be designed to substantially over-collect the pipeline's rates.")

revenue crediting in future Southern rate proceedings. Indeed, FERC required such crediting in the *Natural* section 7 order Municipals cited to FERC.[14]

FERC and Southern/Tennessee also mischaracterize Municipals' argument to be that the lease revenues are excessive.[15] FERC argues that its orders carefully reviewed the pricing of the lease, and FERC reasonably approved it.[16] In that regard, FERC argues that under its lease policy, cost-based ratemaking principles do not apply to its approval of a lease price.[17]

These are classic strawman arguments. Municipals do not challenge the lease price or its derivation.[18] Municipals only seek to ensure that Southern's rates in future rate cases are designed so that Southern's total revenues from all its rates (cost-based rates and lease rates) recover Southern's total costs.

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[14] *Natural Gas Pipeline Co.*, 118 FERC ¶ 61,211, at P 17 (2007) (requiring that lease revenues "be available as a credit against [the pipeline's] cost of service in any future rate case") (*Natural*).

[15] FERC Br. at 83; Intervenors Br. at 30.

[16] FERC Br. at 80-82, 83.

[17] *Id.* at 84-85 and n.5.

[18] Municipals Br. at 22, 27.

As part of its discourse on its lease policy, FERC cites its statement in an earlier order[19] that both its lease policy as well as its Certificate Policy Statement[20] ensure that the lease would have no adverse effect on the existing customers of the lessor pipeline.[21] As a result, FERC contends that under the orders below, "Municipals are fully insulated from any effects of the lease …."[22]

Yet, FERC's lease policy and the Certificate Policy Statement do not address revenue crediting and cannot contravene FERC's statutory obligation to ensure that a pipeline's rates in the aggregate are designed to recover its aggregate costs. Indeed, Municipals' Rehearing Request demonstrated that all of the benefits FERC asserts for its lease policy would still apply with a crediting of revenues,[23] a point that FERC's Rehearing Order left unanswered.

Moreover, as Municipals demonstrated, there are other instances set forth in a major FERC rulemaking in which FERC not only examined individual rates, but also imposed the obligation that the revenues from those rates do not in the

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[19] *E. Ohio Gas Co.*, 135 FERC ¶ 61,034 (2011).

[20] *Certification of New Interstate Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *clarified,* 90 FERC ¶ 61,128, *clarified*, 92 FERC ¶ 61,094 (2000) (Certificate Policy Statement).

[21] FERC Br. at 81-82, 86-87.

[22] *Id.* at 88.

[23] R. 212, Rehearing Request at 8-9.

aggregate exceed the costs.[24] Neither FERC nor Southern/Tennessee address that demonstration.

Finally, as Municipals demonstrated,[25] in the ***only*** section 7 orders to address lease-revenue crediting, *Natural* and *Rockies,*[26] FERC required the crediting of lease revenues, and it did so after approving the lease and the lease price pursuant to its Certificate Policy Statement and the same three-pronged lease policy that it applied in the proceedings below.[27] Neither FERC nor Southern/Tennessee address that demonstration.

Southern/Tennessee also chide Municipals for not discussing what they claim is a relevant precedent, FERC's *National Fuel* order,[28] which, according to them, stands for the principle that "if the shippers were not subject to the costs of the project that they should not have been subject to the benefits of its revenues."[29] For multiple reasons, *National Fuel* does not support FERC's orders below.

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[24] Municipals Br. at 26 n.63.

[25] Municipals Br. at 22.

[26] *Rockies Express Pipeline L.L.C.*, 119 FERC ¶ 61,069 (2007).

[27] *See Rockies* at PP 41-42; *Natural* at P 15.

[28] *Nat. Fuel Gas Supply Co.,* 172 FERC ¶ 61,039 (2020). *See* Intervenors Br. at 31-33.

[29] Intervenors Br. at 32.

First, FERC's orders did not cite, much less rely on, *National Fuel.* Municipals thus had no reason to discuss it, and Southern/Tennessee's discussion of that order is another impermissible post hoc rationalization. Second, by Southern/Tennessee's own admission, *National Fuel* did not address the issue of whether crediting of lease revenues is appropriate.[30] Third, *National Fuel* nowhere states the principle asserted by Southern/Tennessee, that shippers not subject to lease costs should not receive any lease revenues. Fourth, that principle is incorrect, because, as demonstrated above, FERC's rulings in *Natural*, *Rockies*, and numerous other decisions and rulemakings have made clear that when it sets a pipeline's rates, FERC always has the responsibility to ensure that, in the aggregate, the pipeline's revenues do not exceed its total costs.

FERC cites this Court's opinion in *Gulf South Pipeline Co. v. FERC*[31] for the principle that properly designed rates should produce revenues from each class of customers which match the costs to serve that class.[32] This is another impermissible post hoc argument. Moreover, FERC's orders do not purport to establish Southern's just-and-reasonable total cost of service and reasonably allocate these costs to Tennessee as lessee and to Southern's non-lease customers

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[30] *Id.*

[31] 955 F.3d 1001 (D.C. Cir. 2020).

[32] FERC Br. at 88-89.

as if they represented two classes of customers. To the contrary, FERC disclaimed any responsibility to do that. Thus, the issue in this case is far different from that addressed by the Court in *Gulf South Pipeline.* Here, the uncontested facts—which FERC seeks to obscure—are that if the excess lease revenues are not credited against Southern's costs in future Southern rate proceedings, Southern will receive total revenues massively exceeding its total costs. Nothing in *Gulf South Pipeline* addresses, much less supports, that cost over-recovery.

B. FERC and Southern/Tennessee do not show that FERC reasonably explained its departure from FERC policy and precedents requiring pipelines to credit lease revenues.

As noted, *Natural* and *Rockies* are the only FERC precedents that address the issue of lease revenue crediting. In its orders in this case, FERC explicitly acknowledged the relevance of *Natural* and *Rockies* as established FERC policy that lease revenues should be credited in the development of cost-based rates for other customers.[33] Municipals' brief showed why FERC's orders impermissibly departed from the *Natural* and *Rockies* precedents and policy.[34] The briefs of FERC and Southern/Tennessee fail to rebut that demonstration.

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[33] R. 210, Certificate Order, P 63; R. 217, Rehearing Order, P 18.

[34] Municipals Br. at 17-24.

In particular, Municipals demonstrated that FERC's orders erroneously imputed to FERC's *Gulf South* order[35] a "quid pro quo" rationale that supposedly justified terminating the requirement to credit lease revenues reflected in FERC's *Natural* and *Rockies* orders. Specifically, *Gulf South* lacked the supposed "quid" (for the first time, excluding lease costs from pipeline rates) that justified the supposed "quo" (no longer requiring credit for lease revenues in pipeline rates).[36] FERC and Southern/Tennessee nowhere contest that demonstration. In fact, FERC's Certificate Policy Statement—issued well before *Natural, Rockies, and Gulf South* and applied by FERC in each instance—***already*** excluded lease costs from system rates by requiring that Southern, not system customers like Municipals, bear the financial risks associated with the leased facilities.[37] FERC's brief confirms that this Certificate Policy Statement requirement placed "the pipeline at risk for the financial consequences of an expansion decision, including anticipated volumes that do not develop or cost overruns."[38] Thus, FERC's

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[35] *Gulf S. Pipeline Co.*, 119 FERC ¶ 61,281 (2007).

[36] Municipals Br. at 20-21.

[37] R. 212, Rehearing Request at 3-4. *See Certification of New Interstate Gas Pipeline Facilities*, 90 FERC ¶ 61,128, at 61,391, *clarified*, 92 FERC ¶ 61,094 (2000).

[38] FERC Br. at 87-88.

rationale that *Gulf South*'s exclusion of lease costs justified exclusion of lease revenue credits is inarguably wrong.

FERC and Southern/Tennessee argue that *Natural* and *Rockies* are distinguishable because the revenue credits benefited shippers who were paying for part of the costs the leased facilities, whereas Municipals will not pay for any of the costs of the leased facilities.[39] Yet the reason for crediting lease revenues in determining the revenue requirement for cost-based rates applies in this case just as it did in *Natural* and *Rockies*—to prevent rates designed to over-recover costs. In any event, FERC's rationale in its orders was that the revenue crediting required in *Natural* and *Rockies* is unnecessary under its revised policy in *Gulf South*,[40] and thus FERC did not rely on the factual distinctions drawn by the FERC and Southern/Tennessee briefs.

A separate and independent basis for reversing the challenged rulings is the fact that FERC's orders ascribed more weight to *Gulf South* than the order can bear. As Municipals demonstrated, *Gulf South* did not acknowledge *Natural* and *Rockies* as prior revenue-crediting policy or articulate a policy change that made

[39] *Id.* at 90-92; Intervenors Br. at 31.

[40] R. 217, Rehearing Order at PP 20-21.

revenue crediting unnecessary and verboten.[41] Nowhere in their briefs do FERC or Southern/Tennessee demonstrate otherwise.

Undeterred, FERC and Southern/Tennessee provide yet another impermissible post hoc argument by citing other FERC decisions after *Gulf South* to seek to confirm a change in policy.[42] But these decisions suffer from exactly the above-discussed deficiencies applicable to *Gulf South*: they do not address FERC's revenue-crediting policy. Notably, Southern/Tennessee cite orders issued ***before*** *Gulf South* to seek to show that FERC had a consistent policy for a number of years.[43] Yet that fact undermines the critical FERC finding that *Gulf South* implemented a change in policy.

When all the dust is settled, one principle remains: *Rockies* and *Natural* are the only FERC decisions that resolved the issue of the crediting of lease revenues, and FERC and Southern/Tennessee have not provided any credible reason why these decisions should not be applied here.

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[41] Municipals Br. at 18.

[42] FERC Br. at 9; Intervenors Br. at 30.

[43] Intervenors Br. at 30.

C. FERC and Southern/Tennessee do not show that FERC adequately considered Southern and Tennessee's affiliation in refusing to require Southern to credit its excess lease revenues.

Municipals further showed that FERC's decision not to require the crediting of excess lease revenues is arbitrary and capricious because FERC failed to consider an important aspect of the problem—that Southern leased the capacity to its affiliate Tennessee, and they structured a lease that enables Southern to over-collect its overall cost of service.[44] Neither FERC nor Southern and Tennessee show that FERC adequately addressed this issue in its orders.

The FERC brief confirms that the agency's lease analysis ignored the affiliation issue: "The Commission examines leases among affiliates and non-affiliates using the same criteria to ensure that there are benefits to the lease arrangement and there will be no adverse effects on existing shippers."[45] And FERC claims that "the mere fact that the leasing parties are affiliated is itself no basis on which to question the lease transaction."[46] But the Municipals do not challenge "the lease transaction"—they challenge FERC's refusal to require Southern to credit its excess lease revenue from its affiliate Tennessee against

[44] Municipals Br. at 29-33; R. 212 at 9-11.

[45] FERC Br. at 94-95.

[46] *Id.* at 96.

Southern's cost of service in Southern's next transportation-rate proceeding. The FERC brief, like its orders, fails to address Municipals' actual argument.

In any event, FERC does not show that its approval of the lease prevented Southern and Tennessee from structuring the transaction to enable Southern to over-collect its costs. FERC claims that under its lease policy, "it is not true that affiliated lessor and lessees 'may alone determine the lease rate no matter how excessive.'"[47] Indeed, FERC found the lease rate excessive relative to *Southern's* costs; but it waived that criterion of its lease policy and approved the lease by pointing only to the "significant benefits" the lease afforded the parties and to *Tennessee's* costs to build facilities needed to provide comparable service.[48] FERC fails to show how this decision considered, much less limited, the ability and inherent incentive of the affiliates Southern and Tennessee to enable Southern's cost over-recovery.

FERC's reliance[49] on *City of Oberlin v. FERC*[50] and *Environmental Defense Fund v. FERC*,[51] is unavailing, because both of these cases concerned a different issue—whether a pipeline's precedent agreements with an affiliated shipper could

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[47] FERC Br. at 94 (quoting Muncipals Br. at 30).

[48] R. 210, Certificate Order, P 61; R. 217, Rehearing Order, P 22.

[49] *See* FERC Br. at 96-97.

[50] 937 F.3d 599 (D.C. Cir. 2019).

[51] 2 F.4th 953 (D.C. Cir. 2021).

be the basis for FERC to issue a certificate of public convenience and necessity. Again, Municipals do not challenge FERC's issuance of the certificate to Southern to build facilities and lease them to Tennessee.

Similarly, the prior FERC orders FERC cites[52] provide no support. The *Gulf Crossing* order is inapposite because it did not address the revenue-crediting rate issue.[53] In *East Ohio Gas*, FERC acknowledged the possibility of over-recovery of costs but held that revenue crediting was a decision for the state utility commission setting the retail rates of the affiliated lessor, a local distribution company.[54] That rationale provides no support for FERC to deny revenue credits when FERC regulates the affiliated lessor's interstate transportation rates.

Contrary to FERC's suggestion,[55] this Court's decisions in *Tenneco Gas v. FERC*[56] and *National Fuel Gas Supply Corp. v. FERC*[57] do not suggest FERC may close its eyes to Southern's over-recovery of costs absent specific evidence of self-dealing by Southern and Tennessee. *Tenneco Gas* upheld FERC's legislative

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[52] *See* FERC Br. at 97.

[53] *Gulf Crossing Pipeline Co.*, 123 FERC ¶ 61,100 (2008).

[54] *E. Ohio Gas Co.*, 133 FERC ¶ 61,076, P 70 (2010), *reh'g denied*, 135 FERC ¶ 61,034 (2011).

[55] *See* FERC Br. at 97-98.

[56] 969 F.2d 1187 (D.C. Cir. 1992).

[57] 468 F.3d 831 (D.C. Cir. 2006).

finding, in a rulemaking establishing prophylactic rules, that a pipeline can use its "monopolistic market power" over transportation to earn monopoly profits from its dealings with affiliates.[58] *National Fuel Gas Supply Ass'n* did not question that established principle of law.[59] Contrary to FERC's suggestion, neither case supports a FERC ratemaking policy that requires case-by-case evidence of pipeline misconduct to justify FERC requiring cost-of-service ratemaking for pipeline transporation services.[60] In any event, in the present case FERC ordered no "monitoring" of the affiliates' conduct and refused all "consideration of the particular circumstances of individual pipelines and their affiliates."[61] Indeed, as FERC concedes, its lease policy deems the parties' affiliation irrelevant to its approval of the lease and Southern's cost-based transportation rates.

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[58] 969 F.2d at 1199. *See id.* at 1197-99 (requiring disclosure of transportation information provided to marketing affiliates), 1202-09 (requiring maximum practicable independent operation of pipeline operations from marketing affiliates).

[59] 468 F.3d at 834-35, 840, 844.

[60] *Id.* at 844 (noting FERC could rely on potential dangers from affiliate communications to support prophylactic rules). *See also Pennell v. City of San Jose*, 485 U.S. 1, 13 (1988) (noting that "a legitimate and rational goal of price regulation is the protection of consumer welfare" and "'[t]he primary aim of the Natural Gas Act was to protect consumers against exploitation at the hands of natural gas companies'") (quoting *FPC v. Hope Nat. Gas Co.*, 320 U.S. 591, 610 (1944) (alteration omitted)).

[61] FERC Br. at 98.

Southern/Tennessee likewise claim their affiliation is irrelevant: "FERC Appropriately Found That the Affiliate Relationship Between Tennessee and Southern Does Not Change Its Analysis."[62] Like FERC, they simply cite to FERC cases applying the lease policy.[63] And like FERC, they misstate Municipals' challenge as being whether FERC should "reject the lease."[64]

Southern/Tennessee contend that "while [they] are affiliated, they each have independent fiduciary duties."[65] Whatever that argument implies, it is a post hoc rationalization and not a basis to uphold FERC's action. In any event, the fact that a Kinder Morgan wholly owned subsidiary (Tennessee) will overpay a Kinder Morgan 50%-owned subsidiary (Southern) is hardly a basis for FERC to ignore the issue.

Likewise, while Southern/Tennessee assert (without evidence) that they negotiated the lease terms at arm's length,[66] FERC made no such finding—which is unsurprising, because FERC's lease policy treats affiliates and non-affiliates the same.

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[62] Intervenors Br. at 34.

[63] *Id.* at 34 & n.6.

[64] *Id.* at 35.

[65] *Id.*

[66] *See id.* at 35.

Southern/Tennessee also assert that because FERC regulates Tennessee's transportation rates, "[t]here is simply no incentive for Tennessee to overpay Southern."[67] But that argument rings hollow where FERC approved the lease payment simply because of the lease's "benefits" to the parties and because the lease payment was less than Tennessee's cost to construct its own facilities. FERC's orders explicitly allowed Tennessee to overpay Southern's lease costs, yet FERC disclaimed any responsibility to consider that fact when establishing cost-of-service transportation rates for Southern.

D. The Court should vacate FERC's unsustainable revenue-credit ruling.

"Vacatur is the normal remedy when [the Court is] faced with unsustainable agency action."[68] Nonetheless, Intervenors (but not FERC) argue that if the Court remands FERC's orders it should do so without vacatur.[69] Regardless whether the Court vacates FERC's issuance of the certificates and authorization of the lease, however, the Court should vacate FERC's orders with respect to its ruling not requiring lease-revenue crediting in future proceedings on Southern's

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[67] *Id.*

[68] *Brotherhood of Locomotive Eng'rs & Trainmen v. Fed. R.R. Admin.*, 972 F.3d 83, 117 (D.C. Cir. 2020) (cleaned up).

[69] Intervenors Br. at 36-38.

transportation rates.[70] "The decision whether to vacate depends on the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed."[71] The profound deficiencies in FERC's analysis of the revenue-crediting issue make it far from certain FERC chose correctly. Moreover, Intervenors do not assert, much less demonstrate, that vacating FERC's ruling would have any disruptive consequences, and it is hard to see how it could disrupt the affiliated pipelines' operations, facilities, or lease transaction. Vacatur is unquestionably the appropriate remedy.

CONCLUSION

FERC's orders should be vacated to the extent FERC proscribed the crediting of excess lease revenues in determining Southern's cost of service in establishing its rates to its system customers.

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[70] *Cf. NRG Power Mktg. v. FERC*, 862 F.3d 108, 110, 117 (D.C. Cir. 2017) (vacating FERC orders with respect to rulings on aspects of a public utility's proposed wholesale rate changes).

[71] *Allied-Signal, Inc. v. Nuclear Regul. Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993) (cleaned up).

Respectfully submitted,

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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.

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