

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

Nos. 18-1252 and 18-1254 (consolidated)

ENABLE MISSISSIPPI RIVER TRANSMISSION, LLC,
ENABLE GAS TRANSMISSION, LLC, AND SFPP, L.P.,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

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

**BRIEF OF RESPONDENTS
FEDERAL ENERGY REGULATORY COMMISSION
AND UNITED STATES OF AMERICA**

Makan Delrahim
Assistant Attorney General

James P. Danly
General Counsel

Michael F. Murray
Deputy Assistant Attorney General

Robert H. Solomon
Solicitor

Robert J. Wiggers
Robert B. Nicholson
Attorneys

Scott Ray Ediger
Elizabeth E. Rylander
Attorneys

For Respondent
United States of America
U.S. Department of Justice
Washington, D.C. 20530

For Respondent
Federal Energy Regulatory
Commission
Washington, D.C. 20426

Certificate as to Parties, Rulings, and Related Cases

A. Parties:

Except for the following, the parties and intervenors appearing before this Court and before the Federal Energy Regulatory Commission are as stated in the Petitioners' Brief:

Indiana Gas Company, Inc.

Kentucky Cities

B. Rulings Under Review:

1. *Inquiry Regarding the Commission's Policy for Recovery of Income Tax Costs*, 162 FERC ¶ 61,227 (2018) ("2018 Policy Statement"), R. 70, JA 535; and

2. *Inquiry Regarding the Commission's Policy for Recovery of Income Tax Costs*, 164 FERC ¶ 61,030 (2018) ("Rehearing Order"), R. 91, JA 739.

C. Related Cases:

As discussed in the body of this brief, the orders on review in this appeal state Respondent Federal Energy Regulatory Commission's policy intentions, and

have no binding legal effect on Petitioners. The merits of the policy articulated in these orders, as the Commission has applied it to Petitioner SFPP, L.P., are challenged in *SFPP, L.P. v. FERC*, D.C. Cir. Nos. 19-1067, *et al.* (“Related Case”) (briefing in progress).

/s/ Scott Ray Ediger

Scott Ray Ediger

Attorney

November 15, 2019

Table of Contents

Statement of Issues.....	1
Counterstatement of Jurisdiction	3
Statutes and Regulations	4
Statement of Facts.....	5
I. Statutory and regulatory background	5
II. History of proceeding	6
A. Events leading up to <i>United Airlines</i>	6
1. Proportional income tax allowance.....	6
2. Full income tax allowance	9
B. <i>United Airlines</i> and Commission actions on remand.....	13
C. The FERC orders on review	15
Summary of Argument	17
Argument.....	18
I. The petitions for review should be dismissed as non-justiciable.	18
A. The challenged orders are general statements of policy that are not subject to judicial review.....	20
1. The 2018 Policy Statement has no legal effect on Pipelines.	20
2. The Commission characterized the 2018 Policy Statement as a non-binding guidance document.	21
3. The Commission has not applied the 2018 Policy Statement as if it were binding on regulated parties.	23

Table of Contents

B.	Pipelines lack standing to appeal the 2018 Policy Statement.	26
C.	Other issues raised here should be adjudicated elsewhere.....	28
III.	Standard of Review.....	30
IV.	The Commission reasonably adopted the 2018 Policy Statement.	31
A.	A master limited partnership double recovers when its cost-of-service includes an income tax allowance and a discounted cash flow return on equity.	33
1.	Just and reasonable rates are based on the pipeline’s costs.	35
a.	The return on equity in a pipeline’s rates recovers the cost of attracting capital.....	35
b.	The income tax allowance in a pipeline’s rates recovers the pipeline’s direct income tax expense.....	37
2.	Pass-through partnership pipelines do not directly pay income taxes; therefore, no separate recovery of income tax expense is necessary.	37
3.	The discounted cash flow methodology produces a pre-tax return whether or not a pipeline receives an income tax allowance.	40
4.	Empirical evidence does not undercut the finding that the discounted cash flow determines a pre-tax return.	47
B.	Pipelines’ remaining arguments also rely on a misunderstanding about the discounted cash flow methodology.	48
C.	The issue of discriminatory application of the 2018 Revised Policy Statement is not ripe for review.	53
	Conclusion	58

Table of Authorities

Court Cases

<i>Alaska v. FERC</i> , 980 F.2d 761 (D.C. Cir. 1992).....	57
<i>Am. Hosp. Ass’n v. Bowen</i> , 834 F.2d 1037 (D.C. Cir. 1987).....	6, 21
<i>Boston Edison Co. v. FERC</i> , 885 F.2d 962 (1st Cir. 1989).....	31
<i>BP West Coast Prods., LLC v. FERC</i> , 374 F.3d 1263 (D.C. Cir. 2004).....	6-12, 18, 19, 32, 33, 36-38, 49, 52
<i>Brooklyn Union Gas Co. v. FERC</i> , 409 F.3d 404 (D.C. Cir. 2005).....	53
<i>Cal. Communities Against Toxics v. EPA</i> , 934 F.3d 627 (D.C. Cir. 2019).....	20, 21
<i>Canadian Ass’n of Petroleum Producers v. FERC</i> , 487 F.3d 973 (D.C. Cir. 2007).....	4, 19, 22
<i>City of Charlottesville v. FERC</i> , 774 F.2d 1205 (D.C. Cir. 1985).....	6, 11, 33, 37
<i>CNG Transmission Corp. v. FERC</i> , 40 F.3d 1289 (D.C. Cir. 1994).....	28
<i>ESI Energy, LLC v. FERC</i> , 892 F.3d 321 (D.C. Cir. 2018).....	30
<i>ExxonMobil Oil Corp. v. FERC</i> , 487 F.3d 945 (D.C. Cir. 2007).....	6, 9-13, 18, 19, 32, 33, 37-39, 48, 49, 51

Table of Authorities

<i>FERC v. Elec. Power Supply Ass'n</i> , 136 S. Ct. 760 (2016).....	31, 52
<i>Florida Mun. Power Agency v. FERC</i> , 315 F.3d 362 (D.C. Cir. 2003).....	30
<i>FPC v. Hope Natural Gas Co.</i> , 320 U.S. 591 (1944).....	8, 12, 45
<i>FPL Energy Maine Hydro LLC v. FERC</i> , 287 F.3d 1151 (D.C. Cir. 2002).....	30
<i>Frontier Pipeline Co. v. FERC</i> , 452 F.3d 774 (D.C. Cir. 2006).....	5
<i>Hi-Tech Furnace Sys. v. FCC</i> , 224 F.3d 781 (D.C. Cir. 2000).....	54
<i>Interstate Natural Gas Ass'n of Am. v. FERC</i> , 285 F.3d 18 (D.C. Cir. 2002).....	23
<i>Lakeland Bus Lines v. ICC</i> , 810 F.2d 280 (D.C. Cir. 1987).....	54
<i>Moreau v. FERC</i> , 982 F.2d 556 (D.C. Cir. 1993).....	54
<i>Morgan Stanley Capital Grp. v. Pub. Util. Dist. No. 1</i> , 554 U.S. 527 (2008).....	5
<i>Nat'l Mining Ass'n v. McCarthy</i> , 758 F.3d 243 (D.C. Cir. 2014).....	3, 20
<i>New England Power Generators Ass'n v. FERC</i> , 707 F.3d 364 (D.C. Cir. 2013).....	28
<i>Pac. Gas & Elec. Co. v. FPC</i> , 506 F.2d 33 (D.C. Cir. 1974).....	4, 6, 21, 22

Table of Authorities

<i>Public Serv. Comm’n v. FERC</i> , 813 F.2d 448 (D.C. Cir. 1987).....	30
<i>Sierra Club v. EPA</i> , 873 F.3d 946 (D.C. Cir. 2017).....	20
<i>Spokeo, Inc. v. Robins</i> , 136 S. Ct. 1540 (2016).....	4, 26, 27
<i>Tenn. Valley Mun. Gas Ass’n v. FERC</i> , 140 F.3d 1085 (D.C. Cir. 1998).....	53
<i>Texas v. EPA</i> , 726 F.3d 180 (D.C. Cir. 2013).....	26
<i>Transwestern Pipeline Co. v. FERC</i> , 59 F.3d 222 (D.C. Cir. 1995).....	56
<i>United Airlines, Inc. v. FERC</i> , 827 F.3d 122 (D.C. Cir. 2016).....	1, 13-16, 18, 25, 28, 31, 33-36, 38-40, 43, 48-51
<i>Warth v. Seldin</i> , 422 U.S. 490 (1975).....	26
<u>Administrative Cases</u>	
<i>Composition of Proxy Groups for Determining Gas & Oil Pipeline Return on Equity</i> , 123 FERC ¶ 61,048 (2008)	45
<i>Enable Miss. River Transmission, LLC</i> , 164 FERC ¶ 61,075 (2018).....	24, 25, 30, 52, 55, 57
<i>Enbridge Energy, Ltd. P’ship</i> , 166 FERC ¶ 61,237 (2019).....	27
<i>Inquiry Regarding Income Tax Allowances</i> , 111 FERC ¶ 61,139 at P 31 (2005) (2005 Policy Statement)	10

Table of Authorities

<i>Inquiry Regarding Income Tax Allowances,</i> 69 Fed. Reg. 72,188 (Dec. 13, 2004).....	9
<i>Inquiry Regarding the Commission’s Policy for Recovery of Income Tax Costs,</i> 157 FERC ¶ 61,210 (2016) (Notice of Inquiry)	15
<i>Inquiry Regarding the Commission’s Policy for Recovery of Income Tax Costs,</i> 162 FERC ¶ 61,227 (2018) (2018 Policy Statement).....	2, 15, 20, 22, 28, 32, 34, 35, 36, 40, 42, 43, 44, 46-48, 50, 51, 55
<i>Inquiry Regarding the Commission’s Policy for Recovery of Income Tax Costs,</i> 164 FERC ¶ 61,030 (2018) (Rehearing Order)	2, 3, 16, 19, 22, 23, 26, 32, 52, 57
<i>Inquiry Regarding the Commission’s Policy for Recovery of Income Tax Costs,</i> 168 FERC ¶ 61,136 (2019).....	22
<i>Interstate and Intrastate Natural Gas Pipelines, Order No. 849,</i> 164 FERC ¶ 61,031 (2018).....	16, 25
<i>Lakehead Pipe Line Co., Opinion No. 397,</i> 71 FERC ¶ 61,338 (1995).....	7, 8
<i>Lakehead Pipe Line Co., Opinion No. 397-A,</i> 75 FERC ¶ 61,181 (1996).....	7
<i>MoGas Pipeline LLC,</i> 163 FERC ¶ 61,223 (2018).....	48, 53, 56
<i>MoGas Pipeline LLC,</i> 168 FERC ¶ 61,099 (2019).....	57
<i>San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.,</i> 131 FERC ¶ 61,144 (2010).....	54
<i>SFPP, L.P.,</i> 111 FERC ¶ 61,334 (2005).....	10

Table of Authorities

<i>SFPP, L.P.</i> , Opinion No. 511, 134 FERC ¶ 61,121 (2011).....	9, 13
<i>SFPP, L.P.</i> , Opinion No. 511-C, 162 FERC ¶ 61,228 (2018).....	2, 16, 24, 25, 29, 32, 34, 38, 39, 41, 44, 46, 50, 52, 54, 55
<i>SFPP, L.P.</i> , Opinion No. 511-D, 166 FERC ¶ 61,142 (2019).....	2, 24, 29, 35, 41, 43-45, 52
<i>Trailblazer Pipeline Co., LLC</i> , 164 FERC ¶ 61,074 (2018).....	48, 53, 56

Statutes

Administrative Procedure Act

5 U.S.C. § 552.....	6
5 U.S.C. § 553(b).....	6

Interstate Commerce Act

49 U.S.C. § 60502.....	5
49 U.S.C. app. § 1(1)(b)	5
49 U.S.C. app. § 1(5)(a).....	5
49 U.S.C. app. § 6(1)	5
49 U.S.C. app. § 6(7)	5

Natural Gas Act

15 U.S.C. § 717.....	5
15 U.S.C. § 717c.....	5

Table of Authorities

15 U.S.C. § 717c(c)5

15 U.S.C. § 717r(b).....4, 56

Regulations

18 C.F.R. § 154.301(c)24

18 C.F.R. § 385.217(b).....54

Glossary

2005 Policy Statement	<i>Inquiry Regarding Income Tax Allowances</i> , 111 FERC ¶ 61,139 (2005)
2018 Policy Statement	<i>Inquiry Regarding the Commission’s Policy for Recovery of Income Tax Costs</i> , 162 FERC ¶ 61,227 (2018), R. 70, JA 535
FERC or Commission	Respondent Federal Energy Regulatory Commission
Int. Br.	Brief of Intervenor
Opinion No. 511-C	<i>SFPP, L.P.</i> , Opinion No. 511-C, 162 FERC ¶ 61,228 (2018)
Opinion No. 511-D	<i>SFPP, L.P.</i> , Opinion No. 511-D, 166 FERC ¶ 61,142 (2019)
P	A paragraph in a FERC order
Pipeline Association	Intervenor Association of Oil Pipe Lines
Pipelines	Petitioners Enable Mississippi River Transmission, LLC, Enable Gas Transmission, LLC, and SFPP, L.P.
Pet. Br.	Brief of Petitioners
R.	An item in the record of this proceeding
Rehearing Order	<i>Inquiry Regarding the Commission’s Policy for Recovery of Income Tax Costs</i> , 164 FERC ¶ 61,030 (2018), R. 91, JA 739
Related Case	<i>SFPP, L.P. v. FERC</i> , D.C. Cir. Nos. 19-1067, <i>et al.</i> (on review of Opinion Nos. 511-C and 511-D)

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

Nos. 18-1252 and 18-1254 (consolidated)

ENABLE MISSISSIPPI RIVER TRANSMISSION, LLC,
ENABLE GAS TRANSMISSION, LLC, AND SFPP, L.P.,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

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

**BRIEF OF RESPONDENTS
FEDERAL ENERGY REGULATORY COMMISSION
AND UNITED STATES OF AMERICA**

Statement of Issues

In 2016, this Court remanded to Respondent Federal Energy Regulatory Commission (“Commission” or “FERC”) orders that allowed Petitioner SFPP, L.P. to recover both a return on equity and a separate income tax allowance in its rates for transportation of petroleum products. *See United Airlines, Inc. v. FERC*, 827 F.3d 122 (D.C. Cir. 2016). The Commission had not adequately explained why its

orders, which followed then-current Commission policy, did not permit SFPP and other pipelines to double-recover their income tax costs. *Id.* at 136-37.

This is one of two companion cases relating to the Commission's reconsideration of its income tax allowance policy. In the related case, SFPP challenges Commission orders that implemented the remand of *United Airlines* and required SFPP to remove the income tax allowance from its rates. *See SFPP, L.P.*, Opinion No. 511-C, 162 FERC ¶ 61,228 (2018), *on reh'g*, Opinion No. 511-D, 166 FERC ¶ 61,142 (2019), *appeal pending*, *SFPP, L.P. v. FERC*, D.C. Cir. Nos. 19-1067, *et al.* ("Related Case") (briefing in progress).

In this case, Petitioners Enable Mississippi River Transmission, LLC, Enable Gas Transmission, LLC, and SFPP, L.P. (collectively, "Pipelines") bring a facial challenge to a generic statement of policy. *See Inquiry Regarding the Commission's Policy for Recovery of Income Tax Costs*, 162 FERC ¶ 61,227, at PP 2, 45-47 (2018) ("2018 Policy Statement"), R. 70, JA 538, 566-68, *on reh'g*, 164 FERC ¶ 61,030 (2018) (Rehearing Order), R. 91, JA 739. The 2018 Policy Statement announced the Commission's general intention to disallow, going forward, the income tax allowance in master limited partnership pipeline rates. 2018 Policy Statement PP 2, 45-47, JA 538, 566-68.

The issues presented for review are:

1. Whether the Court has jurisdiction to review the 2018 Policy Statement and the Rehearing Order, which have no legal effect on regulated entities and did not cause Petitioners immediate, definitive harm; and
2. Assuming jurisdiction, whether the Commission reasonably announced its general intention not to allow master limited partnership pipelines to continue to recover an income tax allowance in their rates, consistent with this Court's ruling in *United Airlines*.

Counterstatement of Jurisdiction

This Court lacks jurisdiction to review the 2018 Policy Statement and the Rehearing Order. The orders merely announce the Commission's policy intentions; they have no immediate impact on the Pipelines or any other regulated entity, and the Commission has not viewed them as a binding rule. *See* Rehearing Order P 6, JA 741-42. Such statements of policy generally are not reviewable. *See Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014). Instead, the "Commission will have to fully support and justify the application of this guidance in individual cases." Rehearing Order P 6, JA 741-42. Parties therefore may challenge the policy as it is applied to them, as SFPP has done in the Related Case.

Where an agency’s statement of policy has no immediate and significant impact on the petitioners, and where the record does not permit meaningful review, petitioners are not aggrieved within the meaning of the Natural Gas Act. *See Pac. Gas & Elec. Co. v. FPC*, 506 F.2d 33, 48 (D.C. Cir. 1974) (citing 15 U.S.C. § 717r(b)); *see also Canadian Ass’n of Petroleum Producers v. FERC*, 487 F.3d 973, 974 (D.C. Cir. 2007) (facial challenge to statement of agency policy “raises substantial issues of both standing and ripeness”). Pipelines have not shown that their alleged injuries are derived from the orders on review, or how a ruling in their favor would redress them; accordingly, they lack standing to pursue this appeal. *See, e.g., Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547-49 (2016).

This Court, on January 31, 2019, referred the Commission’s October 24, 2018 motion to dismiss petitions for review of the Commission’s policy statement, for lack of an immediate, binding effect, to the merits panel. The Court directed the parties to address in their merits briefs the jurisprudential issues raised in, and in respect to, the Commission’s motion to dismiss.

Statutes and Regulations

Pertinent statutes and regulations are reproduced in the Addendum.

Statement of Facts

I. Statutory and regulatory background

The Interstate Commerce Act requires oil pipelines, as common carriers, to keep their rates on file with a regulatory body—originally the Interstate Commerce Commission, *see* 49 U.S.C. app. §§ 1(1)(b), 6(1), 6(7) (1988), but now FERC. *See* 49 U.S.C. § 60502. “All charges” for pipeline transportation, or service in connection with transportation, must be just and reasonable; unjust and unreasonable charges are unlawful. 49 U.S.C. app. § 1(5)(a); *see also* *Frontier Pipeline Co. v. FERC*, 452 F.3d 774, 776 (D.C. Cir. 2006) (explaining history of regulation under the Interstate Commerce Act, as well as peculiar citation format).

Similarly, the Natural Gas Act requires companies engaged in the transportation and sale for resale of natural gas in interstate commerce to keep their rates on file with FERC. 15 U.S.C. §§ 717, 717c(c). These rates also must be just and reasonable, and unjust and unreasonable rates are unlawful. 15 U.S.C. § 717c. Although the “statutory requirement that rates be ‘just and reasonable’ is obviously incapable of precise judicial definition,” *Morgan Stanley Capital Grp. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 532 (2008), this Court has “held that ‘just and reasonable’ rates are ‘rates yielding sufficient revenue to cover all proper costs, including federal income taxes, plus a specified return on invested capital.’”

ExxonMobil Oil Corp. v. FERC, 487 F.3d 945, 951 (D.C. Cir. 2007) (quoting *City of Charlottesville v. FERC*, 774 F.2d 1205, 1207 (D.C. Cir. 1985)).

The Administrative Procedure Act requires federal agencies to publish “substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency[.]” 5 U.S.C. § 552(a)(1)(D). Agencies may make general statements of policy that lack the force of law, but “announce their ‘tentative intentions for the future’ without binding themselves.” *Am. Hosp. Ass’n v. Bowen*, 834 F.2d 1037, 1046 (D.C. Cir. 1987) (citation omitted) (quoting *Pac. Gas & Elec. Co.*, 506 F.2d at 38)).

II. History of proceeding

A. Events leading up to *United Airlines*

1. Proportional income tax allowance

In 1999 the Commission permitted SFPP to include in its rates an income tax allowance in proportion to the amount of its partnership units held by corporations. *See BP West Coast Prods., LLC v. FERC*, 374 F.3d 1263, 1286-87 (D.C. Cir. 2004) (noting that “SFPP, Inc., a subchapter C corporation, held a 42.7% interest in the SFPP limited partnership,” and therefore the Commission allowed the pipeline to recover in rates 42.7% of the income taxes “that would have been incurred had the pipeline’s jurisdictional earnings been subject to

corporate taxation”). The Commission’s decision followed its then-current “*Lakehead*” policy, which “permitted a corporate income tax allowance but not an allowance for the tax liability of other investors in a limited partnership[.]” *Id.* at 1290; see *Lakehead Pipe Line Co.*, Opinion No. 397, 71 FERC ¶ 61,338 (1995), *reh’g denied*, Opinion No. 397-A, 75 FERC ¶ 61,181 (1996). The Commission’s theory in permitting the tax allowance was that although a limited partnership operating a pipeline did not incur income tax, the corporate owners of partnership units were entitled to recover, as a cost of operating the pipeline, the corporate tax paid on the partnership’s earnings. See *BP West Coast*, 374 F.3d at 1286-87.

Both SFPP and its shipper customers appealed, disagreeing with the Commission that the *Lakehead* policy was the appropriate way to determine the income tax allowance. SFPP claimed that the 42.7% income tax allowance was too low, and that the Commission should have treated the “regulated entity as if it alone were responsible for taxes which would have been incurred” if the pipeline were a corporation, not a partnership. *Id.* at 1287. But pipeline shippers argued that the 42.7% income tax allowance was too high—in fact, a “phantom tax”—because the pipeline itself did not incur income taxes. *Id.* at 1286-87.

This Court found that “shipper petitioners offer a convincing analysis consistent with ratemaking principles and governing law, and that on the record

before [the Court] SFPP is entitled to no allowance for the phantom taxes it did not pay.” *Id.* at 1288. The Court disagreed with the Commission’s view of the corporate tax as an additional burden on corporate investors, finding that “fundamental principles of ratemaking” suggested “that if the corporate tax is to be included in the cost-of-service, it is not because it is ‘an extra layer of taxation,’ but rather because it is a *cost.*” *Id.* at 1288 (citing *Lakehead Pipe Line*, Opinion No. 397, 71 FERC at 62,314) (emphasis in original).

The Court discussed, with approval, the analysis of a Commission administrative law judge, who could not reconcile the *Lakehead* policy with the principle that investors in a partnership pipeline should expect returns commensurate with returns on investments in other entities of similar risk. *See id.* at 1290 (citing *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944)). The administrative law judge “correctly derived from *Hope Natural Gas* the more specific principle that the regulating commission is to set rates in such a fashion that the regulated entity yields returns for its investors commensurate with returns expected from an enterprise of like risks.” *Id.*

Both corporate and individual investors in a non-regulated entity would expect to pay their own taxes on any profit or dividends that investment might produce. *Id.* at 1291. That corporate investors might pay two layers of tax was

merely “a product of the corporate form, not of the regulated or unregulated nature of the pipeline or any comparable investment or of the risks involved therein.” *Id.* The administrative law judge therefore concluded that no tax allowance was necessary to ensure that an individual limited partner received a sufficient return. *Id.* at 1290. And the Court, “unlike the Commission,” agreed. *Id.*; *see id.* at 1291-92 (finding that “where there is no tax generated by the regulated entity, ... the regulator cannot create a phantom tax in order to create an allowance to pass through to the rate payer”).

2. Full income tax allowance

The Commission took two actions in response to *BP West Coast*. First, it issued a Notice of Inquiry seeking comment on “when, if ever, it is appropriate to provide an income tax allowance for partnerships or similar pass-through entities that hold interests in a regulated public utility.” *ExxonMobil*, 487 F.3d at 950 (citing *Inquiry Regarding Income Tax Allowances*, 69 Fed. Reg. 72,188 (Dec. 13, 2004)). (“Pass-through” entities pass their tax liability through to their owners. *SFPP, L.P.*, Opinion No. 511, 134 FERC ¶ 61,121, at n.426 (2011).) The comments proposed four options for modifying the Commission’s income tax allowance policy. *See ExxonMobil*, 487 F.3d at 951-52; *Inquiry Regarding Income Tax Allowances*, 111 FERC ¶ 61,139, at P 31 (2005) (2005 Policy Statement),

appeal dismissed, Canadian Ass'n of Petroleum Producers, 487 F.3d 973. The Commission discarded two options that, like *Lakehead*, distinguished among partnership interests held by corporations and other entities without a sufficient explanation. *See ExxonMobil*, 487 F.3d at 951-52; 2005 Policy Statement at PP 33-38. One of the remaining two choices “would have categorically prohibited limited partnerships from taking income tax allowances, while the other would have granted partnerships a full income tax allowance to the extent that the partners incur actual or potential tax liability.” *ExxonMobil*, 487 F.3d at 952; 2005 Policy Statement at P 31. The Commission chose the latter option. *See ExxonMobil*, 487 F.3d at 952; 2005 Policy Statement at P 1, 32.

Second, the Commission applied the 2005 Policy Statement in its order on remand of *BP West Coast*, and approved SFPP’s request for an income tax allowance, provided that the pipeline could show that its partners would incur an actual or potential income tax obligation from the pipeline’s regulated income. *See SFPP, L.P.*, 111 FERC ¶ 61,334, at PP 21-27 (2005). Various shippers appealed the *BP West Coast* remand order, contending that it was arbitrary, capricious, and contrary to *BP West Coast* to grant an income tax allowance to entities that do not actually pay income taxes. *See ExxonMobil*, 487 F.3d at 948, 950.

This Court rejected those claims. *See id.* at 948-55 (to determine whether the remand orders were contrary to *BP West Coast*, the Court “necessarily review[ed] the Commission’s conclusions and reasoning in the [2005] Policy Statement”). With regard to the 2005 Policy Statement, the Court held that “the Commission was certainly permitted—if not required—to reject the comments that proposed a modified *Lakehead* policy,” and after discarding options in this vein, the Commission had reasonably chosen to provide an income tax allowance for all investors in a partnership pipeline. *ExxonMobil*, 487 F.3d at 951-53.

The Court noted that rates should “yield[] sufficient revenue to cover all proper costs, including federal income taxes, plus a specified return on invested capital.” *Id.* at 951 (quoting *City of Charlottesville*, 774 F.2d at 1207). The Commission had reasonably held that “income taxes paid by partners on their distributive share of the pipeline’s income are ‘just as much a cost of acquiring and operating the assets of that entity as if the utility assets were owned by a corporation,’” and there was “no good reason to limit the income tax allowance to corporations....” *Id.* at 952 (quoting 2005 Policy Statement P 33). In “light of the deference we extend to the Commission’s judgments regarding ratemaking issues,” the Court could not find that the Commission had improperly granted SFPP an

income tax allowance to the extent that any of its partners had an actual or potential income tax liability on their share of partnership income. *Id.* at 951.

As to the consistency of the 2005 Policy Statement with *BP West Coast*, the Court in *ExxonMobil* noted “that *BP West Coast* did not categorically prohibit the Commission from granting income tax allowances to pipelines that operate as limited partnerships.” *Id.* at 953. That case “did not pass upon” the specific question at issue in *ExxonMobil*, i.e., whether the Commission could grant an income tax allowance to limited partnerships for the income taxes that all partners paid on their partnership income. *Id.* at 954. Rather, the *BP West Coast* Court had been concerned with the unsupported differential treatment of individual and corporate investors in a partnership pipeline—and the 2005 Policy Statement had resolved that problem. *See id.* at 953-54; *see also id.* at 951 (orders on remand of *BP West Coast* “resolved the principal defect of the *Lakehead* policy,” which was this differential treatment).

Finally, the Court found that the Commission reasonably determined “that a full income tax allowance is necessary to ensure that corporations and partnerships of like risk will earn comparable after-tax returns,” as required by *Hope Natural Gas*, 320 U.S. at 603. *ExxonMobil*, 487 F.3d at 952-53, 955 (providing numerical example). The Court “defer[s] to FERC’s expert judgment about the best way to

equalize after-tax returns for partnerships and corporations,” although it noted that “[a]rguably, a fair return on equity might have been afforded if FERC had chosen the fourth alternative of computing return on pretax income and providing no tax allowance at all for the pipeline owners.” *Id.* at 953, 955.

B. *United Airlines* and Commission actions on remand

In SFPP’s next rate case, its shipper customers again challenged the policy of granting SFPP’s partner-investors an income tax allowance. *See United Airlines*, 827 F.3d at 134; *SFPP, L.P.*, Opinion No. 511, 134 FERC ¶ 61,121 at P 236. The shippers contended that the Commission’s discounted cash flow methodology provides a sufficient after-tax return to attract investment; therefore, the income tax allowance permitted partners to double-recover their taxes. *See United Airlines*, 827 F.3d at 127; Opinion No. 511 at P 236.

This Court held that, under *ExxonMobil*, it “may be reasonable” for the Commission to grant an income tax allowance to partnership pipelines, to the extent the Commission has a reasoned basis for doing so. *United Airlines*, 827 F.3d at 134-35. In this case, however, the Commission had not explained why allowing SFPP to recover both a return on equity (determined through the discounted cash flow analysis) and an income tax allowance did not produce a double recovery for partnership, as opposed to corporate, pipelines. *Id.* at 134.

The Court noted that the parties “do not disagree on the essential facts:” (1) a partnership pipeline does not incur taxes, except those imputed to its partners, at the entity level; (2) the discounted cash flow return on equity determines the pre-tax investor return required to attract investment, for both corporate and partnership pipelines; and (3) with a tax allowance in place, a partner in a partnership pipeline will receive a higher after-tax return than a shareholder in a corporate pipeline, at least in the short term. *Id.* at 136. These “facts support the conclusion that granting a tax allowance to partnership pipelines results in inequitable returns for partners in those pipelines as compared to shareholders in corporate pipelines.” *Id.* The Court held that this conclusion was inconsistent with the parity requirement of *Hope Natural Gas*, and that the Commission’s failure to ensure parity was arbitrary and capricious. *Id.* at 136-37 (citing 320 U.S. at 603).

The shippers had not asked the Court to overrule *ExxonMobil*, and the Court held that such action was neither possible nor necessary. *Id.* at 137. It noted that the Commission “might be able to remove any duplicative tax recovery for partnership pipelines directly from the discounted cash flow return on equity” and that before *ExxonMobil*, the Commission had considered eliminating income tax allowances and setting rates based on pre-tax returns. *Id.* The Court remanded for

the agency to “consider these or other mechanisms” that would not result in double recovery. *Id.*

C. The FERC orders on review

After *United Airlines*, the Commission initiated the inquiry that culminated in the challenged orders. Recognizing the “potentially significant and widespread effect of [the *United Airlines*] holding upon the oil pipelines, natural gas pipelines, and electric utilities subject to the Commission’s regulation,” the Commission sought comment on “any proposed methods ... to resolve any double recovery of investor-level tax costs for partnerships or similar pass-through entities.” Notice of Inquiry, 157 FERC ¶ 61,210, at PP 2, 19 (2016), R. 1, JA 5, 17-18.

After considering comments, the Commission issued the 2018 Policy Statement, which agreed with the Court that “granting [a master limited partnership] an income tax allowance results in an impermissible double recovery.” 2018 Policy Statement P 45, JA 566. The Commission stated that, going forward, it would no longer permit master limited partnerships to recover an income tax allowance. *Id.* P 2, JA 538. Upon consideration of rehearing requests, the Commission explained that the Policy Statement is not a “binding rule” with immediate legal consequences, but an expression of “general policy intent designed to provide guidance by notifying entities of the course of action the

Commission intends to follow in future adjudications.” Rehearing Order P 6, JA 741-42. In future adjudications: (1) parties will have the opportunity “to challenge or support the revised policies through factual or legal presentation and to present any issues and arguments regarding” the 2018 Policy Statement; and (2) the Commission will have to “fully support and justify” the application of the Policy Statement. *Id. See Interstate and Intrastate Natural Gas Pipelines*, Order No. 849, 164 FERC ¶ 61,031, at P 54 (2018) (“We recognize that the [2018 Policy Statement] itself is guidance, *not binding precedent*.” (emphasis added)).

The Commission also moved forward with case-specific proceedings on remand from *United Airlines*, and found that granting SFPP both a discounted cash flow return on equity and an income tax allowance produces a double recovery. *SFPP, L.P.*, Opinion No. 511-C at PP 22-24. Without reference to the simultaneously-issued Policy Statement, the Commission implemented the *United Airlines* ruling “by removing the income tax allowance from SFPP’s cost of service.” Opinion No. 511-C at P 21. The Related Case concerns this application of *United Airlines* to SFPP’s rates.

Summary of Argument

This Court should dismiss the petitions for review because they challenge a general statement of Commission policy that is not subject to judicial review. The 2018 Policy Statement represents the Commission's attempt to establish broad principles guiding the income tax allowance for certain types of FERC-regulated entities—a difficult and complex aspect of cost-of-service ratemaking.

There is no immediate harm or injury here, so Pipelines lack standing to bring this appeal. The 2018 Policy Statement does not change the rates for any regulated entity. Instead, Pipelines and other entities may litigate income tax allowance issues before the Commission, and appeal the Commission's determinations if they are aggrieved in agency decisions addressing their specific circumstances. The Commission will have to defend challenges to its policy (including allegations about the summary application of the unreviewed 2018 Policy Statement) in the context of fully-formed rate cases, such as the Related Case. Pipelines also have not shown that the issuance of the 2018 Policy Statement adversely affected any specific pipeline's market value or access to capital. They allege broad financial harms to their industry as a whole, but do not establish concrete, particularized injury to themselves or other pipelines.

If the Court reaches the merits, then it should deny the petitions for review. In accordance with *United Airlines, Inc. v. FERC*, 827 F.3d 122 (D.C. Cir. 2016), the 2018 Policy Statement re-examined the Commission’s income tax allowance policy. The Commission could not explain why a pass-through partnership pipeline would not double-recover income tax costs if it receives both an income tax allowance and a return on equity that covers investor-level income taxes.

Pipelines fundamentally err by disputing that the discounted cash flow methodology determines a pre-tax return. Their contention is that the Commission’s methodology determines a pre-tax return that equals the after-tax return for pass-through entities receiving the income tax allowance. But as the *United Airlines* Court found, actual market behavior (unit prices *and* distributions) and logic demonstrate otherwise. 827 F.3d at 136. In light of the Court’s rulings in *BP West Coast*, *ExxonMobil*, and *United Airlines*, the Commission’s reasonable solution to the double-recovery problem was to disallow the income tax allowance.

Argument

I. The petitions for review should be dismissed as non-justiciable.

This case involves a facial challenge to a generic statement of Commission policy, while the Related Case (Nos. 19-1067, *et al.*) concerns the application of that policy to a regulated entity (SFPP). The Court analyzed cases with a similar

relationship to these after the Commission acted on remand of *BP West Coast*. See *Canadian Ass’n of Petroleum Producers v. FERC*, 487 F.3d 973 (D.C. Cir. 2007); *ExxonMobil Oil Corp. v. FERC*, 487 F.3d 945 (D.C. Cir. 2007). The Court dismissed a facial challenge to the 2005 Policy Statement but evaluated the policy itself in a case concerning its application to a regulated entity. See *Canadian Ass’n of Petroleum Producers*, 487 F.3d at 973 (dismissing challenge to 2005 Policy Statement); *ExxonMobil*, 487 F.3d at 951-55 (reviewing “conclusions and reasoning” of 2005 Policy Statement, and orders on remand of *BP West Coast*).

The Court should, as it did in 2007, dismiss the challenge to the 2018 Policy Statement as non-justiciable. See *Canadian Ass’n of Petroleum Producers*, 487 F.3d at 974 (facial challenge to 2005 Policy Statement was moot in light of related, as-applied case, but raised “substantial issues of both standing and ripeness”). The orders on review are “expressions of general policy intent designed to provide guidance by notifying entities of the course of action the Commission intends to follow in future adjudications.” Rehearing Order P 6, JA 741-42. The substantive issues that Pipelines raise in the abstract here have concrete, reviewable application in the Related Case, and are properly considered there. See *infra* pp. 28-30.

A. The challenged orders are general statements of policy that are not subject to judicial review.

Under the Administrative Procedure Act, agency action falls into three categories: legislative rules, interpretive rules, and general statements of policy. *See Nat'l Mining Ass'n*, 758 F.3d at 251. To distinguish among these types of actions, this Court looks at (1) the legal effect of the agency action in question; (2) “the agency’s characterization of the guidance”; and (3) “whether the agency has applied the guidance as if it were binding on regulated parties.” *Id.* at 252-53; *see also Sierra Club v. EPA*, 873 F.3d 946, 951 (D.C. Cir. 2017). Pipelines and supporting Pipeline Association do not dispute the Commission’s description of the 2018 Policy Statement, but claim that the Commission has applied it as a binding rule. Pet. Br. 2, 18-21; Int. Br. 9.

1. The 2018 Policy Statement has no legal effect on Pipelines.

“The most important factor concerns the actual legal effect (or lack thereof) of the agency action in question on regulated entities.” *Nat'l Mining Ass'n.*, 758 F.3d at 252; *see also California Communities Against Toxics v. EPA*, 934 F.3d 627, 635 (D.C. Cir. 2019) (same). The 2018 Policy Statement declared that the Commission would “no longer permit” certain partnership pipelines to recover an income tax allowance in their cost of service. 2018 Policy Statement P 2, JA 538. But because it did not change rates or otherwise directly

affect regulated entities, it is not a rule but “merely an announcement to the public of the policy which the agency hopes to implement in future rulemakings or adjudications.” *Pac. Gas & Elec.*, 506 F.2d at 38; *see also Cal. Communities Against Toxics*, 934 F.3d at 637 (finding lack of finality, for purposes of review, in agency memorandum that “forecasts” agency’s position but “has no independent legal authority”).

The Commission did not constrain its own discretion in implementing this policy, as it might have if it intended the 2018 Policy Statement to be a “binding norm.” *Am. Hosp. Ass’n*, 834 F.2d at 1047. Instead, the Commission expressly reserved the implementation of this new policy to future agency proceedings, and left open the possibility that a pipeline could “argu[e] and provid[e] evidentiary support that it is entitled to an income tax allowance and demonstrat[e] that its recovery of an income tax allowance does not result in a double-recovery of investors’ income tax costs.” Rehearing Order P 8, JA 742.

2. The Commission characterized the 2018 Policy Statement as a non-binding guidance document.

“When the agency states that in subsequent proceedings it will thoroughly consider not only the policy’s applicability to the facts of a given case but also the underlying validity of the policy itself, then the agency intends to treat the order as a general statement of policy.” *Pac. Gas & Elec.*, 506 F.2d at 39. The

Commission characterized the 2018 Policy Statement as non-binding, only “affect[ing] both oil and natural gas [master limited partnership] pipelines on a *going-forward basis*.” 2018 Policy Statement P 46 (emphasis added), JA 566-67. In other words, the 2018 Policy Statement will not have an “immediate and significant impact,” but will only affect regulated entities when (and if) applied in future adjudicated rate cases. *Pac. Gas & Elec.*, 506 F.2d at 35; *see also Canadian Ass’n of Petroleum Producers*, 487 F.3d at 974 (2005 Policy Statement’s lack of immediate and significant impact raised substantial ripeness issues). The Commission also acknowledged that it would “have to fully support and justify the application of this guidance in individual cases.” Rehearing Order P 6, JA 741-42.

The Commission further confirmed the non-binding nature of the 2018 Policy Statement when it declined to address the merits of the rehearing requests until future rate proceedings where these issues could be addressed “in the context of specific cases in which they apply.” Rehearing Order PP 6, 8, JA 741-42. *See id.* P 7 (the 2018 Policy Statement is not “finally determinative of the issues or rights to which it is addressed, but rather, only announces the agency’s tentative intentions for the future”) (*quoting Pac. Gas & Elec.*, 506 F.2d at 38) (internal quotations omitted), JA 742; *see also Inquiry Regarding the Commission’s Policy for Recovery of Income Tax Costs*, 168 FERC ¶ 61,136, at P 4 (2019) (Commission

normally dismisses requests for rehearing of policy statements and reserves the issues contained therein for specific proceedings in which the policy is applied). And as previously noted, the Commission acknowledged that labeling its orders as non-binding means that the policy must survive judicial scrutiny in the context of future, case-specific orders—such as the SFPP-specific rate orders now on review in the Related Case (Nos. 19-1067, *et al.*). Rehearing Order P 6, JA 741-42. *See Interstate Natural Gas Ass’n of Am. v. FERC*, 285 F.3d 18, 60 (D.C. Cir. 2002) (warning that the non-binding characterization “comes at a price to the Commission; in applying the policy, it will not be able simply to stand on its duty to follow its rules.”)

3. The Commission has not applied the 2018 Policy Statement as if it were binding on regulated parties.

Pipelines complain that the Commission has applied the 2018 Policy Statement as a “de facto rule,” and summarily denied them an opportunity to show that they are entitled to an income tax allowance in their transportation rates. Pet. Br. 17-22. But the Commission independently analyzed both pipelines’ individual rate cases, based on the records compiled in those cases, and reasonably concluded that granting the pipelines an income tax allowance would lead to double recovery.

On remand from *United Airlines*, the Commission considered SFPP’s “arguments and evidence,” plus SFPP’s post-remand comments and reply

comments, in its determination to remove the income tax allowance from SFPP's rates. *See* Opinion No. 511-D at P 17; Opinion No. 511-C at P 19-20. As SFPP has acknowledged, the Commission did not rely on the 2018 Policy Statement to find that granting SFPP both a return on equity and an income tax allowance would result in double-recovery of its tax costs. *See* Opinion No. 511-C at P 21 (“implement[ing] the *United Airlines* remand” for SFPP's West Line); Opinion No. 511-D at P 4 (in request for rehearing of Opinion No 511-C, SFPP acknowledged that order's lack of reference to the 2018 Policy Statement). And as “SFPP has had multiple opportunities to be heard on this issue” over “more than a decade,” the Commission reasonably held that administrative finality outweighed SFPP's desire to reopen the record of its long-running proceeding. Opinion No. 511-D P 27.

Enable Mississippi filed a new rate case, including a proposed income tax allowance, three months after the Commission issued the 2018 Policy Statement and Opinion No. 511-C. *See Enable Miss. River Transmission, LLC*, 164 FERC ¶ 61,075, at P 8 (2018), *reh'g pending*. Under Commission regulations, Enable Mississippi was required to present its full case-in-chief in its rate filing. *Id.* P 39 (citing 18 C.F.R. § 154.301(c)). The Commission considered the pipeline's factual and legal arguments, *id.* PP 29-40, and found that granting the income tax

allowance would result in an impermissible double recovery. *Id.* P 39. Enable Mississippi claims that the Commission should have allowed it to respond to the later-issued Rehearing Order, Pet. Br. 20-21, but this does not help its argument. *United Airlines* and Opinion No. 511-C (concerning SFPP pipeline rate) were the precedent to which Enable Mississippi had to respond in advocating for an income tax allowance. *Enable Miss. River Transmission, LLC*, 164 FERC ¶ 61,075 at PP 32-33.

Finally, Pipeline Association claims that the Commission has treated the 2018 Policy Statement as “binding precedent.” Int. Br. 9 (citing *Interstate and Intrastate Natural Gas Pipelines*, Order No. 849, 164 FERC ¶ 61,031, at PP 50, 54, 59 (2018)). This is simply incorrect. Order No. 849 properly characterizes *United Airlines* and Opinion No. 511-C as binding precedent. 164 FERC ¶ 61,031 at PP 50, 54, 59. It describes the 2018 Policy Statement as “guidance, *not* binding precedent.” *Id.* P 54 (emphasis added). Moreover, Order No. 849 did not change rates, but established procedures to examine which pipelines may be collecting unjust and unreasonable rates, and a voluntary process for pipelines to reduce their rates, in light of *United Airlines* and recent income tax legislation. *Id.* P 1.

B. Pipelines lack standing to appeal the 2018 Policy Statement.

In the alternative, the Court should dismiss the petitions for review for lack of standing. The Pipelines bear the burden of establishing the elements of standing in their opening brief. *See Spokeo*, 136 S. Ct. at 1547; *Texas v. EPA*, 726 F.3d 180, 198 (D.C. Cir. 2013). In order to do so, they must “clearly ... allege facts demonstrating” that they have suffered a concrete injury that is derived from the orders on review, and likely to be redressed by a favorable ruling. *Spokeo*, 136 S. Ct. at 1547 (quoting *Warth v. Seldin*, 422 U.S. 490, 518 (1975)). Neither the Pipelines nor the Pipeline Association has satisfied these requirements.

Pipelines make two claims. First, as noted above, they argue that the Commission used the 2018 Policy Statement to deny them an income tax allowance in their transportation rates. Pet. Br. 17-22. But the 2018 Policy Statement and the Rehearing Order have no immediate impact on any regulated entity, so Pipelines cannot establish an injury that is fairly traced to these orders. *See* Rehearing Order P 6, 8 (noting Commission’s intention to apply the new policy guidance in individual pipeline rate cases), JA 741-42. Pipelines admit that the removal of income tax allowances from their rates did not occur in this proceeding. *See* Pet. Br. 18 (“FERC subsequently applied [the new income tax

allowance policy] to SFPP and Mississippi *in their separate rate cases*” (emphasis added)).

Pipelines and Pipeline Association next contend that the issuance of the 2018 Policy Statement diminished the value of master limited partnerships and impeded pipelines’ access to capital—something the Commission should have anticipated. *See* Pet. Br. 33-37; Int. Br. 27-28. The Association adds that the effect of the 2018 Policy Statement and the Rehearing Order will, inevitably, be a reduction in individual pipelines’ recognized cost-of-service and in their rates, which in turn will “cause immediate injury to pipeline market values and their ability to obtain adequate financing.” Int. Br. 8-12.

An injury must be both concrete and particular to support a claim of standing. *Spokeo*, 136 S. Ct. at 1548. Pipelines and the Pipeline Association fail to indicate how the valuation or access to capital of any individual pipeline changed after the Commission issued the 2018 Policy Statement; they make only broad statements about what occurred in their industry. *See* Pet. Br. 33-37; Int. Br. 9-12 (citing only *Enbridge Energy, Ltd. P’ship*, 166 FERC ¶ 61,237, at PP 9-10 (2019)—a non-final order in which the Commission accepted and suspended, subject to refund, a decreased facilities charge because it may be unjust and unreasonable, and required further information so that it could make an informed

determination). “That is not to say the impact of an agency decision on a company’s ability to raise capital is never sufficient to ground standing. But that impact must be concrete” in order to demonstrate an injury. *New England Power Generators Ass’n v. FERC*, 707 F.3d 364, 369 (D.C. Cir. 2013); *cf. CNG Transmission Corp. v. FERC*, 40 F.3d 1289, 1293 (D.C. Cir. 1994) (certain financial loss that is the direct result of a FERC order is sufficient injury to confer standing).

Finally, it is unclear how a favorable ruling in this case will help Pipelines. The 2018 Policy Statement and the Rehearing Order were an effort to address the concerns that this Court articulated in *United Airlines* about the potential for double recovery of income tax expenses under the Commission’s prior policy. 2018 Policy Statement P 1, JA 537. If the Court were to vacate or remand the revised policy, proceedings concerning individual pipelines’ rates would continue—and the Commission would remain obligated to ensure that jurisdictional entities do not over-recover their income taxes. *See United Airlines*, 827 F.3d at 136-37.

C. Other issues raised here should be adjudicated elsewhere.

Pipelines and Pipeline Association raise many arguments about the merits of the Commission’s revised income tax allowance policy. *See* Pet. Br. 25-33, 37-48,

55-60; Int. Br. 14-28. SFPP raised many of the same arguments on rehearing of Opinion No. 511-C, either in the abstract or as the revised policy is applied to SFPP pipeline rates. *See* Opinion No. 511-D at PP 6-36. To the extent the Commission denied those contentions, SFPP may challenge the Commission’s findings based on a full agency record in the Related Case (Nos. 19-1067, *et al.*). *See* 15 U.S.C. § 717r(b).

Broadly, Opinion No. 511-D denied SFPP’s argument that the Commission wrongly found that a double recovery resulted from permitting an income tax allowance for the tax costs of the investors in SFPP’s parent, a master limited partnership. *See* Opinion No. 511-D at PP 6. It held that regardless of whether a pipeline receives an income tax allowance, the discounted cash flow analysis always produces a pre-tax return on equity. *Id.* P 14. It also denied SFPP’s contentions that the Commission applied the 2018 Policy Statement as a binding rule (Opinion No. 511-C at P 17); that the Commission did not address the evidence in the 2018 Revised Policy Statement proceeding (*id.* P 12); and that changes to unit prices resolve the double-recovery problem (*id.* P 13). Dismissing this appeal—to a significant extent a preview of coming attractions in the Related Case—will not deny SFPP an opportunity to raise any of its arguments on review.

Enable Mississippi’s pipeline-specific case remains pending before the Commission. *Enable Miss. River Transmission, LLC*, 164 FERC ¶ 61,075 (2018), *reh’g pending*. It is therefore not yet clear whether, or to what extent, rulings that apply specifically to Enable Mississippi’s rates will aggrieve it for purposes of review. *See* 15 U.S.C. § 717r(b).

III. Standard of Review

If it proceeds to the merits, the Court reviews FERC orders under the arbitrary and capricious standard of 5 U.S.C. § 706(2)(A). *Florida Mun. Power Agency v. FERC*, 315 F.3d 362, 365 (D.C. Cir. 2003). Under that standard, the Commission’s decision must be based upon substantial evidence. *ESI Energy, LLC v. FERC*, 892 F.3d 321, 329 (D.C. Cir. 2018). The Commission’s factual findings are conclusive if supported by substantial evidence. 15 U.S.C. § 717r(b). The substantial evidence standard “requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence.” *Florida Mun. Power Agency*, 315 F.3d at 365 (quoting *FPL Energy Maine Hydro LLC v. FERC*, 287 F.3d 1151, 1160 (D.C. Cir. 2002)).

The Commission’s “determinations regarding rates of return, definition of rate bases, and other technical aspects of ratemaking” are entitled to considerable weight. *Public Serv. Comm’n v. FERC*, 813 F.2d 448, 451 (D.C. Cir. 1987).

Assuming jurisdiction to review the merits, “[t]he disputed question here involves both technical understanding and policy judgment,” so the Court’s “important but limited role is to ensure that the Commission engaged in reasoned decisionmaking—that it weighed competing views, selected [a result] with adequate support in the record, and intelligibly explained the reasons for making that choice.” *FERC v. Elec. Power Supply Ass’n*, 136 S. Ct. 760, 784 (2016).

IV. The Commission reasonably adopted the 2018 Policy Statement.

For pass-through entities (such as SFPP and Enable Mississippi), the *United Airlines* Court found double recovery when cost-of-service rates include both an income tax allowance and a discounted cash flow return on equity.¹ 827 F.3d at 137. The opinion’s language on remedies identified two potential resolutions: (1) take tax costs out of cost-of-service by removing the income tax allowance; or (2) adjust the discounted cash flow return on equity to remove the tax recovery component. *Id.* The Court remanded for the Commission to “consider these or other mechanisms” that would allow the Commission to demonstrate that there is no double recovery. *Id.*

¹ The discounted cash flow methodology determines “the minimum amount that one must pay new investors . . . to offer the utility the money that it needs for investment.” *Boston Edison Co. v. FERC*, 885 F.2d 962, 965 (1st Cir. 1989) (Breyer, J.) (quoting J. Bonbright, A. Danielsen, D. Kamerschen, *Principles of Public Utility Rates* 317–322 (1988)) (internal quotations omitted).

The Commission responded with its Notice of Inquiry, which asked for input on “any proposed methods ... to resolve any double recovery of investor level tax costs for partnerships or similar pass-through entities.” 157 FERC ¶ 61,210 at PP 2, 19, JA 5, 17-18. It received substantial public input on these questions—24 sets of comments and 19 sets of reply comments, including submissions from SFPP and Pipeline Association. 2018 Policy Statement n.21, JA 544. The comments offered many reasons why the Court incorrectly concluded that permitting both the discounted cash flow return on equity and an income tax allowance produces double recovery. *Id.* PP 9-35, JA 541-60; *see also* Opinion No. 511-C at P 24 (dismissing some of SFPP’s arguments on remand as “a direct challenge” to the Court’s findings). But they did not persuade the Commission that no such double recovery exists. *Id.*

According to Pipelines, *United Airlines* required the Commission to find a way to preserve the income tax allowance. Br. 25. But having been unable to find that the income tax allowance could be used without producing double recovery, the Commission reasonably chose to eliminate it. 2018 Policy Statement P 9, JA 541-42; Rehearing Order P 3, JA 740. *See ExxonMobil*, 487 F.3d at 955 (calculating cost-of-service using a pre-tax return and no income tax allowance would have “[a]rguably” been permissible); *BP West Coast*, 374 F.3d at 1291

(Commission administrative law judge “was correct in including no such pass-through or phantom taxes at all”).

A. A master limited partnership double recovers when its cost-of-service includes an income tax allowance and a discounted cash flow return on equity.

Income tax liability is a cost of owning/operating a pipeline, and it can be properly recovered in rates (*City of Charlottesville*). The Commission cannot impute income tax liability to create an allowance to pass through to ratepayers or recognize in rates the taxes of only some pipeline investors (*BP West Coast*). But it can recognize an income tax allowance separate from the discounted cash flow analysis (*ExxonMobil*), if the regulated entity can demonstrate that no double recovery will result from doing so (*United Airlines*).

The 2018 Policy Statement’s double recovery conclusion largely tracked *United Airlines*’ “essential facts”: (1) “[master limited partnerships] and similar pass-through entities do not incur income taxes at the entity level;” (2) the discounted cash flow methodology “estimates the returns a regulated entity must provide to investors in order to attract capital;” (3) “[t]o attract capital, entities in the market must provide investors a pre-tax return, i.e., a return that covers investor-level taxes and leaves sufficient remaining income to earn investors’ required after-tax return;” and (4) the discounted cash flow methodology

“determines the pre-tax investor return required to attract investment.” 2018 Policy Statement P 9 (internal quotations omitted), JA 541-42; *see United Airlines*, 827 F.3d at 136.

Pipelines assert the Commission failed to identify or analyze substantial evidence to support the double recovery finding. Pet. Br. 25-33; *see also* Int. Br. 14-21 (alleging unexplained departure from prior policy). But the Commission’s task was not to disprove the Court’s finding of double recovery, but to resolve the problem the Court had already identified. *See United Airlines*, 827 F.3d at 137; Notice of Inquiry, 157 FERC ¶ 61,210 at P 18, 19 (requesting comments on “any proposed methods to adjust the income tax allowance policy or current [return on equity] policies to resolve any double recovery of investor-level tax costs for partnerships and similar pass-through entities”), JA 15-18; *see also id.* P 18, 20, JA 15-19. The Commission responded to many arguments that there is, in fact, no double recovery—or that double recovery is not problematic. *See* 2018 Policy Statement PP 9-35, JA 541-60; Opinion No. 511-C at PP 21-30.

Pipelines’ fundamental error is to assert that the discounted cash flow methodology does not determine a pre-tax return. *See* Pet. Br. 29-33. This argument reduces to the claim that the discounted cash flow pre-tax return equals the after-tax return for pass-through partnership pipelines receiving the income tax

allowance. Pet. Br. 29. On this flawed base of misunderstanding, Pipelines construct additional arguments about parity (Pet. Br. 37-42, 55-60) and practical consequences (Pet. Br. 33-37) that run counter to *United Airlines* and do not help the Commission resolve the issue of double recovery. *See* 827 F.3d at 136.

Pipelines isolate the four key points of the Commission’s rationale (2018 Policy Statement P 9, JA 541-42) and address them one-by-one. Pet. Br. 26-33. Pipelines admit some truth to the key points, but conclude that they are incomplete—which can only be done by looking at these points in isolation. *See* Opinion No. 511-D at P 28 (noting that SFPP concedes many of the key findings).

1. Just and reasonable rates are based on the pipeline’s costs.

Just and reasonable rates are “typically based on a pipeline’s costs.” *Canadian Ass’n of Petroleum Producers*, 254 F.3d at 293. “Departures from cost-based rates must be made, if at all, only when the non-cost factors are clearly identified and the substitute or supplemental ratemaking methods ensure that the resulting rate levels are justified by those factors.” *Farmers Union Cent. Exch., Inc. v. FERC*, 734 F.2d 1486, 1530 (D.C. Cir. 1984).

a. The return on equity in a pipeline’s rates recovers the cost of attracting capital.

One component of a pipeline’s costs is the “return to investors,” which is the cost to the utility of attracting or raising capital. *Canadian Ass’n of Petroleum*

Producers, 254 F.3d at 293. The Commission determines the amount necessary to attract and raise capital by employing the discounted cash flow methodology.

2018 Policy Statement P 5, JA 539.

The discounted cash flow methodology assumes that an investment in a security is worth the present value of the infinite stream of dividends or distributions discounted at a market rate commensurate with the investment's risk. *Canadian Ass'n of Petroleum Producers*, 254 F.3d at 293. It uses actual market data, i.e. observations of market-determined security prices and distributions that occur before taxes are paid. 2018 Policy Statement P 5, JA 539.

The discounted cash flow return on equity is pre-tax “irrespective of whether the regulated entity is a partnership or a corporate pipeline.” *United Airlines*, 827 F.3d at 136. A pre-tax return is a return sufficient to meet the investor’s after-tax return requirement, which means the pre-tax return includes both: (1) the investor’s tax liability; and (2) the investor’s required after-tax return. 2018 Policy Statement P 9, JA 541-42. The investor makes the investment decision based on the after-tax required return. 2018 Policy Statement P 9 n.18 (quoting *Kern River Transmission Co.*, Opinion No. 486-B, 126 FERC ¶ 61,034, at P 114 (2009)), JA 541-42. See *BP West Coast*, 374 F.3d at 1290-91 (observing that all investors,

whether corporate investors or individual investors, expect to pay taxes on their investment).

b. The income tax allowance in a pipeline's rates recovers the pipeline's direct income tax expense.

Income taxes are another cost. The income tax allowance, which is no different from the allowance for any other cost, compensates an entity for its direct income tax expenses. *Lakehead Pipe Line*, Opinion No. 397, 71 FERC ¶ 61,338, at 62,314. And, “[t]here is no question that as a general proposition a pipeline that pays income taxes is entitled to recover the costs of the taxes paid from its ratepayers.” *BP West Coast*, 374 F.3d at 1286; see *City of Charlottesville*, 774 F.2d at 1207. But where the utility is a pass-through entity, which itself incurs no income tax liability, a “difficulty” arises. *BP West Coast*, 374 F.3d at 1286.

2. Pass-through partnership pipelines do not directly pay income taxes; therefore, no separate recovery of income tax expense is necessary.

Pipelines acknowledge that pass-through entities do not incur income taxes at the entity level. Pet. Br. 26. But they minimize the import of the pass-through of income by referring to *ExxonMobil*'s holding that such a pass-through entity *could be entitled* to an income tax allowance. Pet. Br. 26-27. See *ExxonMobil*, 487 F.3d at 953 (holding the Commission “reasonably explained why income taxes

paid on partnership income are properly allocated to the regulated entity for ratemaking purposes”).

Pipelines miss the point. The issue in this case is not whether a pass-through entity is entitled to recovery of income tax expenses related to regulated assets (*ExxonMobil* says it is, 487 F.3d at 953); but whether that entity can recover those income tax expenses twice (*United Airlines* says it cannot, 827 F.3d at 135-37). The fact that pass-through entities do not directly pay any income tax supports the Commission’s ultimate finding because it is the first step toward identifying the source of the double-recovery problem.

Pipelines stumble at “the first step of this analysis.” *BP West Coast*, 374 F.3d at 1291. When a regulated entity such as a C corporation pays an income tax, inclusion of those income tax costs in cost of service (income tax allowance) should occur along with any other cost directly incurred by the entity. *See* Opinion No. 511-C at P 25 n. 53 (explaining that “[n]o double recovery results when a corporate pipeline’s cost of service includes an income tax allowance because this so-called ‘first tier’ corporate income tax is *paid directly* by the corporation, rather than by shareholders from the dividends used in the [discounted cash flow] methodology” (emphasis added)). But if the tax is paid by the investor, inclusion of that income tax cost logically belongs as a component of the cost required to

attract the investor’s capital. Opinion No. 511-C at P 29 n.67 (explaining that investor-level costs are properly included in the cost of attracting capital and do not belong as a separate “line item in the cost of service”); *id.* (“Based upon the *United Airlines* reasoning, all of these [investor-level] costs should be adequately addressed by the [discounted cash flow return on equity]—an investor will not make an investment unless the returns are sufficient to (a) cover the investor’s costs and (b) allow the investor to retain a sufficient return notwithstanding those costs.”).

ExxonMobil held that it may be reasonable for the Commission to grant an income tax allowance for income taxes paid on partnership income. *See* 487 F.3d at 553. But *ExxonMobil* did not find that there must be a “separate recognition” (Pet. Br. 28) of the income tax liability or that the income tax liability must be treated as a cost paid directly by the entity rather than as a component of the cost of attracting capital. And specifically to the contrary, *United Airlines* held that *ExxonMobil* does not prohibit the Commission from removing the income tax allowance and setting rates “based on pre-tax returns.” *United Airlines*, 827 F.3d at 137.

3. The discounted cash flow methodology produces a pre-tax return whether or not a pipeline receives an income tax allowance.

Pipelines err when they assert that the discounted cash flow return on equity does not provide a pass-through partnership pipeline the “opportunity to recover a valid cost of operating a regulated asset.” Pet. Br. 27-30. This can only be true if the discounted cash flow methodology fails to estimate a pre-tax return for the investor, i.e., a return that covers the investor’s tax costs and provides an adequate after-tax return. So Pipelines essentially contend that, for a pass-through partnership pipeline receiving an income tax allowance, the pre-tax return equals the after-tax return. This is inaccurate (*see* 2018 Policy Statement PP 17-18, JA 548-49) and inconsistent with *United Airlines*.

United Airlines found that the discounted cash flow methodology “determines the *pre-tax investor return* required to attract investment, irrespective of whether the regulated entity is a partnership or a corporate pipeline.” 827 F.3d at 136 (emphasis added). The 2018 Policy Statement found the same. 2018 Policy Statement P 9 & P 14 n.24, JA 541-42, 545-46.

In support of the pre-tax finding, *United Airlines* cited Opinion No. 511, 134 FERC ¶ 61,121 at PP 243-44. *See* 827 F.3d at 136. Opinion No. 511 explained that “a greater cash flow” (from, for example, inclusion of the income tax

allowance) will ultimately result in the same return on equity, “because the percentage return on equity for securities of similar risk is *established by the market.*” 134 FERC ¶ 61,121 at P 243 (emphasis added).

Pipelines, however, do not believe the market behaves this way. Rather, they advance the unsubstantiated assertion that the “market recognizes” when a pass-through partnership pipeline receives an income tax allowance and will settle on a unit price that results in a discounted cash flow-determined return on equity that “does not include a provision for investor-level taxes.” Pet. Br. 29. Pipelines assert the market will adjust to the inclusion of the income tax allowance by “increasing the unit price at which [master limited partnership] units trade.” *Id.* at 30. According to Pipelines, this “lowers the equity return, all else equal.” *Id.*

Pipelines make claims about share prices in the abstract that SFPP already has litigated in the as-applied context. *See* Opinion No. 511-C at PP 23-24; Opinion No. 511-D at PP 13-14. “[C]hanges to our income tax policies may affect the unit price of regulated entities ... [but] do not resolve the double-recovery problem or change any [master limited partnership pipeline’s discounted cash flow] return from a pre-investor tax return to an after-tax investor return.” Opinion No. 511-D at P 14. The Court therefore need not consider this argument in the abstract.

But in any event, Pipelines rely on the unsubstantiated belief that an investor in a pass-through partnership pipeline receiving an income tax allowance “would recognize and reflect that [a master limited partnership] return would not need to include recovery” of the investor’s tax liability because “such liability was already recovered through the income tax allowance.” Pet. Br. 44. *See* 2018 Policy Statement PP 17, 19, JA 548, 549-50. But including the income tax allowance in the pass-through entity’s cost-of-service does not reduce the investor’s required return. *Id.* This is so because investors in pass-through partnership pipelines “owe a tax on *any* increased income, whether or not that income results from an income tax allowance or another source.” *Id.* P 18 (emphasis added), JA 548. Therefore, the results are always pre-tax.

Pipelines reason that the unit price change alone drives down the return, “all else equal.” Pet. Br. 30. But all else is not equal. Pipelines focus solely on the discounted cash flow equation’s denominator (unit price) to the exclusion of the numerator (dividend or distribution). *See id.* (discounted cash flow equation). With inclusion of the income tax allowance, the distribution (or expected distribution) increases, and then the market reacts by increasing the unit price. 2018 Policy Statement P 14 n.24, JA 545-46. “Likewise, if [a master limited partnership pipeline’s] loss of its income tax allowance reduces rates and investor

income, the unit price will decline until the investor once again earns an adequate pre-tax return.” Opinion No. 511-D at n.84. Either way, both variables move, resulting in the same pre-tax return. 2018 Policy Statement P 14 n.24, JA 545-46; *see United Airlines*, 827 F.3d at 136.

Investors recognize their tax liability either with or without an income tax allowance, and in either case, the discounted cash flow return is pre-tax. Policy Statement P 18 n.34 (“In other words, Commission [income tax allowance] policy does not shift the actual liability to pay income taxes from the [master limited partnership] partners to the [master limited partnership] itself.”), JA 548-49; *see also* Opinion No. 511-D at P 31 (explaining that SFPP’s denial of a pre-tax return is illogical because it requires the belief that an investor receiving a 10 percent return retains the same 10 percent after paying income taxes).

The municipal bond illustrates the point. The Internal Revenue Code exempts income from municipal bonds from taxation, resulting in a pre-tax return that actually does equal the after-tax return. But there is no corresponding law that exempts income when it comes from a pipeline with an income tax allowance. Thus, “[master limited partnership] investors owe a tax on *any increased income*, whether or not that income results from an income tax allowance or another source.” 2018 Policy Statement P 18 (emphasis added), JA 548-49.

Pipelines assert the Commission adopts contradictory positions. Pet. Br. 42-48. They assert that market forces, i.e., the efficient markets principle, undercuts the Commission’s conclusion that the discounted cash flow methodology determines a pre-tax return. Pet. Br. 43. But as explained above (*see supra* p. 40), the efficient markets principle supports the pre-tax finding (and undercuts Pipelines when they argue that investors behave differently when a pipeline’s Commission determined cost-of-service includes an income tax allowance). *See* 2018 Policy Statement P 14 & n.24, JA 545-46; *see also United Airlines*, 827 F.3d at 136; Opinion No. 511, 134 FERC 61,121 at P 243.

Before the Commission, Petitioner SFPP took the contradictory position that the income tax allowance will cause *distributions and prices* to move such that the investors will “receive the same rate of return whether or not the pipeline receives an income tax allowance.” 2018 Policy Statement P 12, JA 543-44; *see also id.* n.21 (describing SFPP’s argument that higher tariffs lead to increased distributions and unit prices); Opinion No. 511-C at PP 23-24; Opinion No. 511-D at PP 12, 30, 32. But market forces—i.e. unit prices responding to distributions, thereby holding the discounted cash flow return on equity stable—only obscure the double recovery problem and the harm it causes. The Commission, therefore, had good reason (1) to hold steadfast to the efficient markets principle; and (2) to reject the assertion

that “investors will receive the same rate of return whether or not the pipeline receives an income tax allowance, and thus, there is no double recovery.” 2018 Policy Statement P 12, JA 543-44.

Double recovery of costs, even after the market has adjusted, means “inflated cost of service,” i.e., rates that deviate from the pipeline’s costs without justification. *Id.* n.23; *see also id.* P 35 (explaining how double-recovery obscures the effects in “distribution yields, projected growth rates, and [discounted cash flow] returns”), JA 560; *see also* Opinion No. 511-D at P 13.

Pipelines also state that the discounted cash flow return depends on the composition of the proxy group, and that at the time of the 2018 Policy Statement, any proxy group of master limited partnerships would have returns premised on an investor expectation of an income tax allowance. Pet. Br. 30-31. Accordingly, these investor expectations result in a discounted cash flow return that does not include recovery for the income tax costs. Pet. Br. 32.

“[T]he return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks.” *Hope Natural Gas Co.*, 320 U.S. at 603. Accordingly, the Commission uses a “proxy group of publicly traded firms with corresponding risks to set a range of reasonable returns for both natural gas and oil pipelines.” *Composition of Proxy Groups for Determining Gas & Oil Pipeline Return on Equity*, 123 FERC ¶ 61,048, at P 7

(2008). The Commission assigns the pipeline a return on equity within that “range or zone” that reflects “specific risks of that pipeline as compared to the proxy group companies.” *Id.* See *Canadian Ass'n of Petroleum Producers*, 254 F.3d at 294 (explaining that “adjustments for specific characteristics” are made).

A master limited partnership pipeline’s discounted cash flow return on equity is “typically based upon a proxy group of other [master limited partnerships], all of which must provide investors with sufficient pre-investor tax returns to attract capital.” 2018 Policy Statement P 13, JA 544; see Opinion No. 511-C at P 29 (“SFPP proxy group (a) consists solely of entities of like risk selected pursuant to Commission policy and (b) contains other [master limited partnership pipelines] whose investors also incur partner-level tax costs.”). Both price and distributions change when there is a new revenue source or when a revenue source disappears. 2018 Policy Statement P 14, JA 545. These market forces determine “in all cases” the same discounted cash flow return on equity. *Id.* n.24, JA 545. Finally, if a pipeline believes it faces risks different from the proxy group’s risk, a case-specific rate proceeding is the appropriate forum to address those concerns and consider any necessary adjustments.

4. Empirical evidence does not undercut the finding that the discounted cash flow determines a pre-tax return.

The Pipeline Association argues that record evidence undercuts the assumption that a partnership pipeline does not need an income tax allowance. Int. Br. 22. It points to an Interstate Natural Gas Association of America study demonstrating that partnership pipeline returns are not systematically higher than corporate pipeline returns. Int. Br. 22-24 (citing Interstate Natural Gas Association of America Comments at 31-35, R. 24, JA 276-80).

But the 2018 Policy Statement reasonably concluded that this study did not demonstrate consistently different returns among partnership pipelines and corporate pipelines. 2018 Policy Statement P 32-33, JA 557-59. The 2018 Policy Statement explained that the studies would have to assume that “all other factors are exactly equal.” *Id.* P 33, JA 558-59. Further, the 2018 Policy Statement explained that “differences in risk and other factors can subsume any effects of taxation,” therefore, without adequately controlling for risk, the study does not “isolate the effect of the [master limited partnership pipeline] and corporate investor-level income taxes on the [discounted cash flow] returns.” *Id.* One study “completely ignore[d] the entities’ differing risk levels.” *Id.* The other involved master limited partnerships that were a small part of “larger business interests,” showed mixed results, and suffered from a small sample size. *Id.* P 33 & n.62, JA 558-59. The

Commission reasonably found this evidence unpersuasive. *Id.* PP 27-35, JA 554-560.

B. Pipelines’ remaining arguments also rely on a misunderstanding about the discounted cash flow methodology.

Pipelines argue that the Commission erred by “differentiat[ing] pass-through pipelines owned by [master limited partnerships] whose equity is owned in whole or in part by C-corporations from other pass-through pipelines.” Pet. Br. 37-38; *id.* at 39 (citing *Trailblazer Pipeline Co. LLC*, 164 FERC ¶ 61,074 (2018); *MoGas Pipeline LLC*, 163 FERC ¶ 61,223 (2018)). How the Commission applies the 2018 Policy Statement to specific pipelines is beyond the scope of this appeal, and is unripe because some of the cases Pipelines cite are still before the agency. *See infra* pp. 53-57. Moreover, individual evaluation of these cases is appropriate because, as the 2018 Policy Statement explained, its “record does not provide a basis for addressing the *United Airlines* double-recovery issue for the innumerable partnership and other pass-through business forms that are not [master limited partnerships] like SFPP.” 2018 Policy Statement P 3, JA 538.

Pipelines also assert that the allegedly disparate treatment of pass-through partnership pipelines and C corporation pipelines “directly contravenes the Court’s finding in *ExxonMobil*” that regulated entities, regardless of organizational structure, need to recover income tax liability. Pet. Br. 56. Pipelines cite *BP West*

Coast as a rejection of such “disparate treatment between corporations and partnership pipelines.” *Id.* at 55. But this is the wrong message from *BP West Coast*, which found no justification for disparate treatment of corporations and other entities *as partner-investors*. 374 F.3d at 1289-90. Disparate treatment among partner-investors is not relevant here.

The more basic issue addressed by *BP West Coast* was whether any income tax costs should be included in the pass-through entity’s cost-of-service, and on this “first step of ... analysis,” the Court held “that no such allowance should be included.” 374 F.3d at 1291. Thus, *BP West Coast*, which was premised on the fact that “a limited partnership operating jurisdictional pipelines incurs no income tax liability,” undermines, rather than supports, Pipelines’ claim that the 2018 Policy Statement unjustifiably distinguished among pipeline forms. *Id.* at 1286.

Pipelines also cite *ExxonMobil*. Pet. Br. 56. *ExxonMobil* stands for a pass-through entity’s entitlement to recovery of income tax expenses related to regulated assets—a matter not disputed by the Commission. The issue here (and unaddressed in both *BP West Coast* and *ExxonMobil*) is the problem of parity identified by *United Airlines* that arises in the context of the discounted cash flow return on equity.

“[R]emoval of the income tax allowance for [master limited partnership] pipelines *restores parity* between [master limited partnerships] and corporations by ensuring that a pipeline recovers its income tax costs only once regardless of business form.” 2018 Policy Statement P 43 (emphasis added), JA 565; *see also* Opinion No. 511-C at P 25 (explaining that denying Petitioner SFPP an income tax allowance “restores the parity between the rate treatment of [master limited partnerships] (such as SFPP) and corporations by ensuring that neither double-recover tax costs”). If, in the short term, allowing double recovery by granting pass-through pipeline partnerships an income tax allowance “results in inequitable returns for partners as compared to corporate shareholders,” *United Airlines*, 827 F.2d at 136, then the converse must be true: eliminating the income tax allowance for pass-through entities restores equitable returns.

Pipelines and Pipeline Association argue that the removal of the income tax allowance will hinder access to capital for the pass-through partnership pipelines. Pet. Br. 36-37; Int. Br. 24-28. This argument is premised on the mistaken understanding that the discounted cash flow methodology fails to determine a pre-tax return.

The 2018 Policy Statement reasonably concluded that double recovery through the income tax allowance is not necessary to attract capital. 2018 Policy

Statement P 44, JA 565. Even with removal of the income tax allowance, “[master limited partnership] pipelines “will continue to recover their costs and a reasonable return for investors.” *Id.* Pipelines cite no authority for the proposition that double recovery is necessary to attract capital.

Pipelines assert the Commission mistakenly presumed that *United Airlines* found double recovery. Rather, Pipelines emphasize that *United Airlines* merely found that the Commission had not adequately explained the lack of double recovery. Pet. Br. 48-55; Int. Br. 12-13.

The Commission’s understanding of *United Airlines* is set forth in the background section of the 2018 Policy Statement: The Commission “failed to adequately explain” why there was no double recovery, and the Court therefore “remanded the decisions to the Commission to consider ‘mechanisms for which the Commission can demonstrate that there is no double recovery.’” 2018 Policy Statement P 6, JA 540. Following the Court’s instructions, the Commission considered the mechanisms, and determined the best approach to be removal of the income tax allowance for pass-through partnership pipelines. This outcome is well within the parameters of what *United Airlines* expected from the Commission. *See United Airlines*, 827 F.3d at 137 (stating that *ExxonMobil* does not foreclose the

option of “eliminating all income tax allowances and setting rates based on pre-tax returns”); *see* 2018 Policy Statement P 6 n.13, JA 540.

Pipelines further contend that they should be given a meaningful opportunity to address the income tax allowance in individualized rate proceedings. Pet. Br. 51. Here, the Commission agrees. The Commission has consistently said Pipelines should have the opportunity to challenge the principles expressed in the 2018 Policy Statement. Rehearing Order P 8, JA 742. Pipelines have done so in their individual rate proceedings, and will have the opportunity to petition this Court for review to the extent aggrieved by any pipeline-specific decisions. *See* Opinion No. 511-C at PP 21-30; Opinion No. 511-D at PP 5-36; *Enable Miss. River Transmission, LLC*, 164 FERC ¶ 61,075, *reh’g pending*.

Pipelines assert the 2018 Policy Statement repeats the problems identified in *BP West Coast*. Pet. Br. 57-60. But Pipelines’ discussion of *BP West Coast* fails because the disparate treatment there was among partner-investors, not among pipelines. Here, the Commission has not treated partner-investors differently. Rather, as the more fundamental “first step” of the analysis, the Commission has determined “no such allowance should be included.” *BP West Coast*, 374 F.3d at 1291. It is “not [the Court’s] job to render that judgment, on which reasonable minds can differ.” *Elec. Power Supply Ass’n*, 136 S. Ct. at 784.

C. The issue of discriminatory application of the 2018 Revised Policy Statement is not ripe for review.

The Pipelines distinguish among several post-2018 Policy Statement orders to argue that the Commission “erroneously singled [them] out” for summary denial of an income tax allowance. Pet. Br. 39-40. They note that the Commission did not summarily reject the income tax allowance for other pass-through entities, but established further proceedings in which those entities could more fully litigate income tax allowance issues. *Id.* at 39 (citing *Trailblazer Pipeline Co., LLC*, 164 FERC ¶ 61,074 at PP 30-32; *MoGas Pipeline LLC*, 163 FERC ¶ 61,223, at P 4 (2018)). This argument does not allege errors in the 2018 Policy Statement, but in its implementation elsewhere, so it is not within the scope of this proceeding. *See, e.g., Brooklyn Union Gas Co. v. FERC*, 409 F.3d 404, 406 (D.C. Cir. 2005) (reviewing court will not “reach out to examine a decision made after the one actually under review”) (internal quotation omitted)). But even if it were, the Commission made sound choices about how to manage the cases before it, and the issue of consistency is not yet ripe for review.

The Commission has “broad discretion to determine when and how to hear and decide the matters that come before it.” *Tenn. Valley Mun. Gas Ass’n v. FERC*, 140 F.3d 1085, 1088 (D.C. Cir. 1998). In deciding what approach to take, the Commission’s task “is to consider whether a party has raised a dispute of

genuine material fact, and whether the dispute can be resolved on the basis of the pleadings before it.” *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 131 FERC ¶ 61,144, at P 24 (2010); *see also Moreau v. FERC*, 982 F.2d 556, 568 (D.C. Cir. 1993) (same, and even if there is a genuine issue of material fact, no hearing necessary if the issue can be adequately resolved on the written record). If the Commission “determines that there is no genuine issue of fact material to the decision of a proceeding or part of a proceeding,” then it may summarily dispose of all or part of the proceeding. 18 C.F.R. § 385.217(b). This Court reviews such decisions with “extreme deference,” because they are entrusted to the expert agency. *Hi-Tech Furnace Sys. v. FCC*, 224 F.3d 781, 789 (D.C. Cir. 2000) (quoting *Lakeland Bus Lines v. ICC*, 810 F.2d 280, 286 (D.C. Cir. 1987)); *see also Moreau*, 982 F.2d at 568 (court reviews FERC’s decision not to hold a hearing only for abuse of discretion).

The Commission reasonably chose to rule summarily on income tax allowance issues for Pipelines (SFPP and Enable) while establishing further proceedings for other entities. Under *United Airlines*, an income tax allowance presumptively provides master limited partnerships with double-recovery of tax costs. *See* Opinion No. 511-C PP 16-17. In its proceedings concerning Pipelines, both of which are subsidiaries of such partnerships, the Commission only had to

determine whether the Pipelines had shown that there would be no double-recovery if they continued to use an income tax allowance in their rates. *See id.* PP 21-30 (as to SFPP); *Enable Miss. River Transmission, LLC*, 164 FERC ¶ 61,075 at PP 29-40. After careful review of the administrative dockets of both proceedings, the Commission held that neither pipeline had made such a showing. Opinion No. 511-C PP 21-30; *Enable Miss. River Transmission, LLC*, 164 FERC ¶ 61,075 at PP 29-40. The Pipelines do not explain what further evidence the Commission’s summary rulings prevented them from submitting. *See Hi-Tech Furnace Sys.*, 224 F.3d at 790.

By contrast, the Commission’s decision to examine further whether other, non-master limited partnership pipelines are eligible for an income tax allowance is precisely what the 2018 Policy Statement envisions. *See* 2018 Policy Statement P 3 (underlying record “does not provide a basis for addressing the *United Airlines* double-recovery issues for the innumerable” business forms that are not master limited partnerships; “the Commission will address the application of *United Airlines*” to other business forms “as those issues arise in subsequent proceedings”), JA 538; *see also* Pet. Br. 57 (recognizing various types of pipeline ownership and complexities of pipeline corporate/partnership structures). Trailblazer Pipeline “is a pass-through entity that is indirectly owned by private

equity owners and ... an entity that is taxed as a C corporation.” *Trailblazer Pipeline Co. LLC*, 164 FERC ¶ 61,074 at P 30. The degree to which a pass-through pipeline that is not wholly-owned by a master limited partnership “may recover an income tax allowance following *United Airlines* is an issue of first impression.” *Id.* at P 31. Similarly, MoGas Pipeline claimed that it should receive an income tax allowance because it is owned by a C corporation that is subject to corporate income tax. *See* Transmittal Letter, Docket No. RP18-877, at Exh. MGP-048, p. 11 (May 31, 2018). The Commission did not speak to this issue in setting MoGas’s rate case for hearing, but found “many typical rate case issues that warrant further investigation” and held that “the complexity of the issues raised by the filing” rendered it inappropriate for summary disposition. *MoGas Pipeline LLC*, 163 FERC ¶ 61,223 at P 12.

Pipelines’ argument concerning inconsistent application of the 2018 Policy Statement also is unripe, because it is based in part on non-final orders. This Court “ha[s] jurisdiction to review only final orders of the Commission.” *Transwestern Pipeline Co. v. FERC*, 59 F.3d 222, 226 (D.C. Cir. 1995) (discussing 15 U.S.C. § 717r(b)) (citations omitted). “An order is considered ‘final’ when it ‘imposes an obligation, denies a right, or fixes some legal relationship, usually at the

consummation of an administrative process.” *Id.* (quoting *Alaska v. FERC*, 980 F.2d 761, 763 (D.C. Cir. 1992)).

Enable Mississippi has sought rehearing of the Commission’s determination that it did not justify the income tax allowance in its cost-of-service. *See* Request of Enable Mississippi River Transmission, LLC for Rehearing at 5, 8, 16-19, Docket No. RP18-923 (Aug. 30, 2018) (seeking rehearing of *Enable Miss. River Transmission, LLC*, 164 FERC ¶ 61,075). The Commission has not yet ruled on that request. The Commission approved a settlement that resolved *MoGas Pipeline LLC* without setting precedent for future cases. *MoGas Pipeline, LLC*, 168 FERC ¶ 61,099, at P 6 (2019). And an administrative law judge is conducting a hearing in *Trailblazer* that is scheduled to last until mid-2020. *See* Order Amending Procedural Schedule at 2-3, Docket No. RP18-922 (May 10, 2019). Further agency action may resolve some or all of the Pipelines’ concerns about inconsistent application of the 2018 Policy Statement. *See* Rehearing Order P 6, JA 741-42 (2018 Policy Statement and Rehearing Order “do not establish a binding rule.... The Commission will have to fully support and justify the application of this guidance in individual cases.”).

Conclusion

For the foregoing reasons, the Court should dismiss or, in the alternative, deny Pipelines' petitions for review of the 2018 Policy Statement and the Rehearing Order.

Respectfully submitted,

Makan Delrahim
Assistant Attorney General

James P. Danly
General Counsel

Michael F. Murray
Deputy Assistant Attorney General

Robert H. Solomon
Solicitor

Robert J. Wiggers
Robert B. Nicholson
Attorneys

/s/ Scott Ray Ediger
Scott Ray Ediger
Elizabeth E. Rylander
Attorneys

For Respondent
United States of America
U.S. Department of Justice
Washington, D.C. 20530

For Respondent Federal
Energy Regulatory
Commission
Washington, D.C. 20426

November 15, 2019

Certificate of Compliance

In accordance with Fed. R. App. P. 32(g) and Circuit Rule 32(e) and this Court's Order of April 18, 2019, I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,554 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared using Times New Roman 14-point font, in Microsoft Word 2013.

/s/ Scott Ray Ediger

Scott Ray Ediger
Attorney

Federal Energy Regulatory Commission
Washington, D.C. 20426
Tel: (202) 502-8509
Fax: (202) 273-0901

November 15, 2019

**ADDENDUM
STATUTES AND
REGULATIONS**

TABLE OF CONTENTS

STATUTES:

Administrative Procedure Act

5 U.S.C. § 552(a)(1)(D) A-1

5 U.S.C. § 706(2)(A)..... A-20

Interstate Commerce Act

49 U.S.C. § 60502 A-21

49 U.S.C. app. § 1(1)(b)..... A-23

49 U.S.C. app. § 1(5)(a) A-24

49 U.S.C. app. § 6(1) A-26

49 U.S.C. app. § 6(7) A-26

Natural Gas Act

15 U.S.C. § 717..... A-28

15 U.S.C. § 717c A-30

15 U.S.C. § 717c(c)..... A-30

15 U.S.C. § 717r(b)..... A-32

REGULATIONS:

18 C.F.R. § 154.301(c)..... A-34

18 C.F.R. § 385.217(b) A-35

HISTORICAL AND REVISION NOTES—CONTINUED

<i>Derivation</i>	<i>U.S. Code</i>	<i>Revised Statutes and Statutes at Large</i>
(2)–(13)	5 U.S.C. 1001 (less (a)).	Mar. 30, 1948, ch. 161, §301, 62 Stat. 99. June 11, 1946, ch. 324, §2 (less (a)), 60 Stat. 237.

In paragraph (1), the sentence “Nothing in this Act shall be construed to repeal delegations of authority as provided by law,” is omitted as surplusage since there is nothing in the Act which could reasonably be so construed.

In paragraph (1)(G), the words “or naval” are omitted as included in “military”.

In paragraph (1)(H), the words “functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947” are omitted as executed. Reference to the “Selective Training and Service Act of 1940” is omitted as that Act expired Mar. 31, 1947. Reference to the “Sugar Control Extension Act of 1947” is omitted as that Act expired on Mar. 31, 1948. References to the “Housing and Rent Act of 1947, as amended” and the “Veterans’ Emergency Housing Act of 1946” have been consolidated as they are related. The reference to former section 1641(b)(2) of title 50, appendix, is retained notwithstanding its repeal by §111(a)(1) of the Act of Sept. 21, 1961, Pub. L. 87-256, 75 Stat. 538, since §111(c) of the Act provides that a reference in other Acts to a provision of law repealed by §111(a) shall be considered to be a reference to the appropriate provisions of Pub. L. 87-256.

In paragraph (2), the words “of any character” are omitted as surplusage.

In paragraph (3), the words “and a person or agency admitted by an agency as a party for limited purposes” are substituted for “but nothing herein shall be construed to prevent an agency from admitting any person or agency as a party for limited purposes”.

In paragraph (9), a comma is supplied between the words “limitation” and “amendment” to correct an editorial error of omission.

In paragraph (10)(C), the words “of any form” are omitted as surplusage.

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

CODIFICATION

Section 551 of former Title 5, Executive Departments and Government Officers and Employees, was transferred to section 2242 of Title 7, Agriculture.

AMENDMENTS

2011—Par. (1)(H). Pub. L. 111-350 struck out “chapter 2 of title 41;” after “title 12;”.

1994—Par. (1)(H). Pub. L. 103-272 substituted “subchapter II of chapter 471 of title 49; or sections” for “or sections 1622.”

1976—Par. (14). Pub. L. 94-409 added par. (14).

EFFECTIVE DATE OF 1976 AMENDMENT

Amendment by Pub. L. 94-409 effective 180 days after Sept. 13, 1976, see section 6 of Pub. L. 94-409, set out as an Effective Date note under section 552b of this title.

STUDY AND REPORTS ON ADMINISTRATIVE SUBPOENAS

Pub. L. 106-544, §7, Dec. 19, 2000, 114 Stat. 2719, provided that:

“(a) STUDY ON USE OF ADMINISTRATIVE SUBPOENAS.—Not later than December 31, 2001, the Attorney General, in consultation with the Secretary of the Treasury, shall complete a study on the use of administrative subpoena power by executive branch agencies or entities and shall report the findings to the Committees on the Judiciary of the Senate and the House of Representatives. Such report shall include—

“(1) a description of the sources of administrative subpoena power and the scope of such subpoena power within executive branch agencies;

“(2) a description of applicable subpoena enforcement mechanisms;

“(3) a description of any notification provisions and any other provisions relating to safeguarding privacy interests;

“(4) a description of the standards governing the issuance of administrative subpoenas; and

“(5) recommendations from the Attorney General regarding necessary steps to ensure that administrative subpoena power is used and enforced consistently and fairly by executive branch agencies.

“(b) REPORT ON FREQUENCY OF USE OF ADMINISTRATIVE SUBPOENAS.—

“(1) IN GENERAL.—The Attorney General and the Secretary of the Treasury shall report in January of each year to the Committees on the Judiciary of the Senate and the House of Representatives on the number of administrative subpoenas issued by them under this section and the identity of the agency or component of the Department of Justice or the Department of the Treasury issuing the subpoena and imposing the charges.

“(2) EXPIRATION.—The reporting requirement of this subsection shall terminate in 3 years after the date of the enactment of this section [Dec. 19, 2000].”

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;

(C) administrative staff manuals and instructions to staff that affect a member of the public;

(D) copies of all records, regardless of form or format, which have been released to any person under paragraph (3) and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; and

(E) a general index of the records referred to under subparagraph (D);

unless the materials are promptly published and copies offered for sale. For records created on or after November 1, 1996, within one year after such date, each agency shall make such records available, including by computer telecommunications or, if computer telecommunications means have not been established by the agency, by other electronic means. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, staff manual, instruction, or copies of records referred to in subparagraph (D). However, in each case the justification for the deletion shall be explained fully in writing, and the extent of such deletion shall be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in subsection (b) under which the deletion is made. If technically feasible, the extent of the deletion shall be indicated at the place in the record where the deletion was made. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. Each agency shall make the index referred to in subparagraph (E) available by computer telecommunications by December 31, 1999. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3)(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(B) In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.

(C) In responding under this paragraph to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system.

(D) For purposes of this paragraph, the term "search" means to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request.

(E) An agency, or part of an agency, that is an element of the intelligence community (as that term is defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4))) shall not make any record available under this paragraph to—

(i) any government entity, other than a State, territory, commonwealth, or district of the United States, or any subdivision thereof; or

(ii) a representative of a government entity described in clause (i).

(4)(A)(i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced. Such schedule shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies.

(ii) Such agency regulations shall provide that—

(I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use;

(II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or non-commercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and

(III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.

In this clause, the term "a representative of the news media" means any person or entity that

gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. In this clause, the term “news” means information that is about current events or that would be of current interest to the public. Examples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of “news”) who make their products available for purchase by or subscription by or free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities. A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; the Government may also consider the past publication record of the requester in making such a determination.

(iii) Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

(iv) Fee schedules shall provide for the recovery of only the direct costs of search, duplication, or review. Review costs shall include only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding any portions exempt from disclosure under this section. Review costs may not include any costs incurred in resolving issues of law or policy that may be raised in the course of processing a request under this section. No fee may be charged by any agency under this section—

(I) if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee; or

(II) for any request described in clause (ii) (II) or (III) of this subparagraph for the first two hours of search time or for the first one hundred pages of duplication.

(v) No agency may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed \$250.

(vi) Nothing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records.

(vii) In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo: *Provided*, That the court’s review of the matter shall be limited to the record before the agency.

(viii) An agency shall not assess search fees (or in the case of a requester described under clause (ii)(II), duplication fees) under this subparagraph if the agency fails to comply with any time limit under paragraph (6), if no unusual or exceptional circumstances (as those terms are defined for purposes of paragraphs (6)(B) and (C), respectively) apply to the processing of the request.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency’s determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

[D] Repealed. Pub. L. 98-620, title IV, § 402(2), Nov. 8, 1984, 98 Stat. 3357.]

(E)(i) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(ii) For purposes of this subparagraph, a complainant has substantially prevailed if the complainant has obtained relief through either—

(I) a judicial order, or an enforceable written agreement or consent decree; or

(II) a voluntary or unilateral change in position by the agency, if the complainant’s claim is not insubstantial.

(F)(i) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of

the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

(ii) The Attorney General shall—

(I) notify the Special Counsel of each civil action described under the first sentence of clause (i); and

(II) annually submit a report to Congress on the number of such civil actions in the preceding year.

(iii) The Special Counsel shall annually submit a report to Congress on the actions taken by the Special Counsel under clause (i).

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

(i) determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

The 20-day period under clause (i) shall commence on the date on which the request is first received by the appropriate component of the agency, but in any event not later than ten days after the request is first received by any component of the agency that is designated in the agency's regulations under this section to receive requests under this section. The 20-day period shall not be tolled by the agency except—

(I) that the agency may make one request to the requester for information and toll the 20-day period while it is awaiting such information that it has reasonably requested from the requester under this section; or

(II) if necessary to clarify with the requester issues regarding fee assessment. In either case, the agency's receipt of the requester's response to the agency's request for information or clarification ends the tolling period.

(B)(i) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the unusual circumstances for such extension and

the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days, except as provided in clause (ii) of this subparagraph.

(ii) With respect to a request for which a written notice under clause (i) extends the time limits prescribed under clause (i) of subparagraph (A), the agency shall notify the person making the request if the request cannot be processed within the time limit specified in that clause and shall provide the person an opportunity to limit the scope of the request so that it may be processed within that time limit or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request. To aid the requester, each agency shall make available its FOIA Public Liaison, who shall assist in the resolution of any disputes between the requester and the agency. Refusal by the person to reasonably modify the request or arrange such an alternative time frame shall be considered as a factor in determining whether exceptional circumstances exist for purposes of subparagraph (C).

(iii) As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular requests—

(I) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(II) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(III) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(iv) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for the aggregation of certain requests by the same requestor, or by a group of requestors acting in concert, if the agency reasonably believes that such requests actually constitute a single request, which would otherwise satisfy the unusual circumstances specified in this subparagraph, and the requests involve clearly related matters. Multiple requests involving unrelated matters shall not be aggregated.

(C)(i) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for

records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(ii) For purposes of this subparagraph, the term “exceptional circumstances” does not include a delay that results from a predictable agency workload of requests under this section, unless the agency demonstrates reasonable progress in reducing its backlog of pending requests.

(iii) Refusal by a person to reasonably modify the scope of a request or arrange an alternative time frame for processing a request (or a modified request) under clause (ii) after being given an opportunity to do so by the agency to whom the person made the request shall be considered as a factor in determining whether exceptional circumstances exist for purposes of this subparagraph.

(D)(i) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for multitrack processing of requests for records based on the amount of work or time (or both) involved in processing requests.

(ii) Regulations under this subparagraph may provide a person making a request that does not qualify for the fastest multitrack processing an opportunity to limit the scope of the request in order to qualify for faster processing.

(iii) This subparagraph shall not be considered to affect the requirement under subparagraph (C) to exercise due diligence.

(E)(i) Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, providing for expedited processing of requests for records—

(I) in cases in which the person requesting the records demonstrates a compelling need; and

(II) in other cases determined by the agency.

(ii) Notwithstanding clause (i), regulations under this subparagraph must ensure—

(I) that a determination of whether to provide expedited processing shall be made, and notice of the determination shall be provided to the person making the request, within 10 days after the date of the request; and

(II) expeditious consideration of administrative appeals of such determinations of whether to provide expedited processing.

(iii) An agency shall process as soon as practicable any request for records to which the agency has granted expedited processing under this subparagraph. Agency action to deny or affirm denial of a request for expedited processing pursuant to this subparagraph, and failure by an agency to respond in a timely manner to such a request shall be subject to judicial review under paragraph (4), except that the judicial review shall be based on the record before the agency at the time of the determination.

(iv) A district court of the United States shall not have jurisdiction to review an agency denial of expedited processing of a request for records after the agency has provided a complete response to the request.

(v) For purposes of this subparagraph, the term “compelling need” means—

(I) that a failure to obtain requested records on an expedited basis under this paragraph

could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(II) with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity.

(vi) A demonstration of a compelling need by a person making a request for expedited processing shall be made by a statement certified by such person to be true and correct to the best of such person’s knowledge and belief.

(F) In denying a request for records, in whole or in part, an agency shall make a reasonable effort to estimate the volume of any requested matter the provision of which is denied, and shall provide any such estimate to the person making the request, unless providing such estimate would harm an interest protected by the exemption in subsection (b) pursuant to which the denial is made.

(7) Each agency shall—

(A) establish a system to assign an individualized tracking number for each request received that will take longer than ten days to process and provide to each person making a request the tracking number assigned to the request; and

(B) establish a telephone line or Internet service that provides information about the status of a request to the person making the request using the assigned tracking number, including—

(i) the date on which the agency originally received the request; and

(ii) an estimated date on which the agency will complete action on the request.

(b) This section does not apply to matters that are—

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), if that statute—

(A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or

(ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and

(B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted, and the exemption under which the deletion is made, shall be indicated at the place in the record where such deletion is made.

(c)(1) Whenever a request is made which involves access to records described in subsection (b)(7)(A) and—

(A) the investigation or proceeding involves a possible violation of criminal law; and

(B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings,

the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.

(2) Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the requirements of this section unless the inform-

ant's status as an informant has been officially confirmed.

(3) Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in subsection (b)(1), the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of this section.

(d) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(e)(1) On or before February 1 of each year, each agency shall submit to the Attorney General of the United States a report which shall cover the preceding fiscal year and which shall include—

(A) the number of determinations made by the agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(B)(i) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information; and

(ii) a complete list of all statutes that the agency relies upon to authorize the agency to withhold information under subsection (b)(3), the number of occasions on which each statute was relied upon, a description of whether a court has upheld the decision of the agency to withhold information under each such statute, and a concise description of the scope of any information withheld;

(C) the number of requests for records pending before the agency as of September 30 of the preceding year, and the median and average number of days that such requests had been pending before the agency as of that date;

(D) the number of requests for records received by the agency and the number of requests which the agency processed;

(E) the median number of days taken by the agency to process different types of requests, based on the date on which the requests were received by the agency;

(F) the average number of days for the agency to respond to a request beginning on the date on which the request was received by the agency, the median number of days for the agency to respond to such requests, and the range in number of days for the agency to respond to such requests;

(G) based on the number of business days that have elapsed since each request was originally received by the agency—

(i) the number of requests for records to which the agency has responded with a determination within a period up to and including 20 days, and in 20-day increments up to and including 200 days;

(ii) the number of requests for records to which the agency has responded with a determination within a period greater than 200 days and less than 301 days;

(iii) the number of requests for records to which the agency has responded with a determination within a period greater than 300 days and less than 401 days; and

(iv) the number of requests for records to which the agency has responded with a determination within a period greater than 400 days;

(H) the average number of days for the agency to provide the granted information beginning on the date on which the request was originally filed, the median number of days for the agency to provide the granted information, and the range in number of days for the agency to provide the granted information;

(I) the median and average number of days for the agency to respond to administrative appeals based on the date on which the appeals originally were received by the agency, the highest number of business days taken by the agency to respond to an administrative appeal, and the lowest number of business days taken by the agency to respond to an administrative appeal;

(J) data on the 10 active requests with the earliest filing dates pending at each agency, including the amount of time that has elapsed since each request was originally received by the agency;

(K) data on the 10 active administrative appeals with the earliest filing dates pending before the agency as of September 30 of the preceding year, including the number of business days that have elapsed since the requests were originally received by the agency;

(L) the number of expedited review requests that are granted and denied, the average and median number of days for adjudicating expedited review requests, and the number adjudicated within the required 10 days;

(M) the number of fee waiver requests that are granted and denied, and the average and median number of days for adjudicating fee waiver determinations;

(N) the total amount of fees collected by the agency for processing requests; and

(O) the number of full-time staff of the agency devoted to processing requests for records under this section, and the total amount expended by the agency for processing such requests.

(2) Information in each report submitted under paragraph (1) shall be expressed in terms of each principal component of the agency and for the agency overall.

(3) Each agency shall make each such report available to the public including by computer telecommunications, or if computer telecommunications means have not been established by the agency, by other electronic means. In addition, each agency shall make the raw statistical data used in its reports available electronically to the public upon request.

(4) The Attorney General of the United States shall make each report which has been made available by electronic means available at a single electronic access point. The Attorney General of the United States shall notify the Chairman and ranking minority member of the Committee on Government Reform and Oversight of

the House of Representatives and the Chairman and ranking minority member of the Committees on Governmental Affairs and the Judiciary of the Senate, no later than April 1 of the year in which each such report is issued, that such reports are available by electronic means.

(5) The Attorney General of the United States, in consultation with the Director of the Office of Management and Budget, shall develop reporting and performance guidelines in connection with reports required by this subsection by October 1, 1997, and may establish additional requirements for such reports as the Attorney General determines may be useful.

(6) The Attorney General of the United States shall submit an annual report on or before April 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subparagraphs (E), (F), and (G) of subsection (a)(4). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(f) For purposes of this section, the term—

(1) “agency” as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency; and

(2) “record” and any other term used in this section in reference to information includes—

(A) any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format; and

(B) any information described under subparagraph (A) that is maintained for an agency by an entity under Government contract, for the purposes of records management.

(g) The head of each agency shall prepare and make publicly available upon request, reference material or a guide for requesting records or information from the agency, subject to the exemptions in subsection (b), including—

(1) an index of all major information systems of the agency;

(2) a description of major information and record locator systems maintained by the agency; and

(3) a handbook for obtaining various types and categories of public information from the agency pursuant to chapter 35 of title 44, and under this section.

(h)(1) There is established the Office of Government Information Services within the National Archives and Records Administration.

(2) The Office of Government Information Services shall—

(A) review policies and procedures of administrative agencies under this section;

(B) review compliance with this section by administrative agencies; and

(C) recommend policy changes to Congress and the President to improve the administration of this section.

(3) The Office of Government Information Services shall offer mediation services to resolve disputes between persons making requests under this section and administrative agencies as a non-exclusive alternative to litigation and, at the discretion of the Office, may issue advisory opinions if mediation has not resolved the dispute.

(i) The Government Accountability Office shall conduct audits of administrative agencies on the implementation of this section and issue reports detailing the results of such audits.

(j) Each agency shall designate a Chief FOIA Officer who shall be a senior official of such agency (at the Assistant Secretary or equivalent level).

(k) The Chief FOIA Officer of each agency shall, subject to the authority of the head of the agency—

(1) have agency-wide responsibility for efficient and appropriate compliance with this section;

(2) monitor implementation of this section throughout the agency and keep the head of the agency, the chief legal officer of the agency, and the Attorney General appropriately informed of the agency’s performance in implementing this section;

(3) recommend to the head of the agency such adjustments to agency practices, policies, personnel, and funding as may be necessary to improve its implementation of this section;

(4) review and report to the Attorney General, through the head of the agency, at such times and in such formats as the Attorney General may direct, on the agency’s performance in implementing this section;

(5) facilitate public understanding of the purposes of the statutory exemptions of this section by including concise descriptions of the exemptions in both the agency’s handbook issued under subsection (g), and the agency’s annual report on this section, and by providing an overview, where appropriate, of certain general categories of agency records to which those exemptions apply; and

(6) designate one or more FOIA Public Liaisons.

(l) FOIA Public Liaisons shall report to the agency Chief FOIA Officer and shall serve as supervisory officials to whom a requester under this section can raise concerns about the service the requester has received from the FOIA Requester Center, following an initial response from the FOIA Requester Center Staff. FOIA Public Liaisons shall be responsible for assisting in reducing delays, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 383; Pub. L. 90-23, §1, June 5, 1967, 81 Stat. 54; Pub. L. 93-502, §§1-3, Nov. 21, 1974, 88 Stat. 1561-1564; Pub. L. 94-409, §5(b), Sept. 13, 1976, 90 Stat. 1247; Pub. L. 95-454, title IX, §906(a)(10), Oct. 13, 1978, 92 Stat. 1225; Pub. L. 98-620, title IV, §402(2), Nov. 8, 1984, 98 Stat. 3357; Pub. L. 99-570, title I, §§1802, 1803,

Oct. 27, 1986, 100 Stat. 3207-48, 3207-49; Pub. L. 104-231, §§3-11, Oct. 2, 1996, 110 Stat. 3049-3054; Pub. L. 107-306, title III, §312, Nov. 27, 2002, 116 Stat. 2390; Pub. L. 110-175, §§3, 4(a), 5, 6(a)(1), (b)(1), 7(a), 8-10(a), 12, Dec. 31, 2007, 121 Stat. 2525-2530; Pub. L. 111-83, title V, §564(b), Oct. 28, 2009, 123 Stat. 2184.)

HISTORICAL AND REVISION NOTES
1966 ACT

<i>Derivation</i>	<i>U.S. Code</i>	<i>Revised Statutes and Statutes at Large</i>
.....	5 U.S.C. 1002.	June 11, 1946, ch. 324, §3, 60 Stat. 238.

In subsection (b)(3), the words “formulated and” are omitted as surplusage. In the last sentence of subsection (b), the words “in any manner” are omitted as surplusage since the prohibition is all inclusive.

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

1967 ACT

Section 1 [of Pub. L. 90-23] amends section 552 of title 5, United States Code, to reflect Public Law 89-487.

In subsection (a)(1)(A), the words “employees (and in the case of a uniformed service, the member)” are substituted for “officer” to retain the coverage of Public Law 89-487 and to conform to the definitions in 5 U.S.C. 2101, 2104, and 2105.

In the last sentence of subsection (a)(2), the words “A final order * * * may be relied on * * * only if” are substituted for “No final order * * * may be relied upon * * * unless”; and the words “a party other than an agency” and “the party” are substituted for “a private party” and “the private party”, respectively, on authority of the definition of “private party” in 5 App. U.S.C. 1002(g).

In subsection (a)(3), the words “the responsible employee, and in the case of a uniformed service, the responsible member” are substituted for “the responsible officers” to retain the coverage of Public Law 89-487 and to conform to the definitions in 5 U.S.C. 2101, 2104, and 2105.

In subsection (a)(4), the words “shall maintain and make available for public inspection a record” are substituted for “shall keep a record * * * and that record shall be available for public inspection”.

In subsection (b)(5) and (7), the words “a party other than an agency” are substituted for “a private party” on authority of the definition of “private party” in 5 App. U.S.C. 1002(g).

In subsection (c), the words “This section does not authorize” and “This section is not authority” are substituted for “Nothing in this section authorizes” and “nor shall this section be authority”, respectively.

5 App. U.S.C. 1002(g), defining “private party” to mean a party other than an agency, is omitted since the words “party other than an agency” are substituted for the words “private party” wherever they appear in revised 5 U.S.C. 552.

5 App. U.S.C. 1002(h), prescribing the effective date, is omitted as unnecessary. That effective date is prescribed by section 4 of this bill.

REFERENCES IN TEXT

The date of enactment of the OPEN FOIA Act of 2009, referred to in subsec. (b)(3)(B), is the date of enactment of Pub. L. 111-83, which was approved Oct. 28, 2009.

CODIFICATION

Section 552 of former Title 5, Executive Departments and Government Officers and Employees, was transferred to section 2243 of Title 7, Agriculture.

AMENDMENTS

2009—Subsec. (b)(3). Pub. L. 111-83 added par. (3) and struck out former par. (3), which read as follows: “spe-

cifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.”

2007—Subsec. (a)(4)(A)(ii). Pub. L. 110-175, § 3, inserted concluding provisions.

Subsec. (a)(4)(A)(viii). Pub. L. 110-175, § 6(b)(1)(A), added cl. (viii).

Subsec. (a)(4)(E). Pub. L. 110-175, § 4(a), designated existing provisions as cl. (i) and added cl. (ii).

Subsec. (a)(4)(F). Pub. L. 110-175, § 5, designated existing provisions as cl. (i) and added cls. (ii) and (iii).

Subsec. (a)(6)(A). Pub. L. 110-175, § 6(a)(1), inserted concluding provisions.

Subsec. (a)(6)(B)(ii). Pub. L. 110-175, § 6(b)(1)(B), inserted after the first sentence “To aid the requester, each agency shall make available its FOIA Public Liaison, who shall assist in the resolution of any disputes between the requester and the agency.”

Subsec. (a)(7). Pub. L. 110-175, § 7(a), added par. (7).

Subsec. (b). Pub. L. 110-175, § 12, in concluding provisions, inserted “, and the exemption under which the deletion is made,” after “The amount of information deleted” in second sentence and after “the amount of the information deleted” in third sentence.

Subsec. (e)(1)(B)(ii). Pub. L. 110-175, § 8(a)(1), inserted “the number of occasions on which each statute was relied upon,” after “subsection (b)(3).”

Subsec. (e)(1)(C). Pub. L. 110-175, § 8(a)(2), inserted “and average” after “median”.

Subsec. (e)(1)(E). Pub. L. 110-175, § 8(a)(3), inserted before semicolon “, based on the date on which the requests were received by the agency”.

Subsec. (e)(1)(F) to (O). Pub. L. 110-175, § 8(a)(4), (5), added subpars. (F) to (M) and redesignated former subpars. (F) and (G) as (N) and (O), respectively.

Subsec. (e)(2). Pub. L. 110-175, § 8(b)(2), added par. (2). Former par. (2) redesignated (3).

Subsec. (e)(3). Pub. L. 110-175, § 8(b)(1), (c), redesignated par. (2) as (3) and inserted at end “In addition, each agency shall make the raw statistical data used in its reports available electronically to the public upon request.” Former par. (3) redesignated (4).

Subsec. (e)(4) to (6). Pub. L. 110-175, § 8(b)(1), redesignated pars. (3) to (5) as (4) to (6), respectively.

Subsec. (f)(2). Pub. L. 110-175, § 9, added par. (2) and struck out former par. (2) which read as follows: “‘record’ and any other term used in this section in reference to information includes any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format.”

Subsecs. (h) to (l). Pub. L. 110-175, § 10(a), added subsecs. (h) to (l).

2002—Subsec. (a)(3)(A). Pub. L. 107-306, § 312(1), inserted “and except as provided in subparagraph (E),” after “of this subsection.”

Subsec. (a)(3)(E). Pub. L. 107-306, § 312(2), added subpar. (E).

1996—Subsec. (a)(2). Pub. L. 104-231, § 4(4), (5), in first sentence struck out “and” at end of subpar. (B) and inserted subpars. (D) and (E).

Pub. L. 104-231, § 4(7), inserted after first sentence “For records created on or after November 1, 1996, within one year after such date, each agency shall make such records available, including by computer telecommunications or, if computer telecommunications means have not been established by the agency, by other electronic means.”

Pub. L. 104-231, § 4(1), in second sentence substituted “staff manual, instruction, or copies of records referred to in subparagraph (D)” for “or staff manual or instruction”.

Pub. L. 104-231, § 4(2), inserted before period at end of third sentence “, and the extent of such deletion shall be indicated on the portion of the record which is made available or published, unless including that indication

would harm an interest protected by the exemption in subsection (b) under which the deletion is made”.

Pub. L. 104-231, § 4(3), inserted after third sentence “If technically feasible, the extent of the deletion shall be indicated at the place in the record where the deletion was made.”

Pub. L. 104-231, § 4(6), which directed the insertion of the following new sentence after the fifth sentence “Each agency shall make the index referred to in subparagraph (E) available by computer telecommunications by December 31, 1999.”, was executed by making the insertion after the sixth sentence, to reflect the probable intent of Congress and the addition of a new sentence by section 4(3) of Pub. L. 104-231.

Subsec. (a)(3). Pub. L. 104-231, § 5, inserted subpar. (A) designation after “(3)”, redesignated subpars. (A) and (B) as cls. (i) and (ii), respectively, and added subpars. (B) to (D).

Subsec. (a)(4)(B). Pub. L. 104-231, § 6, inserted at end “In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency’s determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).”

Subsec. (a)(6)(A)(i). Pub. L. 104-231, § 8(b), substituted “20 days” for “ten days”.

Subsec. (a)(6)(B). Pub. L. 104-231, § 7(b), amended subpar. (B) generally. Prior to amendment, subpar. (B) read as follows: “In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. As used in this subparagraph, ‘unusual circumstances’ means, but only to the extent reasonably necessary to the proper processing of the particular request—

“(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

“(ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

“(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.”

Subsec. (a)(6)(C). Pub. L. 104-231, § 7(c), designated existing provisions as cl. (i) and added cls. (ii) and (iii).

Subsec. (a)(6)(D). Pub. L. 104-231, § 7(a), added subpar. (D).

Subsec. (a)(6)(E), (F). Pub. L. 104-231, § 8(a), (c), added subpars. (E) and (F).

Subsec. (b). Pub. L. 104-231, § 9, inserted at end of closing provisions “The amount of information deleted shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted shall be indicated at the place in the record where such deletion is made.”

Subsec. (e). Pub. L. 104-231, § 10, amended subsec. (e) generally, revising and restating provisions relating to reports to Congress.

Subsec. (f). Pub. L. 104-231, § 3, amended subsec. (f) generally. Prior to amendment, subsec. (f) read as follows: “For purposes of this section, the term ‘agency’ as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.”

Subsec. (g). Pub. L. 104-231, §11, added subsec. (g).
 1986—Subsec. (a)(4)(A). Pub. L. 99-570, §1803, amended subpar. (A) generally. Prior to amendment, subpar. (A) read as follows: “In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees applicable to all constituent units of such agency. Such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication. Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public.”

Subsec. (b)(7). Pub. L. 99-570, §1802(a), amended par. (7) generally. Prior to amendment, par. (7) read as follows: “investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;”.

Subsecs. (c) to (f). Pub. L. 99-570, §1802(b), added subsec. (c) and redesignated former subsecs. (c) to (e) as (d) to (f), respectively.

1984—Subsec. (a)(4)(D). Pub. L. 98-620 repealed subpar. (D) which provided for precedence on the docket and expeditious disposition of district court proceedings authorized by subsec. (a).

1978—Subsec. (a)(4)(F). Pub. L. 95-454 substituted references to the Special Counsel for references to the Civil Service Commission wherever appearing and reference to his findings for reference to its findings.

1976—Subsec. (b)(3). Pub. L. 94-409 inserted provision excluding section 552b of this title from applicability of exemption from disclosure and provision setting forth conditions for statute specifically exempting disclosure.

1974—Subsec. (a)(2). Pub. L. 93-502, §1(a), substituted provisions relating to maintenance and availability of current indexes, for provisions relating to maintenance and availability of a current index, and inserted provisions relating to publication and distribution of copies of indexes or supplements thereto.

Subsec. (a)(3). Pub. L. 93-502, §1(b)(1), substituted provisions requiring requests to reasonably describe records for provisions requiring requests, for identifiable records, and struck out provisions setting forth procedures to enjoin agencies from withholding the requested records and ordering their production.

Subsec. (a)(4), (5). Pub. L. 93-502, §1(b)(2), added par. (4) and redesignated former par. (4) as (5).

Subsec. (a)(6). Pub. L. 93-502, §1(c), added par. (6).

Subsec. (b)(1). Pub. L. 93-502, §2(a), designated existing provisions as cl. (A), substituted “authorized under criteria established by an” for “required by”, and added cl. (B).

Subsec. (b)(7). Pub. L. 93-502, §2(b), substituted provisions relating to exemption for investigatory records compiled for law enforcement purposes, for provisions relating to exemption for investigatory files compiled for law enforcement purposes.

Subsec. (b), foll. par. (9). Pub. L. 93-502, §2(c), inserted provision relating to availability of segregable portion of records.

Subsecs. (d), (e). Pub. L. 93-502, §3, added subsecs. (d) and (e).

1967—Subsec. (a). Pub. L. 90-23 substituted introductory statement requiring every agency to make avail-

able to the public certain information for former introductory provision excepting from disclosure (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating to internal management of an agency, covered in subsec. (b)(1) and (2) of this section.

Subsec. (a)(1). Pub. L. 90-23 incorporated provisions of: former subsec. (b)(1) in (A), inserting requirement of publication of names of officers as sources of information and provision for public to obtain decisions, and striking out publication requirement for delegations by the agency of final authority; former subsec. (b)(2), introductory part, in (B); former subsec. (b)(2), concluding part, in (C), inserting publication requirement for rules of procedure and descriptions of forms available or the places at which forms may be obtained; former subsec. (b)(3), introductory part, in (D), inserting requirement of general applicability of substantive rules and interpretations, added clause (E), substituted exemption of any person from failure to resort to any matter or from being adversely affected by any matter required to be published in the Federal Register but not so published for former subsec. (b)(3), concluding part, excepting from publication rules addressed to and served upon named persons in accordance with laws and final sentence reading “A person may not be required to resort to organization or procedure not so published” and inserted provision deeming matter, which is reasonably available, as published in the Federal Register when such matter is incorporated by reference in the Federal Register with the approval of its Director.

Subsec. (a)(2). Pub. L. 90-23 incorporated provisions of former subsec. (c), provided for public copying of records, struck out requirement of agency publication of final opinions or orders and authority for secrecy and withholding of opinions and orders required for good cause to be held confidential and not cited as precedents, latter provision now superseded by subsec. (b) of this section, designated existing subsec. (c) as clause (A), including provision for availability of concurring and dissenting opinions, inserted provisions for availability of policy statements and interpretations in clause (B) and staff manuals and instructions in clause (C), deletion of personal identifications from records to protect personal privacy with written justification therefor, and provision for indexing and prohibition of use of records not indexed against any private party without actual and timely notice of the terms thereof.

Subsec. (a)(3). Pub. L. 90-23 incorporated provisions of former subsec. (d) and substituted provisions requiring identifiable agency records to be made available to any person upon request and compliance with rules as to time, place, and procedure for inspection, and payment of fees and provisions for Federal district court proceedings de novo for enforcement by contempt of non-compliance with court’s orders with the burden on the agency and docket precedence for such proceedings for former provisions requiring matters of official record to be made available to persons properly and directly concerned except information held confidential for good cause shown, the latter provision superseded by subsec. (b) of this section.

Subsec. (a)(4). Pub. L. 90-23 added par. (4).

Subsec. (b). Pub. L. 90-23 added subsec. (b) which superseded provisions excepting from disclosure any function of the United States requiring secrecy in the public interest or any matter relating to internal management of an agency, formerly contained in former subsec. (a), final opinions or orders required for good cause to be held confidential and not cited as precedents, formerly contained in subsec. (c), and information held confidential for good cause found, contained in former subsec. (d) of this section.

Subsec. (c). Pub. L. 90-23 added subsec. (c).

CHANGE OF NAME

Committee on Governmental Affairs of Senate changed to Committee on Homeland Security and Governmental Affairs of Senate, effective Jan. 4, 2005, by

Senate Resolution No. 445, One Hundred Eighth Congress, Oct. 9, 2004.

Committee on Government Reform and Oversight of House of Representatives changed to Committee on Government Reform of House of Representatives by House Resolution No. 5, One Hundred Sixth Congress, Jan. 6, 1999. Committee on Government Reform of House of Representatives changed to Committee on Oversight and Government Reform of House of Representatives by House Resolution No. 6, One Hundred Tenth Congress, Jan. 5, 2007.

EFFECTIVE DATE OF 2007 AMENDMENT

Pub. L. 110-175, §6(a)(2), Dec. 31, 2007, 121 Stat. 2526, provided that: “The amendment made by this subsection [amending this section] shall take effect 1 year after the date of enactment of this Act [Dec. 31, 2007].”

Pub. L. 110-175, §6(b)(2), Dec. 31, 2007, 121 Stat. 2526, provided that: “The amendment made by this subsection [amending this section] shall take effect 1 year after the date of enactment of this Act [Dec. 31, 2007] and apply to requests for information under section 552 of title 5, United States Code, filed on or after that effective date.”

Pub. L. 110-175, §7(b), Dec. 31, 2007, 121 Stat. 2527, provided that: “The amendment made by this section [amending this section] shall take effect 1 year after the date of enactment of this Act [Dec. 31, 2007] and apply to requests for information under section 552 of title 5, United States Code, filed on or after that effective date.”

Pub. L. 110-175, §10(b), Dec. 31, 2007, 121 Stat. 2530, provided that: “The amendments made by this section [amending this section] shall take effect on the date of enactment of this Act [Dec. 31, 2007].”

EFFECTIVE DATE OF 1996 AMENDMENT

Section 12 of Pub. L. 104-231 provided that:
“(a) IN GENERAL.—Except as provided in subsection (b), this Act [amending this section and enacting provisions set out as notes below] shall take effect 180 days after the date of the enactment of this Act [Oct. 2, 1996].

“(b) PROVISIONS EFFECTIVE ON ENACTMENT [sic].—Sections 7 and 8 [amending this section] shall take effect one year after the date of the enactment of this Act [Oct. 2, 1996].”

EFFECTIVE DATE OF 1986 AMENDMENT

Section 1804 of Pub. L. 99-570 provided that:
“(a) The amendments made by section 1802 [amending this section] shall be effective on the date of enactment of this Act [Oct. 27, 1986], and shall apply with respect to any requests for records, whether or not the request was made prior to such date, and shall apply to any civil action pending on such date.

“(b)(1) The amendments made by section 1803 [amending this section] shall be effective 180 days after the date of enactment of this Act [Oct. 27, 1986], except that regulations to implement such amendments shall be promulgated by such 180th day.

“(2) The amendments made by section 1803 [amending this section] shall apply with respect to any requests for records, whether or not the request was made prior to such date, and shall apply to any civil action pending on such date, except that review charges applicable to records requested for commercial use shall not be applied by an agency to requests made before the effective date specified in paragraph (1) of this subsection or before the agency has finally issued its regulations.”

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98-620 not applicable to cases pending on Nov. 8, 1984, see section 403 of Pub. L. 98-620, set out as an Effective Date note under section 1657 of Title 28, Judiciary and Judicial Procedure.

EFFECTIVE DATE OF 1978 AMENDMENT

Amendment by Pub. L. 95-454 effective 90 days after Oct. 13, 1978, see section 907 of Pub. L. 95-454, set out as a note under section 1101 of this title.

EFFECTIVE DATE OF 1976 AMENDMENT

Amendment by Pub. L. 94-409 effective 180 days after Sept. 13, 1976, see section 6 of Pub. L. 94-409, set out as an Effective Date note under section 552b of this title.

EFFECTIVE DATE OF 1974 AMENDMENT

Section 4 of Pub. L. 93-502 provided that: “The amendments made by this Act [amending this section] shall take effect on the ninetieth day beginning after the date of enactment of this Act [Nov. 21, 1974].”

EFFECTIVE DATE OF 1967 AMENDMENT

Section 4 of Pub. L. 90-23 provided that: “This Act [amending this section] shall be effective July 4, 1967, or on the date of enactment [June 5, 1967], whichever is later.”

SHORT TITLE OF 1996 AMENDMENT

Section 1 of Pub. L. 104-231 provided that: “This Act [amending this section and enacting provisions set out as notes under this section] may be cited as the ‘Electronic Freedom of Information Act Amendments of 1996.’”

SHORT TITLE OF 1986 AMENDMENT

Section 1801 of Pub. L. 99-570 provided that: “This subtitle [subtitle N (§§1801-1804) of title I of Pub. L. 99-570, amending this section and enacting provisions set out as a note under this section] may be cited as the ‘Freedom of Information Reform Act of 1986.’”

SHORT TITLE

This section is popularly known as the “Freedom of Information Act”.

PROTECTED NATIONAL SECURITY DOCUMENTS

Pub. L. 111-83, title V, §565, Oct. 28, 2009, 123 Stat. 2184, provided that:

“(a) SHORT TITLE.—This section may be cited as the ‘Protected National Security Documents Act of 2009’.

“(b) Notwithstanding any other provision of the law to the contrary, no protected document, as defined in subsection (c), shall be subject to disclosure under section 552 of title 5, United States Code[,] or any proceeding under that section.

“(c) DEFINITIONS.—In this section:

“(1) PROTECTED DOCUMENT.—The term ‘protected document’ means any record—

“(A) for which the Secretary of Defense has issued a certification, as described in subsection (d), stating that disclosure of that record would endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States; and

“(B) that is a photograph that—

“(i) was taken during the period beginning on September 11, 2001, through January 22, 2009; and

“(ii) relates to the treatment of individuals engaged, captured, or detained after September 11, 2001, by the Armed Forces of the United States in operations outside of the United States.

“(2) PHOTOGRAPH.—The term ‘photograph’ encompasses all photographic images, whether originals or copies, including still photographs, negatives, digital images, films, video tapes, and motion pictures.

“(d) CERTIFICATION.—

“(1) IN GENERAL.—For any photograph described under subsection (c)(1), the Secretary of Defense shall issue a certification if the Secretary of Defense determines that disclosure of that photograph would endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States.

“(2) CERTIFICATION EXPIRATION.—A certification and a renewal of a certification issued pursuant to subsection (d)(3) shall expire 3 years after the date on

which the certification or renewal, [sic] is issued by the Secretary of Defense.

“(3) CERTIFICATION RENEWAL.—The Secretary of Defense may issue—

“(A) a renewal of a certification at any time; and

“(B) more than 1 renewal of a certification.

“(4) NOTICE TO CONGRESS.—The Secretary of Defense shall provide Congress a timely notice of the Secretary’s issuance of a certification and of a renewal of a certification.

“(e) RULE OF CONSTRUCTION.—Nothing in this section shall be construed to preclude the voluntary disclosure of a protected document.

“(f) EFFECTIVE DATE.—This section shall take effect on the date of enactment of this Act [Oct. 28, 2009] and apply to any protected document.”

FINDINGS

Pub. L. 110-175, §2, Dec. 31, 2007, 121 Stat. 2524, provided that: “Congress finds that—

“(1) the Freedom of Information Act [probably means Pub. L. 89-487 which amended section 1002 of former Title 5, Executive Departments and Government Officers and Employees, see Historical and Revision notes above] was signed into law on July 4, 1966, because the American people believe that—

“(A) our constitutional democracy, our system of self-government, and our commitment to popular sovereignty depends upon the consent of the governed;

“(B) such consent is not meaningful unless it is informed consent; and

“(C) as Justice Black noted in his concurring opinion in *Barr v. Matteo* (360 U.S. 564 (1959)), ‘The effective functioning of a free government like ours depends largely on the force of an informed public opinion. This calls for the widest possible understanding of the quality of government service rendered by all elective or appointed public officials or employees.’;

“(2) the American people firmly believe that our system of government must itself be governed by a presumption of openness;

“(3) the Freedom of Information Act establishes a ‘strong presumption in favor of disclosure’ as noted by the United States Supreme Court in *United States Department of State v. Ray* (502 U.S. 164 (1991)), a presumption that applies to all agencies governed by that Act;

“(4) ‘disclosure, not secrecy, is the dominant objective of the Act,’ as noted by the United States Supreme Court in *Department of Air Force v. Rose* (425 U.S. 352 (1976));

“(5) in practice, the Freedom of Information Act has not always lived up to the ideals of that Act; and

“(6) Congress should regularly review section 552 of title 5, United States Code (commonly referred to as the Freedom of Information Act), in order to determine whether further changes and improvements are necessary to ensure that the Government remains open and accessible to the American people and is always based not upon the ‘need to know’ but upon the fundamental ‘right to know’.”

LIMITATION ON AMOUNTS OBLIGATED OR EXPENDED FROM CLAIMS AND JUDGMENT FUND

Pub. L. 110-175, §4(b), Dec. 31, 2007, 121 Stat. 2525, provided that: “Notwithstanding section 1304 of title 31, United States Code, no amounts may be obligated or expended from the Claims and Judgment Fund of the United States Treasury to pay the costs resulting from fees assessed under section 552(a)(4)(E) of title 5, United States Code. Any such amounts shall be paid only from funds annually appropriated for any authorized purpose for the Federal agency against which a claim or judgment has been rendered.”

NONDISCLOSURE OF CERTAIN PRODUCTS OF COMMERCIAL SATELLITE OPERATIONS

Pub. L. 108-375, div. A, title IX, §914, Oct. 28, 2004, 118 Stat. 2029, provided that:

“(a) MANDATORY DISCLOSURE REQUIREMENTS INAPPLICABLE.—The requirements to make information available under section 552 of title 5, United States Code, shall not apply to land remote sensing information.

“(b) LAND REMOTE SENSING INFORMATION DEFINED.—In this section, the term ‘land remote sensing information’—

“(1) means any data that—

“(A) are collected by land remote sensing; and

“(B) are prohibited from sale to customers other than the United States Government and United States Government-approved customers for reasons of national security pursuant to the terms of an operating license issued pursuant to the Land Remote Sensing Policy Act of 1992 ([former] 15 U.S.C. 5601 et seq.) [now 51 U.S.C. 60101 et seq.]; and

“(2) includes any imagery and other product that is derived from such data and which is prohibited from sale to customers other than the United States Government and United States Government-approved customers for reasons of national security pursuant to the terms of an operating license described in paragraph (1)(B).

“(c) STATE OR LOCAL GOVERNMENT DISCLOSURES.—Land remote sensing information provided by the head of a department or agency of the United States to a State, local, or tribal government may not be made available to the general public under any State, local, or tribal law relating to the disclosure of information or records.

“(d) SAFEGUARDING INFORMATION.—The head of each department or agency of the United States having land remote sensing information within that department or agency or providing such information to a State, local, or tribal government shall take such actions, commensurate with the sensitivity of that information, as are necessary to protect that information from disclosure other than in accordance with this section and other applicable law.

“(e) ADDITIONAL DEFINITION.—In this section, the term ‘land remote sensing’ has the meaning given such term in section 3 of the Land Remote Sensing Policy Act of 1992 ([former] 15 U.S.C. 5602) [now 51 U.S.C. 60101].

“(f) DISCLOSURE TO CONGRESS.—Nothing in this section shall be construed to authorize the withholding of information from the appropriate committees of Congress.”

DISCLOSURE OF ARSON, EXPLOSIVE, OR FIREARM RECORDS

Pub. L. 108-7, div. J, title VI, §644, Feb. 20, 2003, 117 Stat. 473, provided that: “No funds appropriated under this Act or any other Act with respect to any fiscal year shall be available to take any action based upon any provision of 5 U.S.C. 552 with respect to records collected or maintained pursuant to 18 U.S.C. 846(b), 923(g)(3) or 923(g)(7), or provided by Federal, State, local, or foreign law enforcement agencies in connection with arson or explosives incidents or the tracing of a firearm, except that such records may continue to be disclosed to the extent and in the manner that records so collected, maintained, or obtained have been disclosed under 5 U.S.C. 552 prior to the date of the enactment of this Act [Feb. 20, 2003].”

DISCLOSURE OF INFORMATION ON JAPANESE IMPERIAL GOVERNMENT

Pub. L. 106-567, title VIII, Dec. 27, 2000, 114 Stat. 2864, as amended by Pub. L. 108-199, div. H, §163, Jan. 23, 2004, 118 Stat. 452; Pub. L. 109-5, §1, Mar. 25, 2005, 119 Stat. 19, provided that:

“SEC. 801. SHORT TITLE.

“This title may be cited as the ‘Japanese Imperial Government Disclosure Act of 2000’.

“SEC. 802. DESIGNATION.

“(a) DEFINITIONS.—In this section:

“(1) AGENCY.—The term ‘agency’ has the meaning given such term under section 551 of title 5, United States Code.

“(2) INTERAGENCY GROUP.—The term ‘Interagency Group’ means the Nazi War Crimes and Japanese Imperial Government Records Interagency Working Group established under subsection (b).

“(3) JAPANESE IMPERIAL GOVERNMENT RECORDS.—The term ‘Japanese Imperial Government records’ means classified records or portions of records that pertain to any person with respect to whom the United States Government, in its sole discretion, has grounds to believe ordered, incited, assisted, or otherwise participated in the experimentation on, and persecution of, any person because of race, religion, national origin, or political opinion, during the period beginning September 18, 1931, and ending on December 31, 1948, under the direction of, or in association with—

“(A) the Japanese Imperial Government;

“(B) any government in any area occupied by the military forces of the Japanese Imperial Government;

“(C) any government established with the assistance or cooperation of the Japanese Imperial Government; or

“(D) any government which was an ally of the Japanese Imperial Government.

“(4) RECORD.—The term ‘record’ means a Japanese Imperial Government record.

“(b) ESTABLISHMENT OF INTERAGENCY GROUP.—

“(1) IN GENERAL.—Not later than 60 days after the date of the enactment of this Act [Dec. 27, 2000], the President shall designate the Working Group established under the Nazi War Crimes Disclosure Act (Public Law 105-246; 5 U.S.C. 552 note) to also carry out the purposes of this title with respect to Japanese Imperial Government records, and that Working Group shall remain in existence for 6 years after the date on which this title takes effect. Such Working Group is redesignated as the ‘Nazi War Crimes and Japanese Imperial Government Records Interagency Working Group’.

“(2) MEMBERSHIP.—[Amended Pub. L. 105-246, set out as a note below.]

“(c) FUNCTIONS.—Not later than 1 year after the date of the enactment of this Act [Dec. 27, 2000], the Interagency Group shall, to the greatest extent possible consistent with section 803—

“(1) locate, identify, inventory, recommend for declassification, and make available to the public at the National Archives and Records Administration, all classified Japanese Imperial Government records of the United States;

“(2) coordinate with agencies and take such actions as necessary to expedite the release of such records to the public; and

“(3) submit a report to Congress, including the Committee on Government Reform [now Committee on Oversight and Government Reform] and the Permanent Select Committee on Intelligence of the House of Representatives, and the Committee on the Judiciary and the Select Committee on Intelligence of the Senate, describing all such records, the disposition of such records, and the activities of the Interagency Group and agencies under this section.

“(d) FUNDING.—There is authorized to be appropriated such sums as may be necessary to carry out the provisions of this title.

“SEC. 803. REQUIREMENT OF DISCLOSURE OF RECORDS.

“(a) RELEASE OF RECORDS.—Subject to subsections (b), (c), and (d), the Japanese Imperial Government Records Interagency Working Group shall release in their entirety Japanese Imperial Government records.

“(b) EXEMPTIONS.—An agency head may exempt from release under subsection (a) specific information, that would—

“(1) constitute an unwarranted invasion of personal privacy;

“(2) reveal the identity of a confidential human source, or reveal information about an intelligence source or method when the unauthorized disclosure of that source or method would damage the national security interests of the United States;

“(3) reveal information that would assist in the development or use of weapons of mass destruction;

“(4) reveal information that would impair United States cryptologic systems or activities;

“(5) reveal information that would impair the application of state-of-the-art technology within a United States weapon system;

“(6) reveal United States military war plans that remain in effect;

“(7) reveal information that would impair relations between the United States and a foreign government, or undermine ongoing diplomatic activities of the United States;

“(8) reveal information that would impair the current ability of United States Government officials to protect the President, Vice President, and other officials for whom protection services are authorized in the interest of national security;

“(9) reveal information that would impair current national security emergency preparedness plans; or

“(10) violate a treaty or other international agreement.

“(c) APPLICATIONS OF EXEMPTIONS.—

“(1) IN GENERAL.—In applying the exemptions provided in paragraphs (2) through (10) of subsection (b), there shall be a presumption that the public interest will be served by disclosure and release of the records of the Japanese Imperial Government. The exemption may be asserted only when the head of the agency that maintains the records determines that disclosure and release would be harmful to a specific interest identified in the exemption. An agency head who makes such a determination shall promptly report it to the committees of Congress with appropriate jurisdiction, including the Committee on the Judiciary and the Select Committee on Intelligence of the Senate and the Committee on Government Reform [now Committee on Oversight and Government Reform] and the Permanent Select Committee on Intelligence of the House of Representatives.

“(2) APPLICATION OF TITLE 5.—A determination by an agency head to apply an exemption provided in paragraphs (2) through (9) of subsection (b) shall be subject to the same standard of review that applies in the case of records withheld under section 552(b)(1) of title 5, United States Code.

“(d) RECORDS RELATED TO INVESTIGATIONS OR PROSECUTIONS.—This section shall not apply to records—

“(1) related to or supporting any active or inactive investigation, inquiry, or prosecution by the Office of Special Investigations of the Department of Justice; or

“(2) solely in the possession, custody, or control of the Office of Special Investigations.

“SEC. 804. EXPEDITED PROCESSING OF REQUESTS FOR JAPANESE IMPERIAL GOVERNMENT RECORDS.

“For purposes of expedited processing under section 552(a)(6)(E) of title 5, United States Code, any person who was persecuted in the manner described in section 802(a)(3) and who requests a Japanese Imperial Government record shall be deemed to have a compelling need for such record.

“SEC. 805. EFFECTIVE DATE.

“The provisions of this title shall take effect on the date that is 90 days after the date of the enactment of this Act [Dec. 27, 2000].”

NAZI WAR CRIMES DISCLOSURE

Pub. L. 105-246, Oct. 8, 1998, 112 Stat. 1859, as amended by Pub. L. 106-567, § 802(b)(2), Dec. 27, 2000, 114 Stat. 2865, provided that:

“SECTION 1. SHORT TITLE.

“This Act may be cited as the ‘Nazi War Crimes Disclosure Act’.

“SEC. 2. ESTABLISHMENT OF NAZI WAR CRIMINAL RECORDS INTERAGENCY WORKING GROUP.

“(a) DEFINITIONS.—In this section the term—

“(1) ‘agency’ has the meaning given such term under section 551 of title 5, United States Code;

“(2) ‘Interagency Group’ means the Nazi War Criminal Records Interagency Working Group [redesignated Nazi War Crimes and Japanese Imperial Government Records Interagency Working Group, see section 802(b)(1) of Pub. L. 106-567, set out above] established under subsection (b);

“(3) ‘Nazi war criminal records’ has the meaning given such term under section 3 of this Act; and

“(4) ‘record’ means a Nazi war criminal record.

“(b) ESTABLISHMENT OF INTERAGENCY GROUP.—

“(1) IN GENERAL.—Not later than 60 days after the date of enactment of this Act [Oct. 8, 1998], the President shall establish the Nazi War Criminal Records Interagency Working Group, which shall remain in existence for 3 years after the date the Interagency Group is established.

“(2) MEMBERSHIP.—The President shall appoint to the Interagency Group individuals whom the President determines will most completely and effectively carry out the functions of the Interagency Group within the time limitations provided in this section, including the Director of the Holocaust Museum, the Historian of the Department of State, the Archivist of the United States, the head of any other agency the President considers appropriate, and no more than 4 other persons who shall be members of the public, of whom 3 shall be persons appointed under the provisions of this Act in effect on October 8, 1998. [sic] The head of an agency appointed by the President may designate an appropriate officer to serve on the Interagency Group in lieu of the head of such agency.

“(3) INITIAL MEETING.—Not later than 90 days after the date of enactment of this Act, the Interagency Group shall hold an initial meeting and begin the functions required under this section.

“(c) FUNCTIONS.—Not later than 1 year after the date of enactment of this Act [Oct. 8, 1998], the Interagency Group shall, to the greatest extent possible consistent with section 3 of this Act—

“(1) locate, identify, inventory, recommend for declassification, and make available to the public at the National Archives and Records Administration, all classified Nazi war criminal records of the United States;

“(2) coordinate with agencies and take such actions as necessary to expedite the release of such records to the public; and

“(3) submit a report to Congress, including the Committee on the Judiciary of the Senate and the Committee on Government Reform and Oversight [now Committee on Oversight and Government Reform] of the House of Representatives, describing all such records, the disposition of such records, and the activities of the Interagency Group and agencies under this section.

“(d) FUNDING.—There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this Act.

“SEC. 3. REQUIREMENT OF DISCLOSURE OF RECORDS REGARDING PERSONS WHO COMMITTED NAZI WAR CRIMES.

“(a) NAZI WAR CRIMINAL RECORDS.—For purposes of this Act, the term ‘Nazi war criminal records’ means classified records or portions of records that—

“(1) pertain to any person with respect to whom the United States Government, in its sole discretion, has grounds to believe ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion, during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with—

“(A) the Nazi government of Germany;

“(B) any government in any area occupied by the military forces of the Nazi government of Germany;

“(C) any government established with the assistance or cooperation of the Nazi government of Germany; or

“(D) any government which was an ally of the Nazi government of Germany; or

“(2) pertain to any transaction as to which the United States Government, in its sole discretion, has grounds to believe—

“(A) involved assets taken from persecuted persons during the period beginning on March 23, 1933, and ending on May 8, 1945, by, under the direction of, on behalf of, or under authority granted by the Nazi government of Germany or any nation then allied with that government; and

“(B) such transaction was completed without the assent of the owners of those assets or their heirs or assigns or other legitimate representatives.

“(b) RELEASE OF RECORDS.—

“(1) IN GENERAL.—Subject to paragraphs (2), (3), and (4), the Nazi War Criminal Records Interagency Working Group shall release in their entirety Nazi war criminal records that are described in subsection (a).

“(2) EXCEPTION FOR PRIVACY, ETC.—An agency head may exempt from release under paragraph (1) specific information, that would—

“(A) constitute a clearly unwarranted invasion of personal privacy;

“(B) reveal the identity of a confidential human source, or reveal information about the application of an intelligence source or method, or reveal the identity of a human intelligence source when the unauthorized disclosure of that source would clearly and demonstrably damage the national security interests of the United States;

“(C) reveal information that would assist in the development or use of weapons of mass destruction;

“(D) reveal information that would impair United States cryptologic systems or activities;

“(E) reveal information that would impair the application of state-of-the-art technology within a United States weapon system;

“(F) reveal actual United States military war plans that remain in effect;

“(G) reveal information that would seriously and demonstrably impair relations between the United States and a foreign government, or seriously and demonstrably undermine ongoing diplomatic activities of the United States;

“(H) reveal information that would clearly and demonstrably impair the current ability of United States Government officials to protect the President, Vice President, and other officials for whom protection services, in the interest of national security, are authorized;

“(I) reveal information that would seriously and demonstrably impair current national security emergency preparedness plans; or

“(J) violate a treaty or international agreement.

“(3) APPLICATION OF EXEMPTIONS.—

“(A) IN GENERAL.—In applying the exemptions listed in subparagraphs (B) through (J) of paragraph (2), there shall be a presumption that the public interest in the release of Nazi war criminal records will be served by disclosure and release of the records. Assertion of such exemption may only be made when the agency head determines that disclosure and release would be harmful to a specific interest identified in the exemption. An agency head who makes such a determination shall promptly report it to the committees of Congress with appropriate jurisdiction, including the Committee on the Judiciary of the Senate and the Committee on Government Reform and Oversight [now Committee on Oversight and Government Reform] of the House of Representatives. The exemptions set forth in paragraph (2) shall constitute the only authority pursuant to which an agency head may

exempt records otherwise subject to release under paragraph (1).

“(B) APPLICATION OF TITLE 5.—A determination by an agency head to apply an exemption listed in subparagraphs (B) through (I) of paragraph (2) shall be subject to the same standard of review that applies in the case of records withheld under section 552(b)(1) of title 5, United States Code.

“(4) LIMITATION ON APPLICATION.—This subsection shall not apply to records—

“(A) related to or supporting any active or inactive investigation, inquiry, or prosecution by the Office of Special Investigations of the Department of Justice; or

“(B) solely in the possession, custody, or control of that office.

“(c) INAPPLICABILITY OF NATIONAL SECURITY ACT OF 1947 EXEMPTION.—Section 701(a) of the National Security Act of 1947 (50 U.S.C. 431[(a)]) shall not apply to any operational file, or any portion of any operational file, that constitutes a Nazi war criminal record under section 3 of this Act.

“SEC. 4. EXPEDITED PROCESSING OF FOIA REQUESTS FOR NAZI WAR CRIMINAL RECORDS.

“(a) EXPEDITED PROCESSING.—For purposes of expedited processing under section 552(a)(6)(E) of title 5, United States Code, any requester of a Nazi war criminal record shall be deemed to have a compelling need for such record.

“(b) REQUESTER.—For purposes of this section, the term ‘requester’ means any person who was persecuted in the manner described under section 3(a)(1) of this Act who requests a Nazi war criminal record.

“SEC. 5. EFFECTIVE DATE.

“This Act and the amendments made by this Act shall take effect on the date that is 90 days after the date of enactment of this Act [Oct. 8, 1998].”

CONGRESSIONAL STATEMENT OF FINDINGS AND PURPOSE; PUBLIC ACCESS TO INFORMATION IN ELECTRONIC FORMAT

Section 2 of Pub. L. 104-231 provided that:

“(a) FINDINGS.—The Congress finds that—

“(1) the purpose of section 552 of title 5, United States Code, popularly known as the Freedom of Information Act, is to require agencies of the Federal Government to make certain agency information available for public inspection and copying and to establish and enable enforcement of the right of any person to obtain access to the records of such agencies, subject to statutory exemptions, for any public or private purpose;

“(2) since the enactment of the Freedom of Information Act in 1966, and the amendments enacted in 1974 and 1986, the Freedom of Information Act has been a valuable means through which any person can learn how the Federal Government operates;

“(3) the Freedom of Information Act has led to the disclosure of waste, fraud, abuse, and wrongdoing in the Federal Government;

“(4) the Freedom of Information Act has led to the identification of unsafe consumer products, harmful drugs, and serious health hazards;

“(5) Government agencies increasingly use computers to conduct agency business and to store publicly valuable agency records and information; and

“(6) Government agencies should use new technology to enhance public access to agency records and information.

“(b) PURPOSES.—The purposes of this Act [see Short Title of 1996 Amendment note above] are to—

“(1) foster democracy by ensuring public access to agency records and information;

“(2) improve public access to agency records and information;

“(3) ensure agency compliance with statutory time limits; and

“(4) maximize the usefulness of agency records and information collected, maintained, used, retained, and disseminated by the Federal Government.”

FREEDOM OF INFORMATION ACT EXEMPTION FOR CERTAIN OPEN SKIES TREATY DATA

Pub. L. 103-236, title V, § 533, Apr. 30, 1994, 108 Stat. 480, provided that:

“(a) IN GENERAL.—Data with respect to a foreign country collected by sensors during observation flights conducted in connection with the Treaty on Open Skies, including flights conducted prior to entry into force of the treaty, shall be exempt from disclosure under the Freedom of Information Act—

“(1) if the country has not disclosed the data to the public; and

“(2) if the country has not, acting through the Open Skies Consultative Commission or any other diplomatic channel, authorized the United States to disclose the data to the public.

“(b) STATUTORY CONSTRUCTION.—This section constitutes a specific exemption within the meaning of section 552(b)(3) of title 5, United States Code.

“(c) DEFINITIONS.—For the purposes of this section—

“(1) the term ‘Freedom of Information Act’ means the provisions of section 552 of title 5, United States Code;

“(2) the term ‘Open Skies Consultative Commission’ means the commission established pursuant to Article X of the Treaty on Open Skies; and

“(3) the term ‘Treaty on Open Skies’ means the Treaty on Open Skies, signed at Helsinki on March 24, 1992.”

CLASSIFIED NATIONAL SECURITY INFORMATION

For provisions relating to a response to a request for information under this section when the fact of its existence or nonexistence is itself classified or when it was originally classified by another agency, see Ex. Ord. No. 13526, § 3.6, Dec. 29, 2009, 75 F.R. 718, set out as a note under section 435 of Title 50, War and National Defense.

EXECUTIVE ORDER NO. 12174

Ex. Ord. No. 12174, Nov. 30, 1979, 44 F.R. 69609, which related to minimizing Federal paperwork, was revoked by Ex. Ord. No. 12291, Feb. 17, 1981, 46 F.R. 13193, formerly set out as a note under section 601 of this title.

EX. ORD. NO. 12600. PREDISCLASURE NOTIFICATION PROCEDURES FOR CONFIDENTIAL COMMERCIAL INFORMATION

Ex. Ord. No. 12600, June 23, 1987, 52 F.R. 23781, provided:

By the authority vested in me as President by the Constitution and statutes of the United States of America, and in order to provide predisclosure notification procedures under the Freedom of Information Act [5 U.S.C. 552] concerning confidential commercial information, and to make existing agency notification provisions more uniform, it is hereby ordered as follows:

SECTION 1. The head of each Executive department and agency subject to the Freedom of Information Act [5 U.S.C. 552] shall, to the extent permitted by law, establish procedures to notify submitters of records containing confidential commercial information as described in section 3 of this Order, when those records are requested under the Freedom of Information Act [FOIA], 5 U.S.C. 552, as amended, if after reviewing the request, the responsive records, and any appeal by the requester, the department or agency determines that it may be required to disclose the records. Such notice requires that an agency use good-faith efforts to advise submitters of confidential commercial information of the procedures established under this Order. Further, where notification of a voluminous number of submitters is required, such notification may be accomplished by posting or publishing the notice in a place reasonably calculated to accomplish notification.

SEC. 2. For purposes of this Order, the following definitions apply:

(a) “Confidential commercial information” means records provided to the government by a submitter that arguably contain material exempt from release

under Exemption 4 of the Freedom of Information Act, 5 U.S.C. 552(b)(4), because disclosure could reasonably be expected to cause substantial competitive harm.

(b) "Submitter" means any person or entity who provides confidential commercial information to the government. The term "submitter" includes, but is not limited to, corporations, state governments, and foreign governments.

SEC. 3. (a) For confidential commercial information submitted prior to January 1, 1988, the head of each Executive department or agency shall, to the extent permitted by law, provide a submitter with notice pursuant to section 1 whenever:

(i) the records are less than 10 years old and the information has been designated by the submitter as confidential commercial information; or

(ii) the department or agency has reason to believe that disclosure of the information could reasonably be expected to cause substantial competitive harm.

(b) For confidential commercial information submitted on or after January 1, 1988, the head of each Executive department or agency shall, to the extent permitted by law, establish procedures to permit submitters of confidential commercial information to designate, at the time the information is submitted to the Federal government or a reasonable time thereafter, any information the disclosure of which the submitter claims could reasonably be expected to cause substantial competitive harm. Such agency procedures may provide for the expiration, after a specified period of time or changes in circumstances, of designations of competitive harm made by submitters. Additionally, such procedures may permit the agency to designate specific classes of information that will be treated by the agency as if the information had been so designated by the submitter. The head of each Executive department or agency shall, to the extent permitted by law, provide the submitter notice in accordance with section 1 of this Order whenever the department or agency determines that it may be required to disclose records:

(i) designated pursuant to this subsection; or

(ii) the disclosure of which the department or agency has reason to believe could reasonably be expected to cause substantial competitive harm.

SEC. 4. When notification is made pursuant to section 1, each agency's procedures shall, to the extent permitted by law, afford the submitter a reasonable period of time in which the submitter or its designee may object to the disclosure of any specified portion of the information and to state all grounds upon which disclosure is opposed.

SEC. 5. Each agency shall give careful consideration to all such specified grounds for nondisclosure prior to making an administrative determination of the issue. In all instances when the agency determines to disclose the requested records, its procedures shall provide that the agency give the submitter a written statement briefly explaining why the submitter's objections are not sustained. Such statement shall, to the extent permitted by law, be provided a reasonable number of days prior to a specified disclosure date.

SEC. 6. Whenever a FOIA requester brings suit seeking to compel disclosure of confidential commercial information, each agency's procedures shall require that the submitter be promptly notified.

SEC. 7. The designation and notification procedures required by this Order shall be established by regulations, after notice and public comment. If similar procedures or regulations already exist, they should be reviewed for conformity and revised where necessary. Existing procedures or regulations need not be modified if they are in compliance with this Order.

SEC. 8. The notice requirements of this Order need not be followed if:

(a) The agency determines that the information should not be disclosed;

(b) The information has been published or has been officially made available to the public;

(c) Disclosure of the information is required by law (other than 5 U.S.C. 552);

(d) The disclosure is required by an agency rule that (1) was adopted pursuant to notice and public comment, (2) specifies narrow classes of records submitted to the agency that are to be released under the Freedom of Information Act [5 U.S.C. 552], and (3) provides in exceptional circumstances for notice when the submitter provides written justification, at the time the information is submitted or a reasonable time thereafter, that disclosure of the information could reasonably be expected to cause substantial competitive harm;

(e) The information requested is not designated by the submitter as exempt from disclosure in accordance with agency regulations promulgated pursuant to section 7, when the submitter had an opportunity to do so at the time of submission of the information or a reasonable time thereafter, unless the agency has substantial reason to believe that disclosure of the information would result in competitive harm; or

(f) The designation made by the submitter in accordance with agency regulations promulgated pursuant to section 7 appears obviously frivolous; except that, in such case, the agency must provide the submitter with written notice of any final administrative disclosure determination within a reasonable number of days prior to the specified disclosure date.

SEC. 9. Whenever an agency notifies a submitter that it may be required to disclose information pursuant to section 1 of this Order, the agency shall also notify the requester that notice and an opportunity to comment are being provided the submitter. Whenever an agency notifies a submitter of a final decision pursuant to section 5 of this Order, the agency shall also notify the requester.

SEC. 10. This Order is intended only to improve the internal management of the Federal government, and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person.

RONALD REAGAN.

EX. ORD. NO. 13110. NAZI WAR CRIMES AND JAPANESE IMPERIAL GOVERNMENT RECORDS INTERAGENCY WORKING GROUP

Ex. Ord. No. 13110, Jan. 11, 1999, 64 F.R. 2419, provided: By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Nazi War Crimes Disclosure Act (Public Law 105-246) (the "Act") [5 U.S.C. 552 note], it is hereby ordered as follows:

SECTION 1. *Establishment of Working Group.* There is hereby established the Nazi War Criminal Records Interagency Working Group [now Nazi War Crimes and Japanese Imperial Government Records Interagency Working Group] (Working Group). The function of the Group shall be to locate, inventory, recommend for declassification, and make available to the public at the National Archives and Records Administration all classified Nazi war criminal records of the United States, subject to certain designated exceptions as provided in the Act. The Working Group shall coordinate with agencies and take such actions as necessary to expedite the release of such records to the public.

SEC. 2. *Schedule.* The Working Group should complete its work to the greatest extent possible and report to the Congress within 1 year.

SEC. 3. *Membership.* (a) The Working Group shall be composed of the following members:

(1) Archivist of the United States (who shall serve as Chair of the Working Group);

(2) Secretary of Defense;

(3) Attorney General;

(4) Director of Central Intelligence;

(5) Director of the Federal Bureau of Investigation;

(6) Director of the United States Holocaust Memorial Museum;

(7) Historian of the Department of State; and

(8) Three other persons appointed by the President.

(b) The Senior Director for Records and Access Management of the National Security Council will serve as

the liaison to and attend the meetings of the Working Group. Members of the Working Group who are full-time Federal officials may serve on the Working Group through designees.

SEC. 4. *Administration.* (a) To the extent permitted by law and subject to the availability of appropriations, the National Archives and Records Administration shall provide the Working Group with funding, administrative services, facilities, staff, and other support services necessary for the performance of the functions of the Working Group.

(b) The Working Group shall terminate 3 years from the date of this Executive order.

WILLIAM J. CLINTON.

EX. ORD. NO. 13392. IMPROVING AGENCY DISCLOSURE OF INFORMATION

Ex. Ord. No. 13392, Dec. 14, 2005, 70 F.R. 75373, provided:

By the authority vested in me as President by the Constitution and the laws of the United States of America, and to ensure appropriate agency disclosure of information, and consistent with the goals of section 552 of title 5, United States Code, it is hereby ordered as follows:

SECTION 1. *Policy.*

(a) The effective functioning of our constitutional democracy depends upon the participation in public life of a citizenry that is well informed. For nearly four decades, the Freedom of Information Act (FOIA) [5 U.S.C. 552] has provided an important means through which the public can obtain information regarding the activities of Federal agencies. Under the FOIA, the public can obtain records from any Federal agency, subject to the exemptions enacted by the Congress to protect information that must be held in confidence for the Government to function effectively or for other purposes.

(b) FOIA requesters are seeking a service from the Federal Government and should be treated as such. Accordingly, in responding to a FOIA request, agencies shall respond courteously and appropriately. Moreover, agencies shall provide FOIA requesters, and the public in general, with citizen-centered ways to learn about the FOIA process, about agency records that are publicly available (e.g., on the agency's website), and about the status of a person's FOIA request and appropriate information about the agency's response.

(c) Agency FOIA operations shall be both results-oriented and produce results. Accordingly, agencies shall process requests under the FOIA in an efficient and appropriate manner and achieve tangible, measurable improvements in FOIA processing. When an agency's FOIA program does not produce such results, it should be reformed, consistent with available resources appropriated by the Congress and applicable law, to increase efficiency and better reflect the policy goals and objectives of this order.

(d) A citizen-centered and results-oriented approach will improve service and performance, thereby strengthening compliance with the FOIA, and will help avoid disputes and related litigation.

SEC. 2. *Agency Chief FOIA Officers.*

(a) *Designation.* The head of each agency shall designate within 30 days of the date of this order a senior official of such agency (at the Assistant Secretary or equivalent level), to serve as the Chief FOIA Officer of that agency. The head of the agency shall promptly notify the Director of the Office of Management and Budget (OMB Director) and the Attorney General of such designation and of any changes thereafter in such designation.

(b) *General Duties.* The Chief FOIA Officer of each agency shall, subject to the authority of the head of the agency:

(i) have agency-wide responsibility for efficient and appropriate compliance with the FOIA;

(ii) monitor FOIA implementation throughout the agency, including through the use of meetings with the

public to the extent deemed appropriate by the agency's Chief FOIA Officer, and keep the head of the agency, the chief legal officer of the agency, and the Attorney General appropriately informed of the agency's performance in implementing the FOIA, including the extent to which the agency meets the milestones in the agency's plan under section 3(b) of this order and training and reporting standards established consistent with applicable law and this order;

(iii) recommend to the head of the agency such adjustments to agency practices, policies, personnel, and funding as may be necessary to carry out the policy set forth in section 1 of this order;

(iv) review and report, through the head of the agency, at such times and in such formats as the Attorney General may direct, on the agency's performance in implementing the FOIA; and

(v) facilitate public understanding of the purposes of the FOIA's statutory exemptions by including concise descriptions of the exemptions in both the agency's FOIA handbook issued under section 552(g) of title 5, United States Code, and the agency's annual FOIA report, and by providing an overview, where appropriate, of certain general categories of agency records to which those exemptions apply.

(c) *FOIA Requester Service Center and FOIA Public Liaisons.* In order to ensure appropriate communication with FOIA requesters:

(i) Each agency shall establish one or more FOIA Requester Service Centers (Center), as appropriate, which shall serve as the first place that a FOIA requester can contact to seek information concerning the status of the person's FOIA request and appropriate information about the agency's FOIA response. The Center shall include appropriate staff to receive and respond to inquiries from FOIA requesters;

(ii) The agency Chief FOIA Officer shall designate one or more agency officials, as appropriate, as FOIA Public Liaisons, who may serve in the Center or who may serve in a separate office. FOIA Public Liaisons shall serve as supervisory officials to whom a FOIA requester can raise concerns about the service the FOIA requester has received from the Center, following an initial response from the Center staff. FOIA Public Liaisons shall seek to ensure a service-oriented response to FOIA requests and FOIA-related inquiries. For example, the FOIA Public Liaison shall assist, as appropriate, in reducing delays, increasing transparency and understanding of the status of requests, and resolving disputes. FOIA Public Liaisons shall report to the agency Chief FOIA Officer on their activities and shall perform their duties consistent with applicable law and agency regulations;

(iii) In addition to the services to FOIA requesters provided by the Center and FOIA Public Liaisons, the agency Chief FOIA Officer shall also consider what other FOIA-related assistance to the public should appropriately be provided by the agency;

(iv) In establishing the Centers and designating FOIA Public Liaisons, the agency shall use, as appropriate, existing agency staff and resources. A Center shall have appropriate staff to receive and respond to inquiries from FOIA requesters;

(v) As determined by the agency Chief FOIA Officer, in consultation with the FOIA Public Liaisons, each agency shall post appropriate information about its Center or Centers on the agency's website, including contact information for its FOIA Public Liaisons. In the case of an agency without a website, the agency shall publish the information on the Firstgov.gov website or, in the case of any agency with neither a website nor the capability to post on the Firstgov.gov website, in the Federal Register; and

(vi) The agency Chief FOIA Officer shall ensure that the agency has in place a method (or methods), including through the use of the Center, to receive and respond promptly and appropriately to inquiries from FOIA requesters about the status of their requests. The Chief FOIA Officer shall also consider, in consultation with the FOIA Public Liaisons, as appropriate, whether

the agency's implementation of other means (such as tracking numbers for requests, or an agency telephone or Internet hotline) would be appropriate for responding to status inquiries.

SEC. 3. Review, Plan, and Report.

(a) *Review.* Each agency's Chief FOIA Officer shall conduct a review of the agency's FOIA operations to determine whether agency practices are consistent with the policies set forth in section 1 of this order. In conducting this review, the Chief FOIA Officer shall:

(i) evaluate, with reference to numerical and statistical benchmarks where appropriate, the agency's administration of the FOIA, including the agency's expenditure of resources on FOIA compliance and the extent to which, if any, requests for records have not been responded to within the statutory time limit (backlog);

(ii) review the processes and practices by which the agency assists and informs the public regarding the FOIA process;

(iii) examine the agency's:

(A) use of information technology in responding to FOIA requests, including without limitation the tracking of FOIA requests and communication with requesters;

(B) practices with respect to requests for expedited processing; and

(C) implementation of multi-track processing if used by such agency;

(iv) review the agency's policies and practices relating to the availability of public information through websites and other means, including the use of websites to make available the records described in section 552(a)(2) of title 5, United States Code; and

(v) identify ways to eliminate or reduce its FOIA backlog, consistent with available resources and taking into consideration the volume and complexity of the FOIA requests pending with the agency.

(b) *Plan.*

(i) Each agency's Chief FOIA Officer shall develop, in consultation as appropriate with the staff of the agency (including the FOIA Public Liaisons), the Attorney General, and the OMB Director, an agency-specific plan to ensure that the agency's administration of the FOIA is in accordance with applicable law and the policies set forth in section 1 of this order. The plan, which shall be submitted to the head of the agency for approval, shall address the agency's implementation of the FOIA during fiscal years 2006 and 2007.

(ii) The plan shall include specific activities that the agency will implement to eliminate or reduce the agency's FOIA backlog, including (as applicable) changes that will make the processing of FOIA requests more streamlined and effective, as well as increased reliance on the dissemination of records that can be made available to the public through a website or other means that do not require the public to make a request for the records under the FOIA.

(iii) The plan shall also include activities to increase public awareness of FOIA processing, including as appropriate, expanded use of the agency's Center and its FOIA Public Liaisons.

(iv) The plan shall also include, taking appropriate account of the resources available to the agency and the mission of the agency, concrete milestones, with specific timetables and outcomes to be achieved, by which the head of the agency, after consultation with the OMB Director, shall measure and evaluate the agency's success in the implementation of the plan.

(c) *Agency Reports to the Attorney General and OMB Director.*

(i) The head of each agency shall submit a report, no later than 6 months from the date of this order, to the Attorney General and the OMB Director that summarizes the results of the review under section 3(a) of this order and encloses a copy of the agency's plan under section 3(b) of this order. The agency shall publish a copy of the agency's report on the agency's website or, in the case of an agency without a website, on the Firstgov.gov website, or, in the case of any agency with neither a website nor the capability to publish on the Firstgov.gov website, in the Federal Register.

(ii) The head of each agency shall include in the agency's annual FOIA reports for fiscal years 2006 and 2007 a report on the agency's development and implementation of its plan under section 3(b) of this order and on the agency's performance in meeting the milestones set forth in that plan, consistent with any related guidelines the Attorney General may issue under section 552(e) of title 5, United States Code.

(iii) If the agency does not meet a milestone in its plan, the head of the agency shall:

(A) identify this deficiency in the annual FOIA report to the Attorney General;

(B) explain in the annual report the reasons for the agency's failure to meet the milestone;

(C) outline in the annual report the steps that the agency has already taken, and will be taking, to address the deficiency; and

(D) report this deficiency to the President's Management Council.

SEC. 4. Attorney General.

(a) *Report.* The Attorney General, using the reports submitted by the agencies under subsection 3(c)(i) of this order and the information submitted by agencies in their annual FOIA reports for fiscal year 2005, shall submit to the President, no later than 10 months from the date of this order, a report on agency FOIA implementation. The Attorney General shall consult the OMB Director in the preparation of the report and shall include in the report appropriate recommendations on administrative or other agency actions for continued agency dissemination and release of public information. The Attorney General shall thereafter submit two further annual reports, by June 1, 2007, and June 1, 2008, that provide the President with an update on the agencies' implementation of the FOIA and of their plans under section 3(b) of this order.

(b) *Guidance.* The Attorney General shall issue such instructions and guidance to the heads of departments and agencies as may be appropriate to implement sections 3(b) and 3(c) of this order.

SEC. 5. OMB Director. The OMB Director may issue such instructions to the heads of agencies as are necessary to implement this order, other than sections 3(b) and 3(c) of this order.

SEC. 6. Definitions. As used in this order:

(a) the term "agency" has the same meaning as the term "agency" under section 552(f)(1) of title 5, United States Code; and

(b) the term "record" has the same meaning as the term "record" under section 552(f)(2) of title 5, United States Code.

SEC. 7. General Provisions.

(a) The agency reviews under section 3(a) of this order and agency plans under section 3(b) of this order shall be conducted and developed in accordance with applicable law and applicable guidance issued by the President, the Attorney General, and the OMB Director, including the laws and guidance regarding information technology and the dissemination of information.

(b) This order:

(i) shall be implemented in a manner consistent with applicable law and subject to the availability of appropriations;

(ii) shall not be construed to impair or otherwise affect the functions of the OMB Director relating to budget, legislative, or administrative proposals; and

(iii) is intended only to improve the internal management of the executive branch and is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by a party against the United States, its departments, agencies, instrumentalities, or entities, its officers or employees, or any other person.

GEORGE W. BUSH.

FREEDOM OF INFORMATION ACT

Memorandum of President of the United States, Jan. 21, 2009, 74 F.R. 4683, provided:

Memorandum for the Heads of Executive Departments and Agencies

A democracy requires accountability, and accountability requires transparency. As Justice Louis Brandeis wrote, “sunlight is said to be the best of disinfectants.” In our democracy, the Freedom of Information Act (FOIA), which encourages accountability through transparency, is the most prominent expression of a profound national commitment to ensuring an open Government. At the heart of that commitment is the idea that accountability is in the interest of the Government and the citizenry alike.

The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears. Nondisclosure should never be based on an effort to protect the personal interests of Government officials at the expense of those they are supposed to serve. In responding to requests under the FOIA, executive branch agencies (agencies) should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public.

All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA.

The presumption of disclosure also means that agencies should take affirmative steps to make information public. They should not wait for specific requests from the public. All agencies should use modern technology to inform citizens about what is known and done by their Government. Disclosure should be timely.

I direct the Attorney General to issue new guidelines governing the FOIA to the heads of executive departments and agencies, reaffirming the commitment to accountability and transparency, and to publish such guidelines in the Federal Register. In doing so, the Attorney General should review FOIA reports produced by the agencies under Executive Order 13392 of December 14, 2005. I also direct the Director of the Office of Management and Budget to update guidance to the agencies to increase and improve information dissemination to the public, including through the use of new technologies, and to publish such guidance in the Federal Register.

This memorandum does not create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

The Director of the Office of Management and Budget is hereby authorized and directed to publish this memorandum in the Federal Register.

BARACK OBAMA.

§ 552a. Records maintained on individuals

(a) DEFINITIONS.—For purposes of this section—

(1) the term “agency” means agency as defined in section 552(e)¹ of this title;

(2) the term “individual” means a citizen of the United States or an alien lawfully admitted for permanent residence;

(3) the term “maintain” includes maintain, collect, use, or disseminate;

(4) the term “record” means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular as-

signed to the individual, such as a finger or voice print or a photograph;

(5) the term “system of records” means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual;

(6) the term “statistical record” means a record in a system of records maintained for statistical research or reporting purposes only and not used in whole or in part in making any determination about an identifiable individual, except as provided by section 8 of title 13;

(7) the term “routine use” means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected;

(8) the term “matching program”—

(A) means any computerized comparison of—

(i) two or more automated systems of records or a system of records with non-Federal records for the purpose of—

(I) establishing or verifying the eligibility of, or continuing compliance with statutory and regulatory requirements by, applicants for, recipients or beneficiaries of, participants in, or providers of services with respect to, cash or in-kind assistance or payments under Federal benefit programs, or

(II) recouping payments or delinquent debts under such Federal benefit programs, or

(ii) two or more automated Federal personnel or payroll systems of records or a system of Federal personnel or payroll records with non-Federal records,

(B) but does not include—

(i) matches performed to produce aggregate statistical data without any personal identifiers;

(ii) matches performed to support any research or statistical project, the specific data of which may not be used to make decisions concerning the rights, benefits, or privileges of specific individuals;

(iii) matches performed, by an agency (or component thereof) which performs as its principal function any activity pertaining to the enforcement of criminal laws, subsequent to the initiation of a specific criminal or civil law enforcement investigation of a named person or persons for the purpose of gathering evidence against such person or persons;

(iv) matches of tax information (I) pursuant to section 6103(d) of the Internal Revenue Code of 1986, (II) for purposes of tax administration as defined in section 6103(b)(4) of such Code, (III) for the purpose of intercepting a tax refund due an individual under authority granted by section 404(e), 464, or 1137 of the Social Security Act; or (IV) for the purpose of intercepting a tax refund due an individual under any other tax refund intercept program authorized by statute which has been deter-

¹ See References in Text note below.

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

HISTORICAL AND REVISION NOTES

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

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

AMENDMENTS

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

§ 704. Actions reviewable

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

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

HISTORICAL AND REVISION NOTES

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

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

§ 705. Relief pending review

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

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

HISTORICAL AND REVISION NOTES

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

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

§ 706. Scope of review

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

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
 - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
 - (B) contrary to constitutional right, power, privilege, or immunity;
 - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
 - (D) without observance of procedure required by law;
 - (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
 - (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

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

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

HISTORICAL AND REVISION NOTES

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

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

ABBREVIATION OF RECORD

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

CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

- Sec.
- 801. Congressional review.
- 802. Congressional disapproval procedure.
- 803. Special rule on statutory, regulatory, and judicial deadlines.
- 804. Definitions.
- 805. Judicial review.
- 806. Applicability; severability.
- 807. Exemption for monetary policy.
- 808. Effective date of certain rules.

§ 801. Congressional review

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

only for an activity related to underground natural gas storage facility safety.

(3) **LIMITATION.**—No fee may be collected under this section, except to the extent that the expenditure of such fee to pay the costs of an activity related to underground natural gas storage facility safety for which such fee is imposed is provided in advance in an appropriations Act.

(Added Pub. L. 114-183, §12(c), June 22, 2016, 130 Stat. 523.)

CHAPTER 605—INTERSTATE COMMERCE REGULATION

- Sec. 60501. Secretary of Energy.
- 60502. Federal Energy Regulatory Commission.
- 60503. Effect of enactment.

§ 60501. Secretary of Energy

Except as provided in section 60502 of this title, the Secretary of Energy has the duties and powers related to the transportation of oil by pipeline that were vested on October 1, 1977, in the Interstate Commerce Commission or the chairman or a member of the Commission.

(Pub. L. 103-272, §1(e), July 5, 1994, 108 Stat. 1329.)

HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
60501	42:7155. 49:101 (note prec.).	Aug. 4, 1977, Pub. L. 95-91, §306, 91 Stat. 581. Oct. 17, 1978, Pub. L. 95-473, §4(c)(1)(A), (2) (related to §306 of Department of Energy Organization Act), 92 Stat. 1470.

The words “duties and powers . . . that were vested . . . in” are coextensive with, and substituted for, “transferred . . . such functions set forth in the Interstate Commerce Act and vested by law in” for clarity and to eliminate unnecessary words. The words “on October 1, 1977” are added to reflect the effective date of the transfer of the duties and powers to the Secretary of Energy.

ABOLITION OF INTERSTATE COMMERCE COMMISSION AND TRANSFER OF FUNCTIONS

Interstate Commerce Commission abolished and functions of Commission transferred, except as otherwise provided in Pub. L. 104-88, to Surface Transportation Board effective Jan. 1, 1996, by section 1302 of this title, and section 101 of Pub. L. 104-88, set out as a note under section 1301 of this title. References to Interstate Commerce Commission deemed to refer to Surface Transportation Board, a member or employee of the Board, or Secretary of Transportation, as appropriate, see section 205 of Pub. L. 104-88, set out as a note under section 1301 of this title.

§ 60502. Federal Energy Regulatory Commission

The Federal Energy Regulatory Commission has the duties and powers related to the establishment of a rate or charge for the transportation of oil by pipeline or the valuation of that pipeline that were vested on October 1, 1977, in the Interstate Commerce Commission or an officer or component of the Interstate Commerce Commission.

(Pub. L. 103-272, §1(e), July 5, 1994, 108 Stat. 1329.)

HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
60502	42:7172(b). 49:101 (note prec.).	Aug. 4, 1977, Pub. L. 95-91, §402(b), 91 Stat. 584. Oct. 17, 1978, Pub. L. 95-473, §4(c)(1)(B), (2) (related to §402(b) of Department of Energy Organization Act), 92 Stat. 1470.

The words “duties and powers . . . that were vested . . . in” are coextensive with, and substituted for, “transferred to, and vested in . . . all functions and authority of” for clarity and to eliminate unnecessary words. The word “regulatory” is omitted as surplus. The words “on October 1, 1977” are added to reflect the effective date of the transfer of the duties and powers to the Federal Energy Regulatory Commission.

ABOLITION OF INTERSTATE COMMERCE COMMISSION AND TRANSFER OF FUNCTIONS

Interstate Commerce Commission abolished and functions of Commission transferred, except as otherwise provided in Pub. L. 104-88, to Surface Transportation Board effective Jan. 1, 1996, by section 1302 of this title, and section 101 of Pub. L. 104-88, set out as a note under section 1301 of this title. References to Interstate Commerce Commission deemed to refer to Surface Transportation Board, a member or employee of the Board, or Secretary of Transportation, as appropriate, see section 205 of Pub. L. 104-88, set out as a note under section 1301 of this title.

§ 60503. Effect of enactment

The enactment of the Act of October 17, 1978 (Public Law 95-473, 92 Stat. 1337), the Act of January 12, 1983 (Public Law 97-449, 96 Stat. 2413), and the Act enacting this section does not repeal, and has no substantive effect on, any right, obligation, liability, or remedy of an oil pipeline, including a right, obligation, liability, or remedy arising under the Interstate Commerce Act or the Act of August 29, 1916 (known as the Pomerene Bills of Lading Act), before any department, agency, or instrumentality of the United States Government, an officer or employee of the Government, or a court of competent jurisdiction.

(Pub. L. 103-272, §1(e), July 5, 1994, 108 Stat. 1329.)

HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
60503	49:101 (note prec.).	Oct. 31, 1988, Pub. L. 100-561, §308, 102 Stat. 2817.

The words “the Act of January 12, 1983 (Public Law 97-449, 96 Stat. 2413), and the Act enacting this section” are added for clarity. The words “department, agency, or instrumentality of the United States Government” are substituted for “Federal department or agency”, and the words “officer or employee” are substituted for “official”, for consistency in the revised title and with other titles of the United States Code.

REFERENCES IN TEXT

Act of October 17, 1978, referred to in text, is Pub. L. 95-473, Oct. 17, 1978, 92 Stat. 1337, the first section of which enacted subtitle IV of this title. For complete classification of this Act to the Code, see Tables.

Act of January 12, 1983, referred to in text, is Pub. L. 97-449, Jan. 12, 1983, 96 Stat. 2413, the first section of which enacted subtitles I and II of this title. For complete classification of this Act to the Code, see Tables.

UNITED STATES CODE

1988 EDITION

CONTAINING THE GENERAL AND PERMANENT LAWS
OF THE UNITED STATES, IN FORCE
ON JANUARY 3, 1989

Prepared and published under authority of Title 2, U.S. Code, Section 285b,
by the Office of the Law Revision Counsel of the House of Representatives



VOLUME NINETEEN

TITLE 48—TERRITORIES AND INSULAR POSSESSIONS
TO
TITLE 50—WAR AND NATIONAL DEFENSE

UNITED STATES
GOVERNMENT PRINTING OFFICE

WASHINGTON : 1989

A 22

TITLE 49, APPENDIX—TRANSPORTATION

This Appendix consists of sections of former Title 49 that were not included in Title 49 as enacted by Pub. L. 95-473 and Pub. L. 97-449, and certain laws related to transportation that were enacted after Pub. L. 95-473. Sections from former Title 49 retain the same section numbers in this Appendix. For disposition of all sections of former Title 49, see Table at beginning of Title 49, Transportation.

Chap.	Sec.	Chap.	Sec.
1.	Interstate Commerce Act, Part I; General Provisions and Railroad and Pipe Line Carriers	33.	Public Airports.....
2.	Legislation Supplementary to "Interstate Commerce Act" [Repealed, Transferred, or Omitted].....	34.	Motor Carrier Safety
3.	Termination of Federal Control [Repealed or Transferred].....	35.	Commercial Space Launch.....
4.	Bills of Lading.....	36.	Commercial Motor Vehicle Safety.....
5.	Inland Waterways Transportation.....		
6.	Air Commerce.....	41	CHAPTER 1—INTERSTATE COMMERCE ACT, PART I; GENERAL PROVISIONS AND RAIL- ROAD AND PIPE LINE CARRIERS
7.	Coordination of Interstate Railroad Transportation [Repealed].....	71	
8.	Interstate Commerce Act, Part II; Motor Carriers [Repealed or Transferred].....	81	
9.	Civil Aeronautics [Repealed, Omitted, or Transferred].....	141	Sec.
10.	Training of Civil Aircraft Pilots [Omitted or Repealed]	171	1 to 23, 25. Repealed.
11.	Seizure and Forfeiture of Carriers Transporting, etc., Contraband Articles	250	26. Safety appliances, methods, and systems.
12.	Interstate Commerce Act, Part III; Water Carriers [Repealed].....		(a) "Railroad" defined.
13.	Interstate Commerce Act, Part IV; Freight Forwarders [Repealed].....	301	(b) Order to install systems, etc.; modification; negligence of railroad.....
14.	Federal Aid for Public Airport Development [Repealed or Transferred]	401	(c) Filing report on rules, standards, and instructions; time; modification.
15.	International Aviation Facilities	471	(d) Inspection by Secretary of Transportation; personnel.
16.	Development of Commercial Aircraft [Omitted]	751	(e) Unlawful use of system, etc.
17.	Medals of Honor for Acts of Heroism..	781	(f) Report of failure of system, etc., and accidents.
18.	Airways Modernization [Repealed].....		(g) Repealed.
19.	Interstate Commerce Act, Part V; Loan Guaranties [Repealed]	901	(h) Penalties; enforcement.
20.	Federal Aviation Program.....	1001	26a to 27. Repealed.
21.	Urban Mass Transportation	1101	§ 1. Repealed. Pub. L. 95-473, § 4(b), (c), Oct. 17, 1978,
22.	High-Speed Ground Transportation [Omitted or Repealed]	1151	92 Stat. 1466, 1470; Pub. L. 96-258, § 3(b), June 3,
23.	Department of Transportation	1181	1980, 94 Stat. 427.
24.	Natural Gas Pipeline Safety.....	1201	Section repealed subject to an exception related to transportation of oil by pipeline. Section 402 of Pub. L. 95-607, which amended par. (14) of this section by adding subdiv. (b) and redesignating existing subdiv. (b) as (c) subsequent to the repeal of this section by Pub. L. 95-473, was repealed by Pub. L. 96-258. For disposition of this section in revised Title 49, Transportation, see Table at beginning of Title 49. See, also, notes following Table.
25.	Aviation Facilities Expansion and Improvement.....	1211	Prior to repeal, section read as follows:
26.	Hazardous Materials Transportation Control [Repealed]	1231	§ 1. Regulation in general; car service; alteration of line
27.	Hazardous Materials Transportation.....	1301	(1) Carriers subject to regulation
28.	National Transportation Safety Board.	1601	The provisions of this chapter shall apply to common carriers engaged in—
29.	Hazardous Liquid Pipeline Safety	1631	(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or
30.	Abatement of Aviation Noise	1651	(b) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water; or
31.	Airport and Airway Improvement	1671	(c) Repealed. June 19, 1934, ch. 652, title VI, § 602(b), 48 Stat. 1102;
32.	Commercial Motor Vehicles.....	1701	
		1761	
		1801	
		1901	
		2001	
		2101	
		2201	
		2301	

from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only insofar as such transportation takes place within the United States.

(2) Transportation subject to regulation

The provisions of this chapter shall also apply to such transportation of passengers and property, but only insofar as such transportation takes place within the United States, but shall not apply—

(a) To the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State and not shipped to or from a foreign country from or to any place in the United States as aforesaid, except as otherwise provided in this chapter;

(b) Repealed. June 19, 1934, ch. 652, title VI, § 602(b), 48 Stat. 1102.

(c) To the transportation of passengers or property by a carrier by water where such transportation would not be subject to the provisions of this chapter except for the fact that such carrier absorbs, out of its port-to-port water rates or out of its proportional through rates, any switching, terminal, lighterage, car rental, trackage, handling, or other charges by a rail carrier for services within the switching, drayage, lighterage, or corporate limits of a port terminal or district.

(3) Definitions

(a) The term "common carrier" as used in this chapter shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this chapter it shall be held to mean "common carrier." The term "railroad" as used in this chapter shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" as used in this chapter shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. The term "person" as used in this chapter includes an individual, firm, co-partnership, corporation, company, association, or joint-stock association; and includes a trustee, receiver, assignee, or personal representative thereof.

(b) For the purposes of sections 5, 12(1), 20, 304(a)(7), 310, 320, 904(b), 910, and 913 of this Appendix, where reference is made to control (in referring to a relationship between any person or persons and another person or persons), such reference shall be construed to include actual as well as legal control, whether maintained or exercised through or by reason of the method of or circumstances surrounding organization or operation, through or by common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or through or by any other direct or indirect means; and to include the power to exercise control.

(4) Duty to furnish transportation and establish through routes; division of joint rates

It shall be the duty of every common carrier subject to this chapter to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this chapter to establish reasonable through routes with common carriers by water subject to chapter 12 of this Appendix, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

(5) Just and reasonable charges; applicability; criteria for determination

(a) All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful. The provisions of this subdivision shall not apply to common carriers by railroad subject to this chapter.

(b) Each rate for any service rendered or to be rendered in the transportation of persons or property by any common carrier by railroad subject to this chapter shall be just and reasonable. A rate that is unjust or unreasonable is prohibited and unlawful. No rate which contributes or which would contribute to the going concern value of such a carrier shall be found to be unjust or unreasonable, or not shown to be just and reasonable, on the ground that such rate is below a just or reasonable minimum for the service rendered or to be rendered. A rate which equals or exceeds the variable costs (as determined through formulas prescribed by the Commission) of providing a service shall be presumed, unless such presumption is rebutted by clear and convincing evidence, to contribute to the going concern value of the carrier or carriers proposing such rate (hereafter in this paragraph referred to as the "proponent carrier"). In determining variable costs, the Commission shall, at the request of the carrier proposing the rate, determine only those costs of the carrier proposing the rate and only those costs of the specific service in question, except where such specific data and cost information is not available. The Commission shall not include in variable cost any expenses which do not vary directly with the level of service provided under the rate in question. Notwithstanding any other provision of this chapter, no rate shall be found to be unjust or unreasonable, or not shown to be just and reasonable, on the ground that such rate exceeds a just or reasonable maximum for the service rendered or to be rendered, unless the Commission has first found that the proponent carrier has market dominance over such service. A finding that a carrier has market dominance over a service shall not create a presumption that the rate or rates for such service exceed a just and reasonable maximum. Nothing in this paragraph shall prohibit a rate increase from a level which reduces the going concern value of the proponent carrier to a level which contributes to such going concern value and is otherwise just and reasonable. For the purposes of the preceding sentence, a rate increase which does not raise a rate above the incremental costs (as determined through formulas prescribed by the Commission) of rendering the service to which such rate applies shall be presumed to be just and reasonable.

(c) As used in this chapter, the terms—

(i) "market dominance" refers to an absence of effective competition from other carriers or modes of transportation, for the traffic or movement to which a rate applies; and

(ii) "rate" means any rate or charge for the transportation of persons or property.

(d) Within 240 days after February 5, 1976, the Commission shall establish, by rule, standards and procedures for determining, in accordance with section 15(9) of this Appendix, whether and when a carrier possesses market dominance over a service rendered or to be rendered at a particular rate or rates. Such rules shall be designed to provide for a practical determination without administrative delay. The Commission shall solicit and consider the recommendations of the Attorney General and of the Federal Trade Commission in the course of establishing such rules.

(5½) Exchange of services

Nothing in this Act shall be construed to prevent any common carrier subject to this Act from entering into or operating under any contract with any telephone, telegraph, or cable company, for the exchange of their services.

(6) Classification of property for transportation; regulations and practices; demurrage charges

It is made the duty of all common carriers subject to the provisions of this chapter to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this chapter upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful. Demurrage charges shall be computed, and rules and regulations relating to such charges shall be established, in such a manner as to fulfill the national needs with respect to (a) freight car utilization and distribution, and (b) maintenance of an adequate freight car supply available for transportation of property.

(7) Free transportation for passengers prohibited; exceptions; penalty

No common carrier subject to the provisions of this chapter, shall, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees, its officers, time inspectors, surgeons, physicians, and attorneys at law, and the families of any of the foregoing; to the executive officers, general chairmen, and counsel of employees' organizations when such organizations are authorized and designated to represent employees in accordance with the provisions of the Railway Labor Act [45 U.S.C. 151 et seq.]; to ministers of religion, traveling secretaries of railroad Young Men's Christian Associations, inmates of hospitals and charitable and eleemosynary institutions, and persons exclusively engaged in charitable and eleemosynary work; to indigent, destitute and homeless persons, and to such persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation; to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Homes, including those about to enter and those returning home after discharge; to necessary caretakers of livestock, poultry, milk, and

fruit; to employees on sleeping cars, express cars, and to linemen of telegraph and telephone companies; to railway mail-service employees and persons in charge of the mails when on duty and traveling to and from duty, and all duly accredited agents and officers of the United States Postal Service and the Railway Mail Service and post-office inspectors while traveling on official business, upon the exhibition of their credentials; to customs inspectors, and immigration officers; to newsboys on trains, baggage agents, witnesses attending any legal investigation in which the common carrier is interested, persons injured in wrecks and physicians and nurses attending such persons; *Provided*, That this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers, and their families; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation; *And provided further*, That this provision shall not be construed to prohibit the privilege of passes or franks, or the exchange thereof with each other, for the officers, agents, employees, and their families of such telegraph, telephone, and cable lines, and the officers, agents, employees and their families of other common carriers subject to the provisions of this chapter; *Provided further*, That the term "employees" as used in this paragraph shall include furloughed, pensioned, and superannuated employees, persons who have become disabled or infirm in the service of any such common carrier, and the remains of a person killed in the employment of a carrier and exemployees traveling for the purpose of entering the service of any such common carrier; and the term "families" as used in this paragraph shall include the families of those persons named in this proviso, also the families of persons killed, and the widows during widowhood and minor children during minority of persons who died, while in the service of any such common carrier. Any common carrier violating this provision shall be deemed guilty of a misdemeanor and for each offense, on conviction, shall pay to the United States a penalty of not less than \$100 nor more than \$2,000, and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass, or free transportation shall be subject to a like penalty. Jurisdiction of offenses under this provision shall be the same as that provided for offenses in sections 41 to 43 of this Appendix.

(8) Transportation of commodity manufactured or produced by railroad forbidden

It shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier.

(9) Switch connections and tracks

Any common carrier subject to the provisions of this chapter, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on

rate, or charge docketed with such organization within 120 days after such proposal is docketed.

(Feb. 4, 1887, ch. 104, part I, § 5b, as added Feb. 5, 1976, Pub. L. 94-210, title II, § 208(b), 90 Stat. 42, and amended Oct. 19, 1976, Pub. L. 94-555, title II, § 220(k), 90 Stat. 2630.)

§ 6. Repealed. Pub. L. 95-473, § 4(b), (c), Oct. 17, 1978, 92 Stat. 1466, 1470

Section repealed subject to an exception related to transportation of oil by pipeline. For disposition of this section in revised Title 49, Transportation, see Table at beginning of Title 49. See, also, notes following Table.

Prior to repeal, section read as follows:

§ 6. Schedules and statements of rates, etc., joint rail and water transportation

(1) Schedule of rates, fares, and charges; filing and posting

Every common carrier subject to the provisions of this chapter shall file with the Commission created by this chapter and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print, and keep open to public inspection, as aforesaid, the separately established rates, fares, and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed, and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this chapter.

(2) Schedule of rates through foreign country

Any common carrier subject to the provisions of this chapter receiving freight in the United States to be carried through a foreign country to any place in the United States shall also in like manner print and keep open to public inspection, at every depot or office where such freight is received for shipment, schedules showing the through rates established and charged by such common carrier to all points in the United States beyond the foreign country to which it accepts freight for shipment; and any freight shipped from the United States through a foreign country into the United States the through rate on which shall not have been made public, as required by this chapter, shall, before it is admitted into the United States from said foreign country, be subject to customs duties as if said freight were of foreign production.

(3) Change in rates, fares, etc.; notice required; simplification of schedules

No change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the Commission and

to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection: *Provided*, That the Commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified, or modify the requirements of this section in respect to publishing, posting, and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions: *Provided further*, That the Commission is authorized to make suitable rules and regulations for the simplification of schedules of rates, fares, charges, and classifications and to permit in such rules and regulations the filing of an amendment of or change in any rate, fare, charge, or classification without filing complete schedules covering rates, fares, charges, or classifications not changed if, in its judgment, not inconsistent with the public interest.

(4) Joint tariffs

The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the Commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the Commission, and where such evidence of concurrence or acceptance is filed it shall not be necessary for the carriers filing the same to also file copies of the tariffs in which they are named as parties.

(5) Copies of traffic contracts to be filed

Every common carrier subject to this chapter shall also file with said Commission copies of all contracts, agreements, or arrangements, with other common carriers in relation to any traffic affected by the provisions of this chapter to which it may be a party: *Provided, however*, That the Commission, by regulations, may provide for exceptions from the requirements of this paragraph in the case of any class or classes of contracts, agreements, or arrangements, the filing of which, in its opinion, is not necessary in the public interest.

(6) Form and manner of publishing, filing, and posting schedules; incorporation of rates into individual tariffs; time for incorporation; rejection of schedules; unlawful use

The schedules required by this section to be filed shall be published, filed, and posted in such form and manner as the Commission by regulation shall prescribe. The Commission shall, beginning 2 years after February 5, 1976, require (a) that all rates shall be incorporated into the individual tariffs of each common carrier by railroad subject to this chapter or rail rate-making association within 2 years after the initial publication of the rate, or within 2 years after a change in any rate is approved by the Commission, whichever is later, and (b) that any rate shall be null and void with respect to any such carrier or association which does not so incorporate such rate into its individual tariff. The Commission may, upon good cause shown, extend such period of time. Notice of any such extension and a statement of the reasons therefor shall be promptly transmitted to the Congress. The Commission is authorized to reject any schedule filed with it which is not in accordance with this section and with such regulations. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

(7) Transportation without filing and publishing rates forbidden; rebates; privileges

No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter,

unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

(8) Preference to shipments for United States

In time of war or threatened war preference and precedence shall, upon demand of the President of the United States, be given, over all other traffic, for the transportation of troops and material of war, and carriers shall adopt every means within their control to facilitate and expedite the military traffic. And in time of peace shipments consigned to agents of the United States for its use shall be delivered by the carriers as promptly as possible and without regard to any embargo that may have been declared, and no such embargo shall apply to shipments so consigned.

(9) Schedule lacking notice of effective date

The Commission may reject and refuse to file any schedule that is tendered for filing which does not provide and give lawful notice of its effective date, and any schedule so rejected by the Commission shall be void and its use shall be unlawful.

(10) Penalty for failure to comply with regulations

In case of failure or refusal on the part of any carrier, receiver, or trustee to comply with the terms of any regulation adopted and promulgated or any order made by the Commission under the provisions of this section, such carrier, receiver, or trustee shall be liable to a penalty of \$500 for each such offense, and \$25 for each and every day of the continuance of such offense, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

(11) Jurisdiction of Commission over transportation by rail and water

When property may be or is transported from point to point in the United States by rail and water through the Panama Canal or otherwise, the transportation being by a common carrier or carriers, and not entirely within the limits of a single State, the Interstate Commerce Commission shall have jurisdiction of such transportation and of the carriers, both by rail and by water, which may or do engage in the same, in the following particulars, in addition to the jurisdiction otherwise given by this chapter:

(a) To establish physical connection between the lines of the rail carrier and the dock at which interchange of passengers or property is to be made by directing the rail carrier to make suitable connection between its line and a track or tracks which have been constructed from the dock to the limits of the railroad right-of-way, or by directing either or both the rail and water carrier, individually or in connection with one another to construct and connect with the lines of the rail carrier a track or tracks to the dock. The Commission shall have full authority to determine and prescribe the terms and conditions upon which these connecting tracks shall be operated, and it may, either in the construction or the operation of such tracks, determine what sum shall be paid to or by either carrier: *Provided*, That construction required by the Commission under the provisions of this paragraph shall be subject to the same restrictions as to findings of public convenience and necessity and other matters as is construction required under section 1 of this Appendix.

(b) To establish proportional rates or maximum, or minimum, or maximum and minimum proportional rates, by rail to and from the ports to which the traffic is brought, or from which it is taken by the water carrier, and to determine to what traffic and in connection with what vessels and upon what terms and conditions such rates shall apply. By proportional rates are meant those which differ from the corresponding local rates to and from the port and which apply only to traffic which has been brought to the port or is carried from the port by a common carrier by water.

(12) Jurisdiction of Commission over carriers contracting with water carriers operating to foreign ports

If any common carrier subject to this Act enters into arrangements with any water carrier operating from a port in the United States to a foreign country, through the Panama Canal or otherwise, for the handling of through business between interior points of the United States and such foreign country, the Commission may by order require such common carrier to enter into similar arrangements with any or all other lines of steamships operating from said port to the same foreign country.

(Feb. 4, 1887, ch. 104, pt. I, § 6, 24 Stat. 380; Mar. 2, 1889, ch. 382, § 1, 25 Stat. 855; June 29, 1906, ch. 3591, § 2, 34 Stat. 586; June 18, 1910, ch. 309, § 9, 36 Stat. 548; Aug. 24, 1912, ch. 390, § 11, 37 Stat. 568; Aug. 29, 1916, ch. 417, 39 Stat. 604; Feb. 28, 1920, ch. 91, §§ 409-413, 41 Stat. 483; Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543; Sept. 18, 1940, ch. 722, title I, § 8, 54 Stat. 910; Aug. 2, 1949, ch. 379, § 5, 63 Stat. 486; Feb. 5, 1976, Pub. L. 94-210, title II, § 209, 90 Stat. 45.)

§ 7. Repealed. Pub. L. 95-473, § 4(b), (c), Oct. 17, 1978, 92 Stat. 1466, 1470

Section repealed subject to an exception related to transportation of oil by pipeline. For disposition of this section in revised Title 49, Transportation, see Table at beginning of Title 49. See, also, notes following Table.

Prior to repeal, section read as follows:

§ 7. Combinations to prevent continuous carriage of freight prohibited

It shall be unlawful for any common carrier subject to the provisions of this chapter to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this chapter.

(Feb. 4, 1887, ch. 104, pt. I, § 7, 24 Stat. 382; Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543.)

§ 8. Repealed. Pub. L. 95-473, § 4(b), (c), Oct. 17, 1978, 92 Stat. 1466, 1470

Section repealed subject to an exception related to transportation of oil by pipeline. For disposition of this section in revised Title 49, Transportation, see Table at beginning of Title 49. See, also, notes following Table.

Prior to repeal, section read as follows:

DELEGATION OF FUNCTIONS

Delegation of President's authority to Secretary of the Interior, see note set out under section 715j of this title.

CHAPTER 15B—NATURAL GAS

- Sec.
- 717. Regulation of natural gas companies.
- 717a. Definitions.
- 717b. Exportation or importation of natural gas; LNG terminals.
- 717b-1. State and local safety considerations.
- 717c. Rates and charges.
- 717c-1. Prohibition on market manipulation.
- 717d. Fixing rates and charges; determination of cost of production or transportation.
- 717e. Ascertainment of cost of property.
- 717f. Construction, extension, or abandonment of facilities.
- 717g. Accounts; records; memoranda.
- 717h. Rates of depreciation.
- 717i. Periodic and special reports.
- 717j. State compacts for conservation, transportation, etc., of natural gas.
- 717k. Officials dealing in securities.
- 717l. Complaints.
- 717m. Investigations by Commission.
- 717n. Process coordination; hearings; rules of procedure.
- 717o. Administrative powers of Commission; rules, regulations, and orders.
- 717p. Joint boards.
- 717q. Appointment of officers and employees.
- 717r. Rehearing and review.
- 717s. Enforcement of chapter.
- 717t. General penalties.
- 717t-1. Civil penalty authority.
- 717t-2. Natural gas market transparency rules.
- 717u. Jurisdiction of offenses; enforcement of liabilities and duties.
- 717v. Separability.
- 717w. Short title.
- 717x. Conserved natural gas.
- 717y. Voluntary conversion of natural gas users to heavy fuel oil.
- 717z. Emergency conversion of utilities and other facilities.

§ 717. Regulation of natural gas companies

(a) Necessity of regulation in public interest

As disclosed in reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) Transactions to which provisions of chapter applicable

The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, and to the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation, but shall not apply to any other transportation or sale of nat-

ural 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, regu-

lation, or order in effect before January 1, 1989. This subsection shall not apply to any provision of any State law, regulation, or order to the extent that such provision has as its primary purpose the protection of public safety.”

EMERGENCY NATURAL GAS ACT OF 1977

Pub. L. 95-2, Feb. 2, 1977, 91 Stat. 4, authorized President to declare a natural gas emergency and to require emergency deliveries and transportation of natural gas until the earlier of Apr. 30, 1977, or termination of emergency by President and provided for antitrust protection, emergency purchases, adjustment in charges for local distribution companies, relationship to Natural Gas Act, effect of certain contractual obligations, administrative procedure and judicial review, enforcement, reporting to Congress, delegation of authorities, and preemption of inconsistent State or local action.

EXECUTIVE ORDER NO. 11969

Ex. Ord. No. 11969, Feb. 2, 1977, 42 F.R. 6791, as amended by Ex. Ord. No. 12038, Feb. 3, 1978, 43 F.R. 4957, which delegated to the Secretary of Energy the authority vested in the President by the Emergency Natural Gas Act of 1977 except the authority to declare and terminate a natural gas emergency, was revoked by Ex. Ord. No. 12553, Feb. 25, 1986, 51 F.R. 7237.

PROCLAMATION NO. 4485

Proc. No. 4485, Feb. 2, 1977, 42 F.R. 6789, declared that a natural gas emergency existed within the meaning of section 3 of the Emergency Natural Gas Act of 1977, set out as a note above, which emergency was terminated by Proc. No. 4495, Apr. 1, 1977, 42 F.R. 18053, formerly set out below.

PROCLAMATION NO. 4495

Proc. No. 4495, Apr. 1, 1977, 42 F.R. 18053, terminated the natural gas emergency declared to exist by Proc. No. 4485, Feb. 2, 1977, 42 F.R. 6789, formerly set out above.

§ 717a. Definitions

When used in this chapter, unless the context otherwise requires—

- (1) “Person” includes an individual or a corporation.
- (2) “Corporation” includes any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, receiver or receivers, trustee or trustees of any of the foregoing, but shall not include municipalities as hereinafter defined.
- (3) “Municipality” means a city, county, or other political subdivision or agency of a State.
- (4) “State” means a State admitted to the Union, the District of Columbia, and any organized Territory of the United States.
- (5) “Natural gas” means either natural gas unmixed, or any mixture of natural and artificial gas.
- (6) “Natural-gas company” means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.
- (7) “Interstate commerce” means commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States.
- (8) “State commission” means the regulatory body of the State or municipality hav-

ing jurisdiction to regulate rates and charges for the sale of natural gas to consumers within the State or municipality.

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

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

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

- (A) waterborne vessels used to deliver natural gas to or from any such facility; or
- (B) any pipeline or storage facility subject to the jurisdiction of the Commission under section 717f of this title.

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

AMENDMENTS

2005—Par. (11). Pub. L. 109-58 added par. (11).
1992—Par. (10). Pub. L. 102-486 added par. (10).

TERMINATION OF FEDERAL POWER COMMISSION;
TRANSFER OF FUNCTIONS

Federal Power Commission terminated and functions, personnel, property, funds, etc., transferred to Secretary of Energy (except for certain functions transferred to Federal Energy Regulatory Commission) by sections 7151(b), 7171(a), 7172(a)(1), 7291, and 7293 of Title 42, The Public Health and Welfare.

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

(a) Mandatory authorization order

After six months from June 21, 1938, no person shall export any natural gas from the United States to a foreign country or import any natural gas from a foreign country without first having secured an order of the Commission authorizing it to do so. The Commission shall issue such order upon application, unless, after opportunity for hearing, it finds that the proposed exportation or importation will not be consistent with the public interest. The Commission may by its order grant such application, in whole or in part, with such modification and upon such terms and conditions as the Commission may find necessary or appropriate, and may from time to time, after opportunity for hearing, and for good cause shown, make such supplemental order in the premises as it may find necessary or appropriate.

(b) Free trade agreements

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

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

(d) Inspections

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

(e) Emergency Response Plan

(1) In any order authorizing an LNG terminal the Commission shall require the LNG terminal operator to develop an Emergency Response Plan. The Emergency Response Plan shall be prepared in consultation with the United States Coast Guard and State and local agencies and be approved by the Commission prior to any final approval to begin construction. The Plan shall include a cost-sharing plan.

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

(A) at the LNG terminal; and

(B) in proximity to vessels that serve the facility.

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

REFERENCES IN TEXT

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

§ 717c. Rates and charges

(a) Just and reasonable rates and charges

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

(b) Undue preferences and unreasonable rates and charges prohibited

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

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

Under such rules and regulations as the Commission may prescribe, every natural-gas com-

pany 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

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

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

(c) Information and reports available to State commissions

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

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

§ 717q. Appointment of officers and employees

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

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

CODIFICATION

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

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

Such appointments are now subject to the civil service laws unless specifically excepted by those laws or

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

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

AMENDMENTS

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

REPEALS

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

§ 717r. Rehearing and review

(a) Application for rehearing; time

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

(b) Review of Commission order

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with

it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which is supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(c) Stay of Commission order

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

(d) Judicial review

(1) In general

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

(2) Agency delay

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

title. The failure of an agency to take action on a permit required under Federal law, other than the Coastal Zone Management Act of 1972, in accordance with the Commission schedule established pursuant to section 717n(c) of this title shall be considered inconsistent with Federal law for the purposes of paragraph (3).

(3) Court action

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

(4) Commission action

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

(5) Expedited review

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

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

REFERENCES IN TEXT

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

CODIFICATION

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

AMENDMENTS

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

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

CHANGE OF NAME

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

§ 154.301

party to the proceeding. A person wishing to become a party to the proceeding must file a motion to intervene.

(b) Any motion to intervene must be filed not later than 12 days after the subject tariff filing in accordance with §385.214 of this chapter.

Subpart D—Material To Be Filed With Changes

§ 154.301 Changes in rates.

(a) Except for changes in rates pursuant to subparts E, F and G, of this part, any natural gas company filing for a change in rates or charges, except for a minor rate change, must submit, in addition to the material required by subparts A, B, and C of this part, the Statements and Schedules described in §154.312.

(b) A natural gas company filing for a minor rate change must file the Statements and Schedules described in §154.313.

(c) A natural gas company filing for a change in rates or charges must be prepared to go forward at a hearing and sustain, solely on the material submitted with its filing, the burden of proving that the proposed changes are just and reasonable. The filing and supporting workpapers must be of such composition, scope, and format as to comprise the company's complete case-in-chief in the event that the change is suspended and the matter is set for hearing. If the change in rates or charges presented are not in full accord with any prior Commission decision directly involving the filing company, the company must include in its working papers alternate material reflecting the effect of such prior decision.

[Order 582, 60 FR 52996, Oct. 11, 1995, as amended by Order 582-A, 61 FR 9628, Mar. 11, 1996]

§ 154.302 Previously submitted material.

(a) If all, or any portion, of the information called for by this part has already been submitted to the Commission within six months of the filing date of this application, or is included in other data filed pursuant to this part, specific reference thereto may be made in lieu of resubmission.

18 CFR Ch. I (4-1-19 Edition)

(b) If a new FERC Form No. 2 or 2-A is required to be filed within 60 days from the end of the base period, the new FERC Form No. 2 or 2-A must be filed concurrently with the rate change filing. There must be furnished to the Director, Office of Energy Market Regulation, with the rate change filing, one copy of the FERC Form No. 2 or 2-A.

[Order 582, 60 FR 52996, Oct. 11, 1995, as amended by Order 699, 72 FR 45325, Aug. 14, 2007; Order 701, 72 FR 61054, Oct. 29, 2007]

§ 154.303 Test periods.

Statements A through M, O, P, and supporting schedules, in §154.312 and §154.313, must be based upon a test period.

(a) If the natural gas company has been in operation for 12 months on the filing date, then the test period consists of a base period followed by an adjustment period.

(1) The base period consists of 12 consecutive months of the most recently available actual experience. The last day of the base period may not be more than 4 months prior to the filing date.

(2) The adjustment period is a period of up to 9 months immediately following the base period.

(3) The test period may not extend more than 9 months beyond the filing date.

(4) The rate factors (volumes, costs, and billing determinants) established during the base period may be adjusted for changes in revenues and costs which are known and measurable with reasonable accuracy at the time of the filing and which will become effective within the adjustment period. The base period factors must be adjusted to eliminate nonrecurring items. The company may adjust its base period factors to normalize items eliminated as nonrecurring.

(b) If the natural gas company has not been in operation for 12 months on the filing date, then the test period must consist of 12 consecutive months ending not more than one year after the filing date. Rate factors may be adjusted as in paragraph (a)(4) of this section but must not be adjusted for occurrences anticipated after the 12-month period.

Federal Energy Regulatory Commission

§ 385.217

(iii) If, in a proceeding, or part of a proceeding, that is set for hearing under subpart E, a written amendment is filed after the time for filing provided under paragraph (a)(3)(ii) of this section, or if an oral amendment is made to a presiding officer during a hearing or conference, the amendment becomes effective as an amendment only as provided under paragraph (d) of this section.

(b) *Answers.* Any participant, or any person who has filed a timely motion to intervene which has not been denied, may answer a written or oral amendment in accordance with Rule 213.

(c) *Motion opposing an amendment.* Any participant, or any person who has filed a timely motion to intervene which has not been denied, may file a motion opposing the acceptance of any amendment, other than an amendment under paragraph (a)(3)(i) of this section, not later than 15 days after the filing of the amendment.

(d) *Acceptance of amendments.* (1) An amendment becomes effective as an amendment at the end of 15 days from the date of filing, if no motion in opposition to the acceptance of an amendment under paragraph (a)(3)(iii) of this section is filed within the 15 day period.

(2) If a motion in opposition to the acceptance of an amendment is filed within 15 days after the filing of the amendment, the amendment becomes effective as an amendment on the twentieth day after the filing of the amendment, except to the extent that the decisional authority, before such date, issues an order rejecting the amendment, wholly or in part, for good cause.

(e) *Directed amendments.* A decisional authority, on motion or otherwise, may direct any participant, or any person seeking to be a party, to file a written amendment to amplify, clarify, or technically correct a pleading.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 714, 73 FR 57538, Oct. 3, 2008]

§ 385.216 Withdrawal of pleadings (Rule 216).

(a) *Filing.* Any person that filed a pleading may seek to withdraw it by filing a notice of withdrawal. The pro-

cedures provided in this section do not apply to withdrawals of tariff or rate filings, which may be withdrawn only as provided in the regulations under this chapter.

(b) *Action on withdrawals.* (1) The withdrawal of any pleading is effective at the end of 15 days from the date of filing of a notice of withdrawal, if no motion in opposition to the notice of withdrawal is filed within that period and the decisional authority does not issue an order disallowing the withdrawal within that period. The decisional authority may disallow, for a good cause, all or part of a withdrawal.

(2) If a motion in opposition to a notice of withdrawal is filed within the 15 day period, the withdrawal is not effective until the decisional authority issues an order accepting the withdrawal.

(c) *Conditional withdrawal.* In order to prevent prejudice to other participants, a decisional authority may, on motion or otherwise, condition the withdrawal of any pleading upon a requirement that the withdrawing person leave material in the record or otherwise make material available to other participants.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 714, 73 FR 57538, Oct. 3, 2008; Order 846, 83 FR 23808, May 23, 2018]

§ 385.217 Summary disposition (Rule 217).

(a) *Applicability.* This section applies to:

(1) Any proceeding, or any part of a proceeding, while the Commission is the decisional authority; and

(2) Any proceeding, or part of a proceeding, which is set for hearing under subpart E.

(b) *General rule.* If the decisional authority determines that there is no genuine issue of fact material to the decision of a proceeding or part of a proceeding, the decisional authority may summarily dispose of all or part of the proceeding.

(c) *Procedures.* (1) Any participant may make a motion for summary disposition of all or part of a proceeding.

(2) If a decisional authority, other than the Commission, is considering summary disposition of a proceeding,

§385.218

18 CFR Ch. I (4-1-19 Edition)

or part of a proceeding, in the absence of a motion for summary disposition by a participant, the decisional authority will grant the participants an opportunity to comment on the proposed disposition prior to any summary disposition, unless, for good cause shown, the decisional authority provides otherwise.

(3) If, prior to setting a matter for hearing, the Commission is considering summary disposition of a proceeding or part of a proceeding in the absence of a motion for summary disposition by any participant and the Commission determines that notice and comment on summary disposition are practicable and necessary, the Commission may notify the participants and afford them an opportunity to comment on any proposed summary disposition.

(d) *Disposition.* (1)(i) If a decisional authority, other than the Commission, summarily disposes of an entire proceeding, the decisional authority will issue an initial decision for the entire proceeding.

(ii) Except as provided under paragraph (d)(1)(iii) of this section, a decisional authority, other than the Commission, which summarily disposes of part of a proceeding may:

- (A) Issue a partial initial decision; or
- (B) Postpone issuing an initial decision on the summarily disposed part and combine it with the initial decision on the entire proceeding or other appropriate part of the proceeding.

(iii) If the decisional authority, other than the Commission, summarily disposes of part of a proceeding and such disposition requires the filing of new tariff or rate schedule sheets or sections, the decisional authority will issue an initial decision on that part of the proceeding.

(2) Any initial decision issued under paragraph (d)(1) of this section is considered an initial decision issued under subpart G of this part, except that the following rules do not apply: Rule 704 (rights of participants before initial decision), Rule 705 (discretion of presiding officer before initial decision), Rule 706 (initial and reply briefs before initial decision), Rule 707 (oral argu-

ment before initial decision), and Rule 709 (other types of decisions).

[Order 225, 47 FR 19022, May 3, 1982; Order 225-A, 47 FR 35956, Aug. 18, 1982, as amended by Order 714, 73 FR 57538, Oct. 3, 2008]

§385.218 Simplified procedure for complaints involving small controversies (Rule 218).

(a) *Eligibility.* The procedures under this section are available to complainants if the amount in controversy is less than \$100,000 and the impact on other entities is *de minimis*.

(b) *Contents.* A complaint filed under this section must contain:

- (1) The name of the complainant;
- (2) The name of the respondent;
- (3) A description of the relationship to the respondent;
- (4) The amount in controversy;
- (5) A statement why the complaint will have a *de minimis* impact on other entities;
- (6) The facts and circumstances surrounding the complaint, including the legal or regulatory obligation breached by the respondent; and
- (7) The requested relief.

(c) *Service.* The complainant is required to simultaneously serve the complaint on the respondent and any other entity referenced in the complaint.

(d) *Notice.* Public notice of the complaint will be issued by the Commission.

(e) *Answers, interventions and comments.* (1) An answer to a complaint is required to conform to the requirements of §385.213(c)(1), (2), and (3).

(2) Answers, interventions and comments must be filed within 10 days after the complaint is filed. In cases where the complainant requests privileged treatment for information in its complaint, answers, interventions, and comments must be filed within 20 days after the complaint is filed. In the event there is an objection to the protective agreement, the Commission will establish when answers, interventions, and comments are due.

(f) *Privileged treatment.* If a complainant seeks privileged treatment for any documents submitted with the complaint, a complainant must use the procedures described in section

James H. Byrd Email
McCarter & English, LLP
Twelfth Floor
1301 K Street, NW
Suite 1000 West
Washington, DC 20005
Email: jbyrd@mbolaw.com

Charles F. Caldwell Email
Caldwell Boudreaux Lefler, PLLC
1800 West Loop South
Suite 1680
Houston, TX 77027
Email: ccaldwell@cblpipelinelaw.com

Thomas James Eastment Email
Baker Botts LLP
1299 Pennsylvania Avenue, NW
The Warner, Suite 1300 West
Washington, DC 20004-2400
Email: tom.eastment@bakerbotts.com

Matthew David Field Email
Venable LLP
600 Massachusetts Avenue, NW
Washington, DC 20001
Email: mfield@venable.com

Melvin Goldstein Email
Goldstein & Associates
1757 P Street, NW
Washington, DC 20036
Email: mgoldstein@goldstein-law.com

R. Gordon Gooch
Travis & Gooch
1111 North 19th Street
Suite 2504
Arlington, VA 22209
Email: travisgooch1@earthlink.net

John P Gregg
McCarter & English, LLP
1301 K Street, NW
Suite 1000 West
Washington, DC 20005
Email: jgregg@mccarter.com

James Harrison Holt
Betts & Holt LLP
1101 Connecticut Avenue, NW
Suite 450
Washington, DC 20036
Email: jhh@bettsandholt.com

Jeffrey Kenneth Janicke
McCarter & English, LLP
1301 K Street, NW
Suite 1000 West
Washington, DC 20005
Email: jjanicke@mccarter.com

Susan Beall Kittey
Caldwell Boudreaux Lefler, PLLC
1800 West Loop South
Suite 1680
Houston, TX 77027
Email: skittey@cblpipelinelaw.com

Steven Mark Kramer
Association of Oil Pipe Lines
1808 Eye Street, NW
Suite 300
Washington, DC 20006
Email: skramer@aopl.org

Andrew Peter Mina
Sheppard Mullin Richter & Hampton LLP
2099 Pennsylvania Avenue, NW
Suite 100
Washington, DC 20006
Email: amina@sheppardmullin.com

Michael Murray
U.S. Department of Justice
(DOJ) Office of the Deputy Attorney General
950 Pennsylvania Avenue, NW
Washington, DC 20530-0000
Email: michael.murray@usdoj.gov

Robert B. Nicholson
U.S. Department of Justice
(DOJ) Antitrust Division, Appellate Section
Room 3228
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001
Email: robert.nicholson@usdoj.gov

Richard E. Powers Jr.
Venable LLP
600 Massachusetts Avenue, NW
Washington, DC 20001
Email: repowers@venable.com

Daniel James Poynor
Steptoe & Johnson LLP
1330 Connecticut Avenue, NW
Washington, DC 20036-1795
Email: dpoynor@steptoe.com

William Michael Rappolt
Sheppard Mullin Richter & Hampton LLP
2099 Pennsylvania Avenue, NW
Suite 100
Washington, DC 20006
Email: wrappolt@sheppardmullin.com

Steven G. Thomson Reed
Steptoe & Johnson LLP
1330 Connecticut Avenue, NW
Washington, DC 20036-1795
Email: sreed@steptoe.com

Mary-Kaitlin Eileen Rigney
Betts & Holt LLP
1101 Connecticut Avenue, NW
Suite 450
Washington, DC 20036
Email: mkrigney@bettsandholt.com

Daniel Watson Sanborn
Kinder Morgan, Inc.
1001 Louisiana Street
Suite 1000
Houston, TX 77002
Email: Daniel_Sanborn@kindermorgan.com

Mark Charles Schroeder
CenterPoint Energy
1111 Louisiana
Houston, TX 77002-0000
Email: mark.schroeder@centerpointenergy.com

US Mail

Mark F. Sundback
Sheppard Mullin Richter & Hampton LLP
2099 Pennsylvania Avenue, NW
Suite 100
Washington, DC 20006
Email: msundback@sheppardmullin.com

Email

Gregory S. Wagner
Venable LLP
600 Massachusetts Avenue, NW
Washington, DC 20001
Email: gswagner@venable.com

Email

Sabina Dugal Walia
Caldwell Boudreaux Lefler, PLLC
1800 West Loop South
Suite 1680
Houston, TX 77027
Email: swalia@cblpipelinelaw.com

Email

Robert J. Wiggers
U.S. Department of Justice
(DOJ) Antitrust Division, Appellate Section
Room 3224
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001
Email: robert.wiggers@usdoj.gov

Email

Kenneth L. Wiseman
Sheppard Mullin Richter & Hampton LLP
2099 Pennsylvania Avenue, NW
Suite 100
Washington, DC 20006
Email: kwiseman@sheppardmullin.com

Email

/s/ Scott Ray Ediger

Scott Ray Ediger
Attorney

Federal Energy Regulatory Commission
Washington, D.C. 20426
Tel: (202) 502-8509
Fax: (202) 273-0901

November 15, 2019