

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

Nos. 19-1067, 19-1077, 19-1078, 19-1081, 19-1082, 19-1084, 19-1086, 19-1090
(consolidated)

—————
SFPP, L.P., *ET AL.*,
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**

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Certificate as to Parties, Rulings, and Related Cases

A. Parties:

The parties and intervenors appearing before this Court and before the Federal Energy Regulatory Commission (“Commission”) are as stated in the Briefs of Petitioners.

B. Rulings under review:

1. *SFPP, L.P.*, Opinion 511-C, 162 FERC ¶ 61,228 (2018) (“Remand Order”), R. 1075, JA 876; and
2. *SFPP, L.P.*, Opinion 511-D, 166 FERC ¶ 61,142 (2019) (“Remand Rehearing Order”), R. 1108, JA 1267.

C. Related cases:

Following remand of *United Airlines, Inc. v. FERC*, 827 F.3d 122 (D.C. Cir. 2016), the Commission announced revised policy intentions concerning the inclusion of an income tax allowance in the transportation rates of certain Commission-regulated pipelines. *Inquiry Regarding the Commission’s Policy for Recovery of Income Tax Costs*, 162 FERC ¶ 61,227 (2018), *on reh’g*, 164 FERC ¶ 61,030 (2018). Separately, the Commission ordered SFPP, L.P., an oil pipeline, to remove the income tax allowance from its Commission-jurisdictional rates. *SFPP, L.P.*, Opinion No. 511-C, 162 FERC ¶ 61,228 (2018), *on reh’g*, Opinion No. 511-D, 166 FERC ¶ 61,142 (2019).

The Commission's two sets of post-remand orders gave rise to two sets of related appeals. The orders announcing the Commission's new income tax allowance policy are on review in *Enable Mississippi River Transmission, LLC, et al., v. FERC*, D.C. Cir. Nos. 18-1252, *et al.* (briefing completed) ("Policy Statement Case"). This appeal concerns the merits of that policy, as it is reflected in the Commission's removal of the income tax allowance from SFPP's rates.

The Court has not consolidated these related cases. But in an August 9, 2019 Order, issued in both proceedings, it directed the Clerk to schedule oral argument for both cases on the same day, before the same panel of judges.

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FINAL BRIEF: February 19, 2020

Table of Contents

Statement of Issues.....	1
Statutes and Regulations	3
Statement of Facts.....	4
I. Statutory and regulatory background	4
A. The Interstate Commerce Act	4
B. Oil pipeline ratemaking.....	4
II. History of proceeding	8
A. Pipeline’s rate filing and <i>United Airlines</i>	8
B. Commission actions on remand of <i>United Airlines</i>	11
Summary of Argument	14
Argument.....	17
I. Standard of review.....	17
II. Pass-through entities like Pipeline double recover when their cost-of-service includes both an income tax allowance and a return on equity determined using the discounted cash flow methodology.....	18
A. Just and reasonable rates are based on costs.	20
1. The return on equity in a pipeline’s rates recovers the cost of attracting capital.....	20
2. The income tax allowance in a pipeline’s rates recovers the pipeline’s direct income tax expense.	21
B. Pass-through partnership pipelines do not directly pay income taxes; therefore, no separate recovery of income tax expense is necessary.	22

Table of Contents

C.	The Commission reasonably found that the discounted cash flow methodology always provides a pre-tax return.	24
1.	Pipeline’s substantive arguments are a veiled attack on <i>United Airlines</i>	25
2.	The Commission reasonably rejected Pipeline’s argument that pre-tax returns equal after-tax returns for investors in pass-through entities that receive an income tax allowance.	27
D.	The Commission did not read <i>United Airlines</i> as mandating a particular result.	29
E.	The pre-tax finding does not conflict with the efficient market hypothesis.	30
F.	A negative market response does not undercut the finding that the discounted cash flow determines a pre-tax return.	33
G.	The Commission considered the implications of its orders.	33
III.	The Commission reasonably declined to reopen the record.	36
A.	Pipeline did not demonstrate an interest more compelling than administrative finality.	37
B.	Pipeline received sufficient process when the Commission considered and rejected Pipeline’s post-remand filings.	39
IV.	The Commission reasonably declined to order refunds of deferred taxes that were collected prior to commencement of this rate case.	42
A.	Normalization principles do not support refunding accumulated deferred taxes from rates collected prior to commencement of the rate case in 2008.	43
B.	Ratepayers have no ownership interest in previously-collected amounts in the accumulated deferred income tax account.	44

Table of Contents

C.	Shippers seek retroactive ratemaking by seeking refunds of money collected from pre-2008 rates.....	46
D.	Commission policy for addressing income tax rate changes does not resolve this issue.....	51
E.	The refusal to order refunds of money collected prior to 2008 did not result in retroactive ratemaking as asserted by Shippers.	52
V.	The Commission reasonably held that Pipeline could not claim larger index rate increases in its recalculated rates than the Commission had previously approved.....	53
VI.	The Commission reasonably allocated recovery of litigation expenses over three years.....	57
	Conclusion	60

Table of Authorities

<u>Court Cases</u>	<u>Page</u>
<i>Ass'n of Oil Pipe Lines v. FERC</i> , 876 F.3d 336 (D.C. Cir. 2017).....	54, 57
<i>Bd. of Pub. Util. Comm'rs v. N.Y. Tel. Co.</i> , 271 U.S. 23 (1926).....	45
<i>Bellsouth Corp. v. FCC</i> , 17 F.3d 1487 (D.C. Cir. 1994).....	54
<i>Boston Edison Co. v. FERC</i> , 885 F.2d 962 (1st Cir. 1989).....	18
* <i>BP West Coast Prods., LLC v. FERC</i> , 374 F.3d 1263 (D.C. Cir. 2004).....	5, 21, 22 24, 29, 34, 36, 59
<i>Butte County v. Hogen</i> , 613 F.3d 190 (D.C. Cir. 2010).....	17
<i>Canadian Ass'n of Petroleum Producers v. FERC</i> , 254 F.3d 289 (D.C. Cir. 2001).....	6, 20, 21
<i>Cerro Wire & Cable Co. v. FERC</i> , 677 F.2d 124 (D.C. Cir. 1982).....	40
<i>Cities of Campbell v. FERC</i> , 770 F.2d 1180 (D.C. Cir. 1985).....	37, 39
<i>City of Charlottesville v. FERC</i> , 774 F.2d 1205 (D.C. Cir. 1985).....	19, 22, 34
<i>City of Piqua v. FERC</i> , 610 F.2d 950 (D.C. Cir. 1979).....	46, 50

* Cases chiefly relied upon are marked with an asterisk.

Table of Authorities

<u>Court Cases</u>	<u>Page</u>
<i>Clifton Power Corp. v. FERC</i> , 294 F.3d 108 (D.C. Cir. 2002).....	54
* <i>ExxonMobil Oil Corp. v. FERC</i> , 487 F.3d 945 (D.C. Cir. 2007).....	4, 5, 7, 17, 22, 23, 29
<i>Farmers Union Cent. Exch., Inc. v. FERC</i> , 734 F.2d 1486 (D.C. Cir. 1984).....	20
<i>FCC v. Fox Television Stations, Inc.</i> , 556 U.S. 502 (2009).....	54
<i>FERC v. Elec. Power Supply Ass'n</i> , 136 S. Ct. 760 (2016).....	18
<i>Florida Mun. Power Agency v. FERC</i> , 315 F.3d 362 (D.C. Cir. 2003).....	17
<i>FPC v. Hope Natural Gas</i> , 320 U.S. 591 (1944).....	10, 35, 37
<i>Frontier Pipeline Co. v. FERC</i> , 452 F.3d 774 (D.C. Cir. 2006).....	4
<i>Memphis Light, Gas & Water Div. v. FERC</i> , 707 F.2d 565 (D.C. Cir. 1983).....	48
<i>Minisink Residents for Env'tl. Pres. and Safety v. FERC</i> , 762 F.3d 97 (D.C. Cir. 2014).....	41
<i>Miss. Indus. v. FERC</i> , 808 F.2d 1525 (D.C. Cir. 1987).....	38
<i>Mobil Oil Corp. v. FERC</i> , 483 F.2d 1238 (D.C. Cir. 1973).....	39, 40

Table of Authorities

<u>Court Cases</u>	<u>Page</u>
<i>Moreau v. FERC</i> , 982 F.2d 556 (D.C. Cir. 1993).....	40
<i>Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1</i> , 554 U.S. 527 (2008).....	17
<i>Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.</i> , 463 U.S. 29 (1983).....	17
<i>Old Dominion Elec. Coop. v. FERC</i> , 892 F.3d 1223 (D.C. Cir. 2018).....	49
<i>Oxy USA, Inc. v. FERC</i> , 64 F.3d 679 (D.C. Cir. 1995).....	46, 47
<i>Pub. Serv. Comm’n of N.Y. v. FERC</i> , 813 F.2d 448 (D.C. Cir. 1987).....	18
<i>Pub. Sys. v. FERC</i> , 709 F.2d 73 (D.C. Cir. 1983).....	4, 14, 45
<i>*Pub. Utils. Comm’n of Cal. v. FERC</i> , 894 F.2d 1372 (D.C. Cir. 1990).....	7, 8, 14, 45, 46, 49, 50, 52, 53
<i>Pub. Utils. Comm’n of Cal. v. FERC</i> , 988 F.2d 154 (D.C. Cir. 1993).....	47
<i>Sw. Airlines Co. v. FERC</i> , 926 F.3d 851 (D.C. Cir. 2019).....	4, 5, 56
<i>Tennessee Gas Pipeline Co. v. FERC</i> , 926 F.2d 1206 (D.C. Cir. 1991).....	30
<i>Town of Norwood v. FERC</i> , 53 F.3d 377 (D.C. Cir. 1995).....	7, 8, 48, 49

Table of Authorities

<u>Court Cases</u>	<u>Page</u>
<i>*United Airlines, Inc. v. FERC</i> , 827 F.3d 122 (D.C. Cir. 2016).....	1, 2, 4-7, 9-12, 15, 17-19, 21-23, 25, 28, 30, 32, 34-36, 57
<i>Williston Basin Interstate Pipeline Co. v. FERC</i> , 165 F.3d 54 (D.C. Cir. 1999).....	5
<i>Wis. Gas Co. v. FERC</i> , 770 F.2d 1144 (D.C. Cir. 1985).....	40
 <u>Administrative Cases</u>	
<i>Alcoa Power Generating, Inc.</i> , 152 FERC ¶ 61,040 (2015).....	41
<i>BP Pipelines (Alaska) Inc.</i> , Initial Decision, 119 FERC ¶ 63,007 (2007).....	50
<i>BP Pipelines (Alaska) Inc.</i> , Opinion No. 502, 123 FERC ¶ 61,287 (2008).....	50
<i>E. Tex. Elec. Coop., Inc. v. Cent. & S.W. Servs., Inc.</i> , 94 FERC ¶ 61,218 (2001).....	38
<i>Inquiry Regarding Income Tax Allowances</i> , 111 FERC ¶ 61,139 (2005) (2005 Policy Statement).....	35
<i>Inquiry Regarding the Commission’s Policy for Recovery of Income Tax Costs</i> , 157 FERC ¶ 61,210 (2016) (Notice of Inquiry).....	11
<i>Inquiry Regarding the Commission’s Policy for Recovery of Income Tax Costs</i> , 162 FERC ¶ 61,227 (2018) (2018 Policy Statement).....	2, 12, 21, 25 27, 28, 30, 32, 34, 36

Table of Authorities

<u>Administrative Cases</u>	<u>Page</u>
<i>Inquiry Regarding the Commission’s Policy for Recovery of Income Tax Costs,</i> 164 FERC ¶ 61,030 (2018) (Policy Statement Rehearing Order).....	2, 6, 12, 44, 45
<i>Interstate Power & Light Co. v. ITC Midwest, LLC,</i> 135 FERC ¶ 61,162 (2011).....	38
<i>Kern River Transmission Co.,</i> Opinion No. 486-B, 126 FERC ¶ 61,034 (2009).....	21, 26
<i>Lakehead Pipe Line,</i> Opinion No. 397, 71 FERC ¶ 61,338 (1995).....	22
<i>Regulations Implementing Tax Normalization for Certain Items Reflecting Timing Differences in the Recognition of Expenses or Revenues for Ratemaking and Income Tax Purposes,</i> Order No. 144, FERC Stats. & Regs. ¶ 30,254 (1981).....	45, 46
<i>SFPP, L.P.,</i> 111 FERC ¶ 61,334 (2005).....	9
<i>SFPP, L.P.,</i> Initial Decision, 129 FERC ¶ 63,020 (2009).....	9
<i>SFPP, L.P.,</i> Opinion No. 511, 134 FERC ¶ 61,121 (2011).....	5, 6, 8, 9, 25, 26, 32, 58, 59
<i>SFPP, L.P.,</i> Opinion No. 511-A, 137 FERC ¶ 61,220 (2011).....	6, 9, 27, 57-59
<i>SFPP, L.P.,</i> Opinion No. 511-B, 150 FERC ¶ 61,096 (2015).....	13, 57

Table of Authorities

<u>Administrative Cases</u>	<u>Page</u>
<i>SFPP, L.P.</i> , Opinion No. 511-C, 162 FERC ¶ 61,228 (2018) (Remand Order)	2, 12, 13, 19, 20-37, 55-57
<i>SFPP, L.P.</i> , Opinion No. 511-D, 166 FERC ¶ 61,142 (2019) (Remand Rehearing Order).....	2, 12-14, 19, 22 24-28, 30-35, 37, 39-49, 51-54, 58, 59
<i>SFPP, L.P.</i> , Opinion No. 522-B, 162 FERC ¶ 61,229 (2018) (East Line Order)	53, 55-57
<i>SFPP, L.P.</i> , Opinion No. 527-A, 162 FERC ¶ 61,230 (2018)	56
<i>Transw. Pipeline Co.</i> , Opinion No. 238, 32 FERC ¶ 61,009 (1985).....	38
<u>Statutes</u>	
Administrative Procedure Act	
5 U.S.C. § 706(2)(A)	17

Table of Authorities

<u>Statutes</u>	<u>Page</u>
Interstate Commerce Act	
49 U.S.C. § 60502.....	4
49 U.S.C. app. § 1(1)(b)	4
49 U.S.C. app. § 1(5)(a).....	4
49 U.S.C. app. § 6(1)	4
49 U.S.C. app. § 6(7)	4
49 U.S.C. app. § 15(7)	43
<u>Regulations</u>	
18 C.F.R. § 154.305(d).....	48
18 C.F.R. § 342.3.....	54
18 C.F.R. § 342.4(a)	5
18 C.F.R. § 385.214(d)(3)(ii)	41
18 C.F.R. § 385.716.....	37
<u>Other</u>	
<i>Safe Harbor for Inadvertent Normalization Violations</i> , Rev. Proc. 2017-47, 2017-38 I.R.B. 233	44

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)
East Line Order	<i>SFPP, L.P.</i> , Opinion No. 522-B, 162 FERC ¶ 61,229 (2018)
FERC or Commission	Respondent Federal Energy Regulatory Commission
Opinion No. 511	<i>SFPP, L.P.</i> , Opinion No. 511, 134 FERC ¶ 61,121 (2011), R. 967, JA 288
Opinion No. 511-A	<i>SFPP, L.P.</i> , Opinion No. 511-A, 137 FERC ¶ 61,220 (2011), R. 1014, JA 542
Opinion No. 511-B	<i>SFPP, L.P.</i> , Opinion No. 511-B, 150 FERC ¶ 61,096 (2015), R. 1044, JA 761
Opinion No. 511-C or Remand Order	<i>SFPP, L.P.</i> , Opinion No. 511-C, 162 FERC ¶ 61,228 (2018), R. 1075, JA 876
Opinion No. 511-D or Remand Rehearing Order	<i>SFPP, L.P.</i> , Opinion No. 511-D, 166 FERC ¶ 61,142 (2019), R. 1108, JA 1267
P	A paragraph in a FERC order
Pipeline	Petitioner SFPP, L.P.
Pipeline Association	Intervenor Association of Oil Pipe Lines
Pipeline Association Br.	Brief of Intervenor Association of Oil Pipe Lines
Pipeline Br.	Brief of Petitioner SFPP, L.P.

Glossary

Policy Statement Case	<i>Enable Mississippi River Transmission, LLC, et al., v. FERC</i> , D.C. Cir. Nos. 18-1252, <i>et al.</i>
Policy Statement Rehearing Order	<i>Inquiry Regarding the Commission's Policy for Recovery of Income Tax Costs</i> , 164 FERC ¶ 61,030 (2018)
R.	An item in the record of this proceeding
Shippers	Petitioners American Airlines, Inc., BP West Coast Products LLC, Chevron Products Co., Delta Air Lines, Inc., ExxonMobil Oil Corp., Phillips 66 Company, Southwest Airlines Co., Tesoro Refining & Marketing Co. LLC, United Airlines, and Valero Marketing and Supply Co.
Shippers Br.	Brief of Shippers

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**BRIEF OF RESPONDENTS
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Statement of Issues

In 2016, this Court remanded to Respondent Federal Energy Regulatory Commission (“Commission” or “FERC”) orders that allowed Petitioner SFPP, L.P. (“Pipeline”), an oil pipeline, 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 entities like Pipeline to double-recover their income tax costs. *Id.* at 136-37.

This is the second of two companion cases relating to the Commission’s reconsideration of its income tax allowance policy. In the first case, several entities, including Pipeline, make a facial challenge to a generic policy statement. *See Inquiry Regarding the Commission’s Policy for Recovery of Income Tax Costs*, 162 FERC ¶ 61,227 (2018) (2018 Policy Statement), *on reh’g*, 164 FERC ¶ 61,030 (2018) (Policy Statement Rehearing Order), *appeal pending sub nom. Enable Miss. River Transmission, LLC et al. v. FERC*, D.C. Cir. Nos. 18-1252, *et al.* (“Policy Statement Case”) (briefing completed). The 2018 Policy Statement announced the Commission’s general intention to disallow, going forward, the inclusion of an income tax allowance in master limited partnership pipeline rates. 2018 Policy Statement PP 2, 45-47.

In this case, the Court consolidated petitions for review of Commission orders concerning rates, and implementing the 2018 Policy Statement, for transportation of petroleum products on the Pipeline’s West Line. *See SFPP, L.P.*, Opinion No. 511-C, 162 FERC ¶ 61,228 (2018) (“Remand Order”), R. 1075, JA 876, *on reh’g*, Opinion No. 511-D, 166 FERC ¶ 61,142 (2019) (“Remand Rehearing Order”), R. 1108, JA 1267. Pipeline principally challenges the Commission’s requirement that, in accordance with *United Airlines*, Pipeline must

remove the income tax allowance from its West Line rates. Shippers receiving service on Pipeline's West Line (Petitioners American Airlines, Inc., BP West Coast Products LLC, Chevron Products Co., Delta Air Lines, Inc., ExxonMobil Oil Corp., Phillips 66 Co., Southwest Airlines Co., Tesoro Refining & Marketing Co. LLC, United Airlines, Inc., and Valero Marketing and Supply Co.) contend that the Commission erred in determining how Pipeline should treat its reserve for accumulated deferred income tax balances.

The issues presented for review are:

1. Whether the Commission reasonably determined that Pipeline must remove the income tax allowance from its oil transportation rates, consistent with this Court's ruling in *United Airlines* (raised by Pipeline);
2. Whether the Commission reasonably declined to reopen the record of Pipeline's rate case (raised by Pipeline); and
3. Whether the Commission reasonably declined to order Pipeline to refund its accumulated deferred income tax balance to Shippers (raised by Shippers).

Statutes and Regulations

Pertinent statutes and regulations are reproduced in the Addendum.

Statement of Facts

I. Statutory and regulatory background

A. The Interstate Commerce Act

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). “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.’” *United Airlines*, 827 F.3d at 128 (quoting *ExxonMobil Oil Corp. v. FERC*, 487 F.3d 945, 951 (D.C. Cir. 2007)) (citation omitted); *see also* *Pub. Sys. v. FERC*, 709 F.2d 73, 75 (D.C. Cir. 1983) (same; rates are based on cost of service).

B. Oil pipeline ratemaking

Generally, oil pipelines must use the Commission’s index-based ratemaking methodology to change their rates. *Sw. Airlines Co. v. FERC*, 926 F.3d 851, 852 (D.C. Cir. 2019). This straightforward system allows pipelines to make annual

increases to rates that have been previously determined to be just and reasonable, at a pace that roughly tracks the change in economy-wide costs. *Id.* The Commission calculates an index for every twelve-month period, and pipelines may file to raise rates to a “ceiling level” that is no higher than their previous rate times the amount of the index. *Id.*

If a pipeline can show a “substantial divergence” between its actual costs and the rate that results from applying index increases, then it may file for a rate increase based on its cost of service. 18 C.F.R. § 342.4(a); *SFPP, L.P.*, Opinion No. 511, 134 FERC ¶ 61,121 P 322 (2011), R. 967, JA 445-46. Under the cost-of-service ratemaking methodology, the operating and capital costs of a regulated pipeline are calculated to establish the revenue required to cover the pipeline’s costs, including a return on equity—the rate of return an investor requires to invest in the pipeline. *See Williston Basin Interstate Pipeline Co. v. FERC*, 165 F.3d 54, 56-57 (D.C. Cir. 1999). Ultimately, the total revenue requirement is divided by throughput to establish the pipeline’s transportation rate. *See id.* at 57.

This case, like three predecessors, concerns the proper way to reflect income tax liability in Pipeline’s cost-of-service rates. *See United Airlines*, 827 F.3d at 134-37; *ExxonMobil*, 487 F.3d at 948-55; *BP West Coast Prods. v. FERC*, 374 F.3d 1263, 1285-93 (D.C. Cir. 2004). It implicates interrelated components of Pipeline’s cost of service: the return on equity; the income tax allowance; and the

accumulated deferred income tax balance. *See United Airlines*, 827 F.3d at 492 (relationship between return on equity and income tax allowance); Policy Statement Rehearing Order PP 14-22 (relationship between income tax allowance and deferred tax balance).

The Commission determines a pipeline's return on equity using a discounted cash flow methodology that considers the return on equity that the market requires for members of a proxy group—a set of utilities with comparable risks and publicly-traded securities. *United Airlines*, 827 F.3d at 128-29; *SFPP, L.P.*, Opinion No. 511-A, 137 FERC ¶ 61,220 P 292 (2011), R. 1014, JA 678-79; Opinion No. 511 P 242, JA 405. The methodology starts with the stock price of the securities in the proxy group, and then calculates the percentage return, or yield, by dividing the distribution or dividend of the security by the stock price. Opinion No. 511 P 243, JA 405-06; *see also Canadian Ass'n of Petroleum Producers v. FERC*, 254 F.3d 289, 293 (D.C. Cir. 2001) (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). The return on equity, as calculated using the discounted cash flow methodology, “determines the pre-tax investor return required to attract investment.” *United Airlines*, 827 F.3d at 136.

A partnership pipeline's rates may include an income tax allowance, separate from the discounted cash flow-determined return on equity, to the extent a pipeline's partner-owners "incurred actual or potential income tax liability on their distributive share of partnership income." *ExxonMobil*, 487 F.3d at 951. In order to include the income tax allowance, the regulated entity must show that it will not recover its income tax liability a second time in its return on equity. *United Airlines*, 827 F.3d at 134.

When a utility's rates include an income tax allowance, a challenge of cost-of-service ratemaking is to align income tax treatment of a particular expense with ratemaking treatment of that expense. *See Pub. Utils. Comm'n of Cal. v. FERC*, 894 F.2d 1372, 1378-79 (D.C. Cir. 1990). The issue is one of timing. Internal Revenue Service rules often allow for accelerated depreciation of a utility's facility expense; i.e., a utility may deduct from its income the entire expense of a facility earlier than the end of that facility's useful life. *Id.*; *Town of Norwood v. FERC*, 53 F.3d 377, 381-82 (D.C. Cir. 1995). But ratemaking uses straight-line depreciation, in which the facility expense is spread evenly over the useful life of the facility. *Town of Norwood*, 53 F.3d at 382. The effect is that in the early years of an asset's life, tax liability is relatively low, and the utility may collect more via its rates than it owes in taxes (normalization). *Public Utils. Comm'n*, 894 F.2d at 1379. The reverse occurs in later years. *See id.* Normalization "spreads the tax benefit over

the life of the relevant asset, so that a customer, in any given year of the asset's life, will both bear the burden of depreciation allocable to that year and enjoy whatever tax benefit is associated with that depreciation, which is "known as the matching principle." *Id.* "The company holds on to the surplus from the early years in a deferred tax account, and uses this surplus to make up for the deficit in the later years." *Town of Norwood*, 53 F.3d at 382.

II. History of proceeding

A. Pipeline's rate filing and *United Airlines*

In 2008, Pipeline began these proceedings with a cost-of-service filing that proposed new, increased rates for movements of all petroleum products on its West Line. See Opinion No. 511 P 2, JA 292-93. Pipeline explained that there was a substantial divergence between its actual costs and its ceiling rate (determined under the indexing system), such that the ceiling rate precluded it from charging just and reasonable rates. *See id.* PP 322-23, JA 445-46.

Pipeline's shipper customers raised many concerns, including concerns about having an income tax allowance in Pipeline's proposed rates. *Id.* PP 8-9, JA 294-95. They alleged, among other things, that the Commission had not recognized *BP West Coast*, as clarified by *ExxonMobil*, as controlling legal authority. *Id.* P 220, JA 392.

After an evidentiary hearing, a Commission administrative law judge ruled that Pipeline was entitled to include an income tax allowance in its rates. *Id.* P 218, JA 391 (citing *SFPP, L.P.*, Initial Decision, 129 FERC ¶ 63,020 P 670 (2009), R. 938, JA 227). The Commission affirmed this determination, noting that “the applicable precedent on the issue of income tax allowances for regulated utilities organized as partnerships is *ExxonMobil*” and an earlier Commission order that approved an income tax allowance for Pipeline’s East Line rates, to the extent that Pipeline could show that its partner-owners would incur an actual or potential income tax obligation from Pipeline’s regulated income. *See id.* P 235, JA 402 (citing *SFPP, L.P.*, 111 FERC ¶ 61,334 (2005)). “This precedent establishes the legality of allowing an income tax allowance for pipelines organized as” partnerships, including master limited partnerships. *Id.*; *see also* Order No. 511-A P 267, JA 658.

Some of Pipeline’s shippers appealed the Commission’s decision to grant an income tax allowance. *See United Airlines*, 827 F.3d at 134. The shippers argued that the discounted cash flow methodology provides a sufficient after-tax return to attract investment and that the income tax allowance allows partners to double-recover their taxes. *See id.* at 127.

This Court held that under *ExxonMobil*, it “may be reasonable” for the Commission to grant an income tax allowance to partnership pipelines, if the

Commission has a reasoned basis for doing so. *United Airlines*, 827 F.3d at 134-35. But the Commission had not explained why partnership pipelines (as opposed to corporate pipelines) could recover both a return on equity (determined using the discounted cash flow methodology) and an income tax allowance without double recovery. *Id.* at 134.

The Court found 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.* Because this conclusion was inconsistent with the parity requirement of *FPC v. Hope Natural Gas*, 320 U.S. 591 (1944), the Commission’s failure to ensure parity was arbitrary and capricious. *United Airlines*, 827 F.3d 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.*

B. Commission actions on remand of *United Airlines*

The Commission addressed the *United Airlines* remand in two administrative proceedings, which culminated in the orders underlying the Policy Statement Case, and the orders underlying this as-applied appeal. First, the Commission sought public input on “how to address any double recovery resulting from [its] current income tax allowance and rate of return policies.” *Inquiry Regarding the Commission’s Policy for Recovery of Income Tax Costs*, Notice of Inquiry, 157 FERC ¶ 61,210 P 1 (2016). Specifically, in light of 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 requested comment on “any proposed methods ... to resolve any double recovery of investor-level tax costs for partnerships or similar pass-through entities.” *Id.* PP 2, 19.

After considering comments from customer, pipeline, and electric utility groups, the Commission concluded that “granting [a master limited partnership] an income tax allowance results in an impermissible double recovery.” 2018 Policy Statement PP 7, 45. The Commission provided guidance that going forward, it generally would no longer allow master limited partnerships to recover an income tax allowance. *Id.* P 2; *see also* Policy Statement Rehearing Order P 8 (explaining that entities would be allowed to advocate for an income tax allowance, and to demonstrate that recovery of an income tax allowance would not result in double recovery of tax costs). It also provided guidance that a master limited partnership pipeline no longer recovering an income tax allowance should eliminate previously-accumulated sums of deferred taxes from its cost of service and not refund them to ratepayers. Policy Statement Rehearing Order P 10.

Second, in an order issued on the same day as the 2018 Policy Statement, the Commission addressed the *United Airlines* remand in the context of Pipeline’s rate case. Remand Order PP 1-30, JA 876-89. Citing the “essential facts” that the Court identified in *United Airlines*, and rejecting Pipeline’s argument that the Court’s ruling was wrong, the Commission found that granting Pipeline both a discounted cash flow return on equity and an income tax allowance produces an impermissible double recovery. *Id.* PP 22-24, JA 884-86 (citing *United Airlines*, 827 F.3d at 136); Remand Rehearing Order PP 10-11, JA 1273-75. Pipeline’s

post-remand supplemental comments did not persuade the Commission that this was not the case. Remand Order PP 23-29, JA 885-89; Remand Rehearing Order PP 26-36, JA 1282-90.

The Commission implemented the *United Airlines* remand by removing the income tax allowance from Pipeline's cost of service. Remand Order P 21, JA 883. It later denied Pipeline's motion to reopen the record of the rate case (finding that Pipeline had already litigated the double-recovery issue and that its supplemental evidence was unpersuasive) and denied rehearing of its decision to eliminate Pipeline's income tax allowance. Remand Rehearing Order PP 8-36, JA 1272-90.

The orders on review also addressed Pipeline's compliance with prior orders. The Remand Order accepted Pipeline's filing, as required by *SFPP, L.P.*, Opinion No. 511-B, 150 FERC ¶ 61,096 (2015), R. 1044, JA 761, to place on file just and reasonable West Line rates, effective August 1, 2008. Remand Order PP 54 & Ordering P (A), JA 901, 903. It rejected Pipeline's request to increase retroactively, via that compliance filing, the index-rate increases that it had earlier claimed for 2011, 2012, and 2013. *Id.* PP 55-57, JA 901-02.

In the Remand Rehearing Order, the Commission accepted Pipeline's filing to remove the income tax allowance from its rates and to eliminate its deferred tax balance. Remand Rehearing Order P 61, JA 1301. The Commission found that

once an income tax allowance has been eliminated from a pipeline's cost of service, there is no basis on which to keep including deferred taxes to normalize the pipeline's income tax costs. *Id.* P 91, JA 1313-14. Ratepayers have no equitable interest in the amounts collected for deferred tax payments because those amounts are eventually payable to the federal government; moreover, returning the deferred tax balances to shippers would violate the rule against retroactive ratemaking. *Id.* PP 92-93, JA 1314-15 (citing *Pub. Utils. Comm'n. of Cal.*, 894 F.2d at 1381; *Pub. Sys.*, 709 F.2d at 85). Shippers advocated that Pipeline refund the deferred tax balances to them, but the Commission rejected several arguments along these lines. *Id.* PP 96-106, JA 1316-23.

Summary of Argument

In the orders on review, the Commission explained why Pipeline, a pass-through partnership, would double-recover income tax costs if it receives both an income tax allowance and a return on equity that covers investor-level income taxes. This explanation fully satisfied this Court's *United Airlines* instructions. The Commission reasonably found, consistent with *United Airlines*, that the discounted cash flow methodology's pre-tax return on equity covers investors' tax liability. For this reason, providing a separate means of recovering investors' income tax liability for pass-through entities in the form of an income tax allowance results in a double recovery.

Pipeline fundamentally errs by disputing that the discounted cash flow methodology determines a pre-tax return. It contends that the Commission's methodology determines a pre-tax return equal to 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.

Removing the income tax allowance from Pipeline's rates meant removing the deferred tax balance. Shippers' alternative proposal for refunds of the deferred tax balance is flawed. First, Shippers have no equitable interest in deferred taxes collected prior to this rate case. Second, the rule against retroactive ratemaking prohibits refunding these amounts, which were embedded in rates on file prior to this rate case. Comparing, as Shippers do, the removal of the income tax allowance to adjustments that occur following changes in income tax rates only illustrates why refunds are inappropriate. A change in income tax rates justifies adjustments in recognition of ongoing tax liability and ongoing need to match costs with benefits; removal of the income tax allowance does not. Moreover, the Commission's normalization policy, which gives rise to deferred

taxes, provides notice that adjustments will take place when income tax rates change.

The Commission reasonably declined to reopen the record of this proceeding—which is done only under extraordinary circumstances—to admit evidence that the unit price of Pipeline’s parent, a master limited partnership, fell after the Commission issued the 2018 Policy Statement. The Commission accepted and considered four post-remand filings from Pipeline, which already had ample opportunity to support its income tax allowance over 10 years of litigation by the time of the orders on review. Moreover, the Commission reviewed the supplemental material Pipeline proffered, and reasonably found it unpersuasive.

When calculating refunds and rates going forward, the Commission reasonably explained why it would not allow Pipeline to adjust retroactively index-rate increases that were being litigated, or that had been approved, in other proceedings. Retroactive tinkering with the index filings does not follow established Commission procedure for index rate increases, and would undermine the indexing program’s efficiency and predictability.

Finally, and consistent with earlier rulings, the Commission reasonably allocated litigation expenses that Pipeline incurred after its Opinion No. 511-B compliance filing by updating the three-year litigation surcharge established in

Opinion No. 511-A. Shippers did not persuade the Commission that it was reasonable to spread the litigation cost recovery over a longer time period.

Argument

I. Standard of review

The Court reviews FERC orders under the arbitrary and capricious standard of 5 U.S.C. § 706(2)(A). *E.g., Fla. Mun. Power Agency v. FERC*, 315 F.3d 362, 365 (D.C. Cir. 2003). The Court has not “expressly stated” whether it reviews the Commission’s factual findings in orders under the Interstate Commerce Act for substantial evidence, as it does when reviewing Commission orders involving other FERC-administered statutes. *United Airlines*, 827 F.3d at 127. But “in their application to the requirement of factual support the substantial evidence test and the arbitrary and capricious test are one and the same.” *Id.* (citing *Butte County v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010)). And in any event, the Court will uphold the Commission’s decisions “as long as the Commission has examined the relevant data and articulated a rational connection between the facts found and the choice made.” *ExxonMobil*, 487 F.3d at 951 (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

Commission rate decisions are entitled to “great deference.” *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 532 (2008). The Commission’s “determinations regarding rates of return, definition of rate bases,

and other technical aspects of ratemaking,” in particular, are entitled to considerable weight. *Pub. Serv. Comm’n of N.Y. v. FERC*, 813 F.2d 448, 451 (D.C. Cir. 1987). “The 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).

II. Pass-through entities like Pipeline double recover when their cost-of-service includes both an income tax allowance and a return on equity determined using the discounted cash flow methodology.

This Court’s 2016 *United Airlines* decision 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 Court identified two potential resolutions: (1) remove the income tax allowance; or (2) adjust the return on equity (determined by the discounted cash flow methodology) to remove the tax

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. Daniels, D. Kamerschen, *Principles of Public Utility Rates* 317–322 (1988)) (internal quotations omitted).

component. *Id.* It remanded for the Commission to “consider these or other mechanisms” to demonstrate that there would be no double recovery. *Id.*

Income tax liability is a cost of owning/operating a pipeline, and it can be properly recovered in rates. *See City of Charlottesville v. FERC*, 774 F.2d 1205, 1207 (D.C. Cir. 1985). 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 Commission’s double-recovery finding 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.” Remand Order P 22, JA 884-85; *see* Remand Rehearing Order P 10, JA 1273-74; *United Airlines*, 827 F.3d at 136.

After considering comments from Pipeline and Shippers, the Commission reasonably removed the income tax allowance. Remand Order PP 22-24, JA 884-86; *see also id.* P 24, JA 885-86 (dismissing some of Pipeline’s arguments as “a direct challenge” to the findings of *United Airlines*). Pipeline’s supplemental information did not persuade the Commission that no such double recovery exists. *Id.* P 24, JA 885-86.

A. Just and reasonable rates are based on costs.

Just and reasonable rates for an oil pipeline 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).

1. 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. *See* Remand Order P 11, JA 879-80.

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. *See* Remand Order P 11, JA 879-80; *see also* 2018 Policy Statement P 5. Because the discounted cash flow inputs are pre-tax, so are the outputs, "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. *See* Remand Order P 22, JA 884-85. The investor makes the investment decision based on the after-tax required return. *See id.* n.46, JA 884 (quoting *Kern River Transmission Co.*, Opinion No. 486-B, 126 FERC ¶ 61,034 P 114 (2009)); *see also* *BP West Coast*, 374 F.3d at 1290-91 (observing that all investors, whether corporate or individual, expect to pay taxes on their investment).

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

Income taxes are another cost. "[A]s 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 also City of Charlottesville*, 774 F.2d at 1207 (same); Remand Rehearing Order P 35 n.94, JA 1289 (same). The income tax allowance, like 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 (1995). 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.

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

Pass-through entities do not directly pay income taxes. *See* Remand Order P 22, JA 884-85; *see also United Airlines*, 827 F.3d at 136. Pipeline glosses over this fact in order to emphasize *ExxonMobil* and the tax liability of the partners in a pass-through entity. *See* Pipeline Br. 13; *see also ExxonMobil*, 487 F.3d at 953 (holding that the Commission “reasonably explained why income taxes paid on partnership income are properly allocated to the regulated entity for ratemaking purposes”).

The reference to *ExxonMobil* misses the point. The issue is not whether a pass-through entity may recover income tax expenses related to regulated assets (*ExxonMobil* says it may, 487 F.3d at 953), but whether that entity may recover those income tax expenses twice (*United Airlines* says it may not, 827 F.3d at 135-

37). The lack of direct tax liability for pass-through entities matters because it is the first step toward identifying the source of the double-recovery problem.

Moreover, *ExxonMobil* left open the possibility that disallowing the income tax allowance may be permissible. *See* 487 F.3d at 955; *see also United Airlines*, 827 F.3d at 137. Pipeline acknowledges, as it must, that *United Airlines* identified elimination of the income tax allowance as a potential remedy. Pipeline Br. 15 (citing *United Airlines*, 827 F.3d at 136).

When a regulated entity directly pays an income tax, that entity’s cost of service properly includes an income tax allowance along with recovery for any other directly-incurred cost. *See* Remand Order P 25 n.53, JA 886 (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 investor pays the tax, then that income tax cost logically belongs as a component of the cost required to attract the investor’s capital rather than as a separate “line item in the cost of service.” *Id.* P 29 n.67, JA 889 (“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.”); *see also BP West Coast*, 374 F.3d at 1291 (explaining that the “bookkeeping expenses of the corporate unit holders are not recoverable in the rates of the pipeline”).

C. The Commission reasonably found that the discounted cash flow methodology always provides a pre-tax return.

To attract capital, entities must provide a pre-tax return that “covers investor-level taxes and leaves sufficient remaining income to earn investors’ required after-tax return.” Remand Order P 22, JA 884-85. Moreover, investors in a Commission-regulated entity are required by law to pay income tax irrespective of whether there is an income tax allowance in the entity’s rates. Thus, even when the entity has an income tax allowance in its cost-of-service, the discounted cash flow return is still pre-tax. Remand Rehearing Order P 14, JA 1276-77.

Pipeline disagrees. *See* Pipeline Br. 23. But Pipeline fundamentally errs when it argues that the discounted cash flow methodology does not produce a pre-tax return. This can only be true if the discounted cash flow methodology fails to estimate a return that covers the investor’s tax costs and provides an adequate after-tax return. Remand Rehearing Order P 31, JA 1286 (explaining that Pipeline’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). Pipeline essentially contends that, for a pass-through partnership pipeline receiving an income tax allowance, the pre-tax return equals the after-tax

return because investors in such an entity would have a “reasonable expectation” that “their costs would be accounted for by the income tax allowance” and therefore would not demand a pre-tax return. *See* Pipeline Br. 20-21; *see also* Remand Rehearing Order P 30, JA 1285-86.

This is not how the market works. Investors in a pass-through entity “owe a tax on any income they receive *whether or not* a portion of a pipeline’s rate is attributable to an income tax allowance.” Remand Rehearing Order P 31 (emphasis added), JA 1286; *see also id.* n.82, JA 1286; 2018 Policy Statement PP 17-18 (disagreeing with Pipeline’s assertion that master limited partnership investors do not demand an after-tax return on equity if they know they will receive an income tax allowance). Moreover, Pipeline’s view is inconsistent with *United Airlines*, which 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).

1. Pipeline’s substantive arguments are a veiled attack on *United Airlines*.

The Commission cited *United Airlines* for the proposition that the discounted cash flow methodology produces a pre-tax return. *See* Remand Order P 22 n.47, JA 885. For its part, *United Airlines* cited Opinion No. 511 PP 243-44. 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.*” Opinion No. 511 P 243 (emphasis added). Like *United Airlines*, the orders on remand agree with this principle. See Remand Order P 16 n.32, JA 882; Remand Rehearing Order P 11 n.26, JA 1274-75.

Pipeline attacks the authorities cited by saying: (1) the Commission took *Kern River*, 126 FERC ¶ 61,034 P 114, out of context; and (2) statements in Opinion 511-A “clarified and undermined” that part of Opinion 511 cited by *United Airlines*. Pipeline Br. 18-20.

But the part of *Kern River* that Pipeline emphasizes (its ultimate conclusion that no double recovery existed there) does not contradict the more fundamental point for which it was cited, i.e. “investors invest on the basis of after-tax returns and price an instrument accordingly.” See Remand Order P 22 n.46, JA 884 (quoting *Kern River*, 126 FERC ¶ 61,034 P 114). Moreover, Pipeline’s own post-remand filings recognize that the market must provide a pre-tax return, and that investors make investments decisions based on their after-tax required return. See Remand Rehearing Order P 29, JA 1285 (citing Pipeline’s Motion to Reopen the Record, Ex. 2 at 15-16, 40-41, R.1099, JA 1148-49, 1173-74). Finally, Opinion No. 511-A did not contradict Opinion 511’s reliance on the “fundamental fact that a greater distribution or dividend will result in a higher stock price and a lower

distribution or dividend will result in lower stock price because prices adjust to reflect the same after-tax return.” Opinion No. 511-A P 324.

2. The Commission reasonably rejected Pipeline’s argument that pre-tax returns equal after-tax returns for investors in pass-through entities that receive an income tax allowance.

SFPP’s theory has meandered since remand from *United Airlines*. See Remand Rehearing Order P 14 n.37, JA 1276-77. In post-remand comments prior to issuance of the Remand Order, Pipeline conceded that the discounted cash flow provides a pre-tax investor return with or without an income tax allowance, but justified this pre-tax return on the basis that the market response (unit prices and distributions) will eventually revert to the same level with or without an income tax allowance. See Remand Order P 24 n.51, JA 885-86; Remand Rehearing Order P 14 n.37, JA 1276-77; 2018 Policy Statement P 12 & n.23. Pipeline now asserts that investors in pass-through entities that receive an income tax allowance have a “reasonable expectation” that “their tax costs would be accounted for by the income tax allowance” and would, therefore, invest “at unit prices . . . that did not presume a recovery of their income tax costs again in the pipeline’s equity return.” Pipeline Br. 20-21. Both assertions are wrong. See Remand Rehearing Order P 14, JA 1276-77.

Pipeline wrongly claims that an investor in a pass-through entity that receives an income tax allowance would not “expect” a second recovery. Pipeline

Br. 23. Exactly to the contrary, the investor *would* expect a pre-tax return because “Commission policy [of including an income tax allowance] does not shift the actual liability to pay income taxes from the [master limited partnership] partners to the [master limited partnership] itself.” Remand Rehearing Order P 31 n.82, JA 1286. Stated another way, an investor’s tax liability does not depend on whether the pipeline receives an income tax allowance in rates, so any investor who faces income taxes will expect a pre-tax return. *See id.* P 31, JA 1286 (explaining that Pipeline’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).

When distributions increase (or decrease), the market reacts by increasing (or decreasing) the unit price. *See id.* P 11 n.26, P 14 n.38, P 31 n.84, JA 1274-75, 1277, 1286-87; 2018 Policy Statement P 14 n.24. Either way, the result is the same pre-tax return. *See* Remand Rehearing Order P 31, JA 1286; 2018 Policy Statement P 14 n.24; *see also United Airlines*, 827 F.3d at 136.

Having found that the discounted cash flow methodology provides a pre-tax return, the Commission correctly determined that “there is no basis for imputing the partners’ income tax costs in [Pipeline’s] cost of service,” and reasonably concluded that the income tax allowance should be removed. *See* Remand Order P 28, JA 888-89.

D. The Commission did not read *United Airlines* as mandating a particular result.

From the outset, Pipeline argued that *United Airlines* erroneously held that a double recovery results from including both a discounted cash flow return on equity and an income tax allowance in Pipeline’s cost of service. *Id.* P 19, JA 883.

According to Pipeline and Intervenor Association of Oil Pipe Lines (“Pipeline Association”), *United Airlines* required the Commission to find a way to preserve the income tax allowance. Pipeline Br. 4, 14-15; Pipeline Association Br. 6-7. 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. Remand Order P 28, JA 888-89. *See ExxonMobil*, 487 F.3d at 955 (calculating cost-of-service using a pre-tax return and no income tax allowance “[a]rguably” would have 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”).

Without citing authority, Pipeline asserts that for the Commission “[t]o supplant its decision-making with purported findings by a court is contrary to the Administrative Procedure Act.” Pipeline Br. 17. But the agency reasoned that the discounted cash flow methodology provides a pre-tax return that compensates unit holders for their tax liability, which is—with or without *United Airlines*—a finding based on the record in this proceeding. The Commission’s orders explain its

reasoning and provide a sufficient explanation to sustain the Commission in this proceeding. *See* Remand Order PP 22-24, JA 884-86; Remand Rehearing Order PP 10-18, JA 1273-79.

Pipeline also asserts that the Commission failed to identify or analyze substantial evidence to support the double-recovery finding. *See* Pipeline Br. 19-20; *see also* Pipeline Association Br. 15-16. But the Commission’s task was not to disprove the Court’s identification of the double-recovery problem, but to resolve the problem the Court identified. *See United Airlines*, 827 F.3d at 137. Moreover, the Commission responded to many arguments that there is, in fact, no double recovery—or that double recovery is not problematic. *See* Remand Order PP 21-30, JA 883-89; *see also* 2018 Policy Statement PP 9-35.

E. The pre-tax finding does not conflict with the efficient market hypothesis.

As a general matter, when markets operate efficiently, “stock prices will react promptly to new public releases of information and thus fully reflect all public information.” *Tennessee Gas Pipeline Co. v. FERC*, 926 F.2d 1206, 1210-11 (D.C. Cir. 1991) (quoting Frank K. Reilly, *Investment Analysis and Portfolio Management* 215 (1989)) (internal quotations omitted). Efficient markets help explain a negative unit price reaction following news of *any* revenue decrease. *See* Remand Order P 23, JA 885.

Pipeline argues that the Commission abandoned belief in efficient markets. *See* Pipeline Br. 7, 20-23. Under Pipeline’s view, investors in pass-through entities that receive an income tax allowance recognize the allowance and therefore do not demand a pre-tax return. *See* Pipeline Br. 7, 23.

The Commission considered and rejected Pipeline’s argument that efficient markets compel a finding that the double recovery was permissible. *See* Remand Order P 23, JA 885 (Pipeline “essentially argues that there is no ‘short term’ because (pursuant to the efficient market hypothesis) the market immediately increases the price of partnership units in response to the cash flow from an income tax allowance, thereby maintaining the same rate of return as if there was no income tax allowance.”); *see also* Remand Rehearing Order P 31 & n.84, JA 1286-87. The Commission found Pipeline’s attempt to justify double recovery to be a “direct challenge” to *United Airlines*, and that Pipeline’s reasoning obscures the fundamental problem of an inflated cost of service. Remand Order P 24, JA 885-86.

Moreover, efficient markets do not require this Court to accept the “illogical” argument that investors receiving a given return will retain that same return after paying taxes. *See id.* P 31, JA 889-90; Remand Rehearing Order PP 30-31, JA 1285-86. On the contrary, efficient markets help explain the pre-tax finding (and undercut the contention that investors behave differently when a

pipeline's Commission-determined cost-of-service includes an income tax allowance). *See* Opinion No. 511 P 243, JA 405-06; *see also United Airlines*, 827 F.3d at 136; 2018 Policy Statement P 14 & n.24.

Before the Commission, Pipeline 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.” Remand Order PP 23-24, JA 885-86; Remand Rehearing Order PP 12, 30, 32, JA 1275, 1285-86, 1287; *see also* 2018 Policy Statement P 12; *see also id.* n.21 (describing Pipeline's argument that higher tariffs lead to increased distributions and unit prices). But these 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. Remand Order P 24, JA 885-86. The Commission, therefore, had good reason to adhere to efficient markets while affirming the Remand Order's “finding that instantaneous stock price adjustments do not eliminate the double recovery that would result from permitting [a master limited partnership] to recover an income tax allowance.” Remand Rehearing Order P 13, JA 1275-76. 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.*

F. A negative market response does not undercut the finding that the discounted cash flow determines a pre-tax return.

The Commission recognized that “changes to . . . income tax policies may affect the unit price of regulated entities.” *Id.* P 14, JA 1276-77. But these changes “do not resolve the double-recovery problem or change any [master limited partnership’s discounted cash flow] return from a pre-investor tax return to an after-investor tax return.” *Id.*

The Commission found that studies showing the fall in unit prices was “not relevant” to the issue of double recovery, and did “not undercut the holding” of the Remand Order. *Id.* P 34, JA 890-91. The Commission explained that double recovery was the relevant inquiry, “not the post-rate case effects upon the unit price of [Pipeline’s] parent [master limited partnership].” Remand Order P 24, JA 885-86; *see* Remand Rehearing Order P 34, JA 1288-89.

Pipeline states that the double-recovery finding harmed the pipeline industry. Pipeline Br. 12-13. Its argument cites no authority and rests solely on the market response as reflected in the drop of unit prices. *Id.* at 12.

G. The Commission considered the implications of its orders.

Pipeline argues that the Commission failed to consider the implications of the policy shift, including the tax liability of the “corporate parent.” *Id.* at 24-25. Pipeline emphasizes that this corporate investor in Pipeline will have to pay taxes before making distributions (dividends) to its shareholders, and the “return to

stockholders will decrease accordingly.” *Id.* But that corporate parent, as investor, is not unique. All investors have to pay taxes, even individuals. *See BP West Coast*, 374 F.3d at 1289. The discounted cash flow methodology allows recovery of all investor expenses. *See United Airlines*, 827 F.3d at 136; *BP West Coast*, 374 F.3d at 1291.

Pipeline argues that removing the income tax allowance will hinder access to capital for pass-through entities. Pipeline Br. 12. This speculative argument assumes the discounted cash flow methodology is not pre-tax. As explained above (*supra* pp. 24-28), the Commission’s discounted cash flow methodology provides a pre-tax return that leaves investors with an after-tax return commensurate with other investments of like risk after paying taxes. *See Remand Order P 22*, JA 884-85.

Pipeline and Pipeline Association cite no authority for the proposition that double recovery is necessary to attract capital, and the Commission reasonably concluded that it is not. *See id.* P 29, JA 889; Remand Rehearing Order PP 10, 13, JA 1273-74, 1275-76; *see also* 2018 Policy Statement P 44. Cost-of-service ratemaking is designed to ensure that a Commission-jurisdictional pipeline may recover its costs, including income tax costs, plus a reasonable return on equity. *E.g., City of Charlottesville*, 774 F.2d at 1207. Double recovery is “contrary to fundamental cost-of-service principles” and precludes just and reasonable rates.

Remand Rehearing Order P 15 n.39, JA 1277-78. *Hope*'s requirement that return be "commensurate with the return on investments in other enterprises having corresponding risks" (320 U.S. at 603) is satisfied because the discounted cash flow-return "provides the pipeline with a return commensurate with investments of corresponding risk and sufficient to attract capital." Remand Order P 29, JA 889, Remand Rehearing Order P 34, JA 1288-89. Thus, under *Hope*, the Commission's focus is not on maintaining an inflated equity market capitalization of Pipeline based on the unfounded income tax allowance. Rather, the focus is on the adequacy of Pipeline's return on rate base, which is not undermined by evidence of a drop in unit prices.

Pipeline Association argues that the Commission did not give a reasoned explanation for "abandoning the policies underpinning its prior income tax allowance methodology." Pipeline Association Br. 15-22. In particular, Pipeline Association cites: (1) achieving "comparability in rates;" and (2) "encouraging investment in pipeline infrastructure." *Id.* at 5, 15; *see also id.* at 16-17 (citing similar goals from *Inquiry Regarding Income Tax Allowances*, 111 FERC ¶ 61,139 (2005) (2005 Policy Statement)). *United Airlines* suggested two remedies, neither of which was justifying double recovery to encourage infrastructure or to advance a policy of equalizing rates. 827 F.3d at 137.

In any event, the Commission’s removal of the income tax allowance restored parity in returns between corporations and partnerships. *See* Remand Order P 25, JA 886. “[Pipeline’s] attempt to justify affording an income tax allowance on the basis that the Commission is implementing Congress’ intent does not address the remand’s mandate to resolve the double recovery issue.” *Id.* P 26 n.56, JA 887; *see also United Airlines*, 827 F.3d at 136 (rejecting the Commission’s argument that “any disparate treatment between partners in partnership pipelines and shareholders in corporate pipelines is the result of the Internal Revenue Code, not FERC’s tax allowance policy”); *BP West Coast*, 374 F.3d at 1293 (“The mandate of Congress in the tax amendment was exhausted when the pipeline limited partnership was exempted from corporate taxation.”); 2018 Policy Statement P 38 n.70.

III. The Commission reasonably declined to reopen the record.

Pipeline and Pipeline Association claim that the drop in Pipeline’s stock price after the Commission issued the 2018 Policy Statement shows that Pipeline could not have been double-recovering its income tax liability, and that the Commission should have reopened the record in order to consider this new evidence. Pipeline Br. 25-31; Pipeline Association Br. 8-14. The Commission reasonably held, however, that the need for administrative finality outweighed Pipeline’s interest in submitting material that was, at best, minimally relevant to

this much-litigated issue. *See* Remand Rehearing Order PP 27, 33-34, JA 1282-83, 1287-89. This case “involves whether an income tax allowance should be included in [Pipeline’s] cost of service, not the post-rate case effects upon the unit price of [Pipeline’s] parent partnership.” *Id.* P 34, JA 1288-89 (quoting Remand Order P 24, JA 885-86). And in any event, the “fact that value is reduced does not mean that the regulation is invalid.” *Hope*, 320 U.S. at 601 (citing cases). The Commission acknowledged that eliminating the double recovery could cause pipeline unit prices to decrease, but such a market response “does not justify perpetuation of the double recovery.” Remand Rehearing Order P 34, JA 1288-89; *see also* Remand Order P 24 n.52, JA 886 (finding “without merit” Pipeline’s converse argument, i.e., that it is just and reasonable to allow recovery of duplicative costs because this causes unit prices to rise).

A. Pipeline did not demonstrate an interest more compelling than administrative finality.

The Commission may reopen an administrative record if it “has reason to believe that reopening . . . is warranted by any changes in conditions of fact or law or by the public interest.” 18 C.F.R. § 385.716 (cited in Remand Rehearing Order P 26, JA 1282). This agency discretion “is reserved for extraordinary circumstances.” *Cities of Campbell v. FERC*, 770 F.2d 1180, 1191-92 (D.C. Cir. 1985). Circumstances that justify reopening the record must rise above a level that

is merely “material,” and go “to the very heart of the case.” *Miss. Indus. v. FERC*, 808 F.2d 1525, 1567 (D.C. Cir. 1987).

Pipeline’s arguments (Br. 27) in favor of reopening the record to admit information about the re-pricing of master limited partnership units in equity markets do not rise to this level. The Commission typically does not reopen the record simply to ascertain the most recent information. *See, e.g., Interstate Power & Light Co. v. ITC Midwest, LLC*, 135 FERC ¶ 61,162 at PP 12, 23 (2011) (new testimony about effect of transmission formula implementation does not warrant reopening); *E. Tex. Elec. Coop., Inc. v. Cent. & S.W. Servs., Inc.*, 94 FERC ¶ 61,218, at 61,801 (2001) (no reopening in order to substitute real-world data for hypothetical data used in litigation). Changes “always occur” after the close of an agency record, and “litigation must come to an end at some point. Hence, the general rule is that once closed, an agency record will not be reopened.” *Transw. Pipeline Co.*, Opinion No. 238, 32 FERC ¶ 61,009, at 61,037 (1985), *reh’g denied*, Opinion No. 238-A, 36 FERC ¶ 61,175 (1986), *aff’d*, *Transw. Pipeline Co. v. FERC*, 820 F.2d 733 (5th Cir. 1987); *E. Tex. Elec. Coop.*, 94 FERC at 61,800 (citing cases).

The Commission emphasized that Pipeline had litigated the income tax allowance issue for more than 10 years, and had “presented its arguments regarding the double-recovery issue through briefing and expert testimony” many

times before the Commission and this Court. Remand Rehearing Order P 27 & nn.60-62, JA 1282-83. “The duty of the Commission to examine all relevant facts, moreover, does not extend to holding an evidentiary hearing open indefinitely . . . as if in an attempt to assist a party in figuring out what its story really is.” *Cities of Campbell*, 770 F.2d at 1191-92. In light of these factors, it was reasonable for the Commission to find that administrative finality outweighed any need to allow Pipeline “another bite at the apple at this late stage.” Remand Rehearing Order P 27, JA 1282-83.

B. Pipeline received sufficient process when the Commission considered and rejected Pipeline’s post-remand filings.

Pipeline explains that the Commission may reach substantive conclusions without holding a hearing – just not in this case, because it involves “the application of a major policy change.” Pipeline Br. 25. Pipeline also claims that the Commission “unreasonably foreclosed” it from re-litigating the income tax allowance issue “under the governance of” the 2018 Policy Statement. Pipeline Br. 28-29 (citing Policy Statement Rehearing Order P 8). Neither argument has merit.

To support its argument for a hearing, Pipeline cites *Mobil Oil Corp. v. FERC*, in which an Administrative Procedure Act rulemaking began as an inquiry into cost allocation for transportation of hydrocarbons, but ended with the Commission establishing nationally applicable rates for these services. 483 F.2d

1238, 1243-45 (D.C. Cir. 1973). *Mobil Oil* is “no longer good law.” *Wis. Gas Co. v. FERC*, 770 F.2d 1144, 1167 (D.C. Cir. 1985) (Supreme Court has rejected the foundational assumption of *Mobil Oil*’s Administrative Procedure Act analysis). And it does not help Pipeline anyway, because it does not stand for the proposition that any specific procedure is always necessary to develop a record; like other cases, it acknowledges the agency’s flexibility in this regard. *Mobil Oil*, 483 F.2d at 1259 (“[I]n any administrative proceeding, the type of procedure is related and proportionate to the degree of evidentiary support required for the agency’s decision.”); *see also, e.g., Moreau v. FERC*, 982 F.2d 556, 568 (D.C. Cir. 1993) (no need for evidentiary hearing where there are no issues of material fact, and/or if the Commission can resolve disputed issues based on the written record); *Cerro Wire & Cable Co. v. FERC*, 677 F.2d 124, 129 (D.C. Cir. 1982) (“mere allegations of disputed facts are insufficient to warrant a hearing; petitioners must make an adequate proffer of evidence to support them”).

As for Pipeline’s argument that the Commission wrongly denied it an opportunity to demonstrate a lack of double recovery, Pipeline submitted four post-remand filings arguing for the preservation of its income tax allowance: two sets of comments, a request for rehearing, and a motion to reopen the record. *See* Remand Rehearing Order P 27, JA 1282-83. The Commission did not dismiss these submissions out of hand, but discussed Pipeline’s proffer of additional

evidence and explained why it found that evidence “without merit.” *Id.* P 26, JA 1282 (motion and attached exhibits “concede the Commission’s key findings” in the Remand Order); *see also id.* PP 26-37, JA 1282-90 (analyzing submissions). This approach is “well within the bounds of the Commission’s discretion, particularly given the highly technical nature of the issues raised in the” submissions. *Minisink Residents for Env’tl. Pres. and Safety v. FERC*, 762 F.3d 97, 115-16 (D.C. Cir. 2014) (no error in Commission’s decision to review, and then not accept, late-filed evidence that would not have changed the Commission’s conclusions). And as the Commission pointed out, Pipeline had been litigating the income tax allowance issue for years before the agency issued its 2018 Policy Statement. Remand Rehearing Order P 27, JA 1282-83.

Pipeline Association, as a non-party in the underlying rate case, must accept the record as it is. *See* 18 C.F.R. § 385.214(d)(3)(ii). Pipeline Association would not have been entitled to file a motion to reopen the record before the Commission, *see Alcoa Power Generating, Inc.*, 152 FERC ¶ 61,040 P 13 (2015), so its request for this relief on appeal attempts to circumvent Commission regulations. Pipeline Association cites no authority for its assertion that the Commission should have considered, in this ratemaking proceeding, specific record items from the 2018 Policy Statement proceeding. *See* Pipeline Association Br. 11-13. Those

pleadings were submitted to the Commission in response to its Notice of Inquiry, not to support findings regarding specific pipeline rates.

IV. The Commission reasonably declined to order refunds of deferred taxes that were collected prior to commencement of this rate case.

When it removed the income tax allowance from its cost of service in rates going forward (beginning in 2008), Pipeline also eliminated the regulatory construct of reducing its rate base by its deferred income tax balance (accumulated from 1992 to 2008) of approximately \$28,021,359 because “there is no longer an income tax allowance.” Remand Rehearing Order P 89, JA 1312-13.

The Commission found that “[o]nce an income tax allowance has been removed from cost of service, as is the case for [Pipeline], there is no basis to continue to include [accumulated deferred income tax] to normalize the pipeline’s income tax costs.” *Id.* If there is no income tax allowance in Commission rates, normalization plays no role in matching tax benefits with the associated costs creating those benefits. *Id.* Moreover, there is no need for the deferred income tax regulatory construct “to ensure that regulated entities do not earn a return on cost-free capital.” *Id.*

The income tax allowance and the deferred tax account were putative “costs” that went into the computation of rates, and when they were disallowed as such, the rates became unreasonably high. The question, therefore, is what remedy is available for unlawful rates. Shippers are entitled to refunds of the unreasonable

portion of rates back to the beginning of this proceeding in 2008 (*see* Interstate Commerce Act section 15(7), 49 U.S.C. app. § 15(7)), and they are receiving that in Pipeline’s compliance filing. What they are seeking now, therefore, are refunds of amounts collected in rates on file before this rate case began in 2008. But the Act makes no provision for that. To “amortize” to ratepayers the deferred tax balance “would, effectively, retroactively apply the holding in [the Remand Order] by requiring Pipeline to refund the deferred taxes recovered under past rates for service prior to the commencement of this proceeding.” Remand Rehearing Order P 93, JA 1315. The Commission correctly rejected Shippers’ proposal as retroactive ratemaking.

A. Normalization principles do not support refunding accumulated deferred taxes from rates collected prior to commencement of the rate case in 2008.

The Commission’s normalization principles undermine Shippers’ view that the pre-2008 deferred income tax balance should be refunded to them, or that the balance should continue to reduce Pipeline’s rate base. *See* Remand Rehearing Order PP 91, 105, JA 1313-14, 1322-23. The Commission’s normalization regulations “only apply to entities with an income tax allowance component in their regulated cost-of-service rates.” *Id.* P 91, JA 1313-14 (referring to analogous natural gas regulations).

Normalization matches “the pipeline’s cost-of-service expenses in rates with the tax effects of those same cost-of-service expenses.” *Id.* “If there is no income tax allowance in Commission rates, there is no basis for the ‘matching’ function of normalization, including [accumulated deferred income tax].” *Id.*; *see also id.* P 91 n.198, JA 1314; Policy Statement Rehearing Order P 14.

B. Ratepayers have no ownership interest in previously-collected amounts in the accumulated deferred income tax account.

Pipeline’s pre-2008 rates included an income tax allowance “determined by the straight-line depreciation used in cost-of service rates.” Remand Rehearing Order P 101, JA 1319; *see also id.* P 105, JA 1322-23. Therefore, pre-2008 customers “paid their properly allocated share of the pipeline’s costs for the transportation service they received.” *Id.* P 105, JA 1322-23. In addition, the benefits of accelerated taxation and normalization were spread ratably over the entire useful life of Pipeline’s facilities. *See Safe Harbor for Inadvertent Normalization Violations*, Rev. Proc. 2017-47, 2017-38 I.R.B. 233, § 2. As pre-2008 ratepayers paid their properly allocated share (and received their properly allocated benefit), “[i]t follows that, if the Commission determines part way through the overall normalization period that the pipeline is not entitled to any tax allowance, the Commission cannot require the pipeline to return to shippers [deferred tax] amounts collected in prior rates without engaging in retroactive ratemaking.” Remand Rehearing Order P 94, JA 1315-16.

The accumulated deferred income tax balance is a regulatory construct that prevents the pipeline from earning a return on cost-free capital. *Id.* P 63, JA 1302-03. It is not a “true-up or tracker of money owed to shippers.” *Id.* P 92, JA 1314-15. Rather, the deferred tax balance “is simply a way of reflecting the fact that a certain portion of rate base is not financed by investor funds so that there is no ‘interest’ cost to the utility on a portion of its rate base.” *Regulations Implementing Tax Normalization for Certain Items Reflecting Timing Differences in the Recognition of Expenses or Revenues for Ratemaking and Income Tax Purposes*, Order No. 144, FERC Stats. & Regs. ¶ 30,254, at 31,539 (1981).

The Commission and this Court have rejected Shippers’ contrary view that rates prior to the rate case were a “prepayment” because “every [prior ratepayer] received the full tax benefit associated with every expense that it bore.” Remand Rehearing Order P 105, JA 1322-23 (quoting *Public Utilities*, 894 F.2d at 1381) (internal quotations omitted); *see also* Order No. 144 at 31,539. Shippers therefore do not have an ownership interest in previously-accumulated sums in the deferred income tax balance. *See* Remand Rehearing Order P 74, 78, 92, JA 1306-07, 1308, 1314-15; *see also* Policy Statement Rehearing Order PP 15-16; *Bd. of Pub. Util. Comm’rs v. N.Y. Tel. Co.*, 271 U.S. 23, 32 (1926) (utility customers’ payments for service do not confer legal or equitable interest in the property used to provide that service, or in company funds); *Pub. Sys.*, 709 F.2d at 85 (rejecting the notion “that

ratepayers have an ownership claim” to the accumulated deferred income tax balance).

In addition, deferred taxes are not like a loan from ratepayers. *See* Order No. 144 at 31,539. Therefore, ratepayers do not “have an ownership claim or equitable entitlement to the ‘loaned monies.’” *See id.* To be sure, pre-2008 customers paid rates that included deferred taxes, “[b]ut paying deferred taxes in rates does not convey an ownership or creditor’s right.” *Id.* n. 75. On review, this Court agreed. *Public Utilities*, 894 F.2d at 1381.

C. Shippers seek retroactive ratemaking by seeking refunds of money collected from pre-2008 rates.

The rule against retroactive ratemaking “bars utility refunds for past excessive rates.” *City of Piqua v. FERC*, 610 F.2d 950, 954 (D.C. Cir. 1979). Shippers’ refund proposal would violate the rule against retroactive ratemaking because the pre-2008 deferred taxes were “recovered under past rates for service prior to the commencement of this proceeding.” Remand Rehearing Order P 74, 93, JA 1306-07, 1315; *see also Public Utilities*, 894 F.2d at 1381. However, “[u]nder the Interstate Commerce Act, the Commission only has the authority to address over-recovery by prospectively changing a pipeline’s rate, and may not retroactively refund over-collected amounts.” Remand Rehearing Order P 93, JA 1315; *see also Oxy USA, Inc. v. FERC*, 64 F.3d 679, 698-700 (D.C. Cir. 1995). Notice matters because the rule against retroactive ratemaking aims to achieve

predictability. *See Pub. Utils. Comm'n of Cal. v. FERC*, 988 F.2d 154, 163-64 (D.C. Cir. 1993); *Oxy*, 64 F.2d at 699.

Shippers recognize the “limitations of [Interstate Commerce Act] section 15(7)” and acknowledge that rates set in this case became effective on August 1, 2008. Shippers Br. 19. They nonetheless assert that refunding the deferred portion of the pre-2008 income tax allowance would not be retroactive ratemaking because there was notice that the Commission reconciles over-recoveries of accumulated deferred income tax balances. *Id.* at 22-23.

But just as the Interstate Commerce Act gives the Commission no authority to order a refund of the currently payable portion of income tax allowance collected before 2008 (not at issue here, *see* Shippers Br. 21 n.49), the Commission cannot order a refund of the deferred portion (Shippers’ objective here). *See* Remand Rehearing Order P 17, JA 1278-79 (observing that it would be retroactive ratemaking to refund either (1) “the income tax allowance expenses;” or (2) the “deferred tax reserves recovered in past rates”). Further, the Commission’s normalization policies do not provide notice that would justify carving out an exception to the rule against retroactive ratemaking. *Id.* P 104, JA 1321-22. The normalization policy “does not apply in the context of a complete elimination of a pipeline’s income tax allowance.” *Id.*

Shippers' proposal demonstrates the lack of notice. Shippers acknowledge that, going forward, Pipeline will not have an income tax allowance; therefore, the Commission's standard methodology for addressing an over-funded deferred tax balance would not work. *See* Comments and Protests of the Joint Shippers at 17-18, R. 1087, JA 985-86 (acknowledging that the "reverse South Georgia method," *see Memphis Light, Gas & Water Div. v. FERC*, 707 F.2d 565, 569 (D.C. Cir. 1983), would not work). Instead, Shippers proposed that the Commission "create a separate amortization mechanism" in order to refund the pre-2008 deferred taxes to ratepayers. *Id.* But no one paying pre-2008 rates or providing pre-2008 service had notice of any such "separate amortization mechanism."

By contrast, the Commission's natural gas pipeline normalization regulations provide notice for addressing income tax rate changes. *See* 18 C.F.R. § 154.305(d). Similar principles apply to oil pipelines. Remand Rehearing Order P 91, JA 1313-14. *Town of Norwood*, which addressed the Commission's ratemaking treatment of a transition from pay-as-you-go to accrual accounting for post-retirement benefits, provides an additional counter-example. *Norwood* found no retroactivity problem with a "transition obligation" that accounted for higher liabilities under accrual accounting because "the only shift is timing within the future." 53 F.3d at 381. Here, Shippers' proposal would not merely shift the timing of an adjustment, but correct "errors in earlier approximations of actual

costs” (namely, the error of permitting pass-through entities an income tax allowance), which is “impermissible retroactive ratemaking.” *Id.* at 383; *see also* Remand Rehearing Order P 104 n.231, JA 1322.

Because ordering refunds for pre-2008 time periods would necessarily presume a finding that those rates were “in retrospect too high” or “unjust and unreasonable,” refunds are impermissible retroactive ratemaking. *Public Utilities*, 894 F.2d at 1382. “The Commission [has] no legal right to reduce [the Pipeline’s going-forward] rates ... below levels found to be just and reasonable” as “the Commission’s adjustments of those rates were in substance a retroactive adjustment of prior rates based on normalization.” *Id.* at 1383-84; *see* Remand Rehearing Order P 103, JA 1321. “This kind of post hoc tinkering would undermine the predictability which the [retroactive ratemaking] doctrine seeks to protect.” *Public Utilities*, 894 F.2d at 1383; *see also Old Dominion Elec. Coop. v. FERC*, 892 F.3d 1223, 1230 (D.C. Cir. 2018) (Commission cannot waive or retroactively change filed rates for equitable reasons).

Shippers state that *Public Utilities* addressed unique circumstances that are inapplicable here. Shippers Br. 29-33. Although there are differences, in both *Public Utilities* and this case the “basis for tax normalization no longer applied because the pipeline no longer recovered an income tax allowance.” Remand Rehearing Order P 102, JA 1319-20; *see Public Utilities*, 894 F.2d at 1379, 1382.

In both cases, normalization played a matching role that ceased to exist going forward. Accordingly, unwinding that previous matching—where Shippers paid their fair share of the costs and received their ratable share of the benefits—would retroactively change past rates.

Shippers assert that the Commission “had to change its reading [of *Public Utilities*] to make its ruling here.” Shippers Br. 32 (citing *BP Pipelines (Alaska) Inc.*, Opinion No. 502, 123 FERC ¶ 61,287 P 161-63 (2008)). Not so. *BP Pipelines (Alaska)* is inapplicable because: (1) the dismantlement costs at issue there were prepayments; and (2) an accounting of those dismantlement costs going forward was not retroactive ratemaking because the accounting concerned rates going forward for ongoing costs. See Opinion No. 502, 123 FERC ¶ 61,287 P 163 n.274 (citing *BP Pipelines (Alaska) Inc.*, Initial Decision, 119 FERC ¶ 63,007 PP 165-69 (2007)). In addition, it is not correct that the *Public Utilities* Court had “no claim of retroactive ratemaking . . . before it.” Shippers Br. 31. Both the Court and a petitioner before the Court (El Paso) cited *City of Piqua*, 610 F.2d at 954, for the rule against retroactive ratemaking. See *Public Utilities*, 894 F.2d at 1383; El Paso Brief, *Public Utilities* at 22 n.14. And El Paso argued against a ruling that would allow the Commission to “reduce El Paso’s current and future rates to adjust for the tax component of rates previously held to be just and reasonable.” El Paso Brief, *Public Utilities* at 22.

D. Commission policy for addressing income tax rate changes does not resolve this issue.

Shippers acknowledge that the accumulated deferred income tax balance relates to Pipeline's "past rates." Shippers Br. 10. But they analogize the removal of the income tax allowance to adjustments that are necessary when Congress changes income tax rates. *See id.* at 6, 10-15; *see also* Remand Rehearing Order P 77, JA 1307-08.

The tax rate analogy fails. A tax rate change is forward-looking and recognizes that "the pipeline currently needs to collect a lower level of tax expenses in rates to cover the tax liability for that year." Remand Rehearing Order P 97, JA 1317. By contrast, the rate case here completely removed the income tax allowance going forward; thus, "there is no basis for the 'matching' function of normalization and no liability for the deferred taxes reflected in [accumulated deferred taxes]." *Id.* "Where there is no income tax allowance component in cost-of-service rates, there is no rationale for requiring [Pipeline] to continue to account for [accumulated deferred income taxes]." *Id.*

Moreover, Shippers appear to assume that because there is notice of adjustments when tax rates change, there must also be notice for all other situations, including the removal of income tax allowance from cost of service. As discussed above (*see supra* p. 43-44), because the Commission's normalization policies do not apply here, the Commission reasonably concluded that refunds

would pose a retroactive ratemaking issue. *See* Remand Rehearing Order P 104, JA 1321-22.

E. The refusal to order refunds of money collected prior to 2008 did not result in retroactive ratemaking as asserted by Shippers.

The Commission rejected Shippers’ “[i]ronic[.]” (Shippers Br. 19) argument that the failure to refund deferred taxes collected in pre-2008 rates was itself retroactive ratemaking. Remand Rehearing Order P 101, JA 1319. As explained above (*see supra* pp. 46-50), the converse is true: refunds would be retroactive ratemaking.

Shippers continue to argue that the failure to return the earnings on those amounts would be retroactive ratemaking. Shippers Br. 19-21. They complain that the removal of the deferred tax balance from rate base allows Pipeline to earn a return on what was previously considered cost-free capital. *Id.* at 19. Shippers also assert that removing deferred taxes from Pipeline’s pre-2008 rate base calculations caused the deferred return balance (applied to post-2008 rates) to be too high. *Id.* at 20-21.

The Commission rejected Shippers’ argument, and explained that *Public Utilities* also applied to the “earnings on an excess [deferred income tax] balance.” Remand Rehearing Order P 101, JA 1319. Accordingly, Shippers’ retroactive ratemaking assertion should be rejected because it would deny Pipeline the fruits of proceeds collected in pre-2008 rates. *See Public Utilities*, 894 F.2d at 1384

(retroactive ratemaking applies to the “proceeds of rates that have been finally approved and collected” and also to the “fruits of those proceeds”).

Finally, Shippers did not explicitly link the increased deferred return to a violation of the rule against retroactive ratemaking. *See* Comments and Protests of the Joint Shippers at 21-22, R. 1087, JA 989-90; Joint Shippers Surreply Comments at 31-32, R. 1101, JA 1243-44. In any event, this is not retroactive ratemaking because Pipeline is not seeking additional recovery to make up for deficient pre-2008 rates, and Pipeline’s post-2008 calculation of deferred equity return is consistent with the removal of income tax allowance and the associated deferred taxes for purposes of determining future rates. *See* Remand Rehearing Order P 101, JA 1319.

V. The Commission reasonably held that Pipeline could not claim larger index rate increases in its recalculated rates than the Commission had previously approved.

In the Remand Order, the Commission rejected Pipeline’s attempt to claim higher index-rate increases for 2011, 2012, and 2013 than Pipeline had previously filed with the Commission. *See* Remand Rehearing Order P 57, JA 1300 (citing similar decision concerning Pipeline’s East Line rates in *SFPP, L.P.*, Opinion No. 522-B, 162 FERC ¶ 61,229 (2018) (“East Line Order”). It required Pipeline to recalculate its refunds and going-forward rates using the index increases that

Pipeline had already filed, and that the Commission had already accepted. *Id.* P 58, JA 1301 (citing 18 C.F.R. § 342.3).

Pipeline contends that this ruling is an arbitrary change in policy designed to further reduce its just and reasonable rates. Pipeline Br. 33-34. Most of its argument criticizes the East Line Order. *See id.* at 34-37. But because Pipeline has sought agency rehearing of other issues in the East Line Order, that order is neither final nor properly before the Court. *See Order*, Case No. 18-1131 (Aug. 31, 2018) (granting unopposed motion to dismiss for lack of jurisdiction); *see also*, e.g., *Clifton Power Corp. v. FERC*, 294 F.3d 108, 111-12 (D.C. Cir. 2002) (petition for review filed before rehearing order issues is “incurably premature” and “must be dismissed”); *Bellsouth Corp. v. FCC*, 17 F.3d 1487, 1489-90 (D.C. Cir. 1994) (finality is a party-based concept; case cannot be final for one purpose, but non-final for another).

In any event, when an agency action marks a change in position, the agency must “display awareness that it *is* changing position,” and “show that there are good reasons for the shift; but the reasons for the new position need not be better than the reasons for the old one.” *Ass’n of Oil Pipe Lines v. FERC*, 876 F.3d 336, 342 (D.C. Cir. 2017) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)) (emphasis in original). As the Remand Order acknowledges, the East Line Order expressly reversed an earlier ruling, and explained the Commission’s

reasons for doing so. Remand Order P 57, JA 902. Therefore, to any extent that the Remand Order itself can be considered a change in policy, the Commission provided an appropriate explanation. *See id.*

The East Line Order provided five reasons to “determine [Pipeline’s] refunds and going forward rates based upon Pipeline’s actual index filings,” and, conversely, not to allow a pipeline to update the index-rate increases that it takes in a particular year when it recalculates its rates. East Line Order PP 16-20; *see also id.* P 15 (expressly reversing earlier “holding that [Pipeline] may apply index increases different from those previously submitted in this proceeding”). Briefly, the Commission did not allow Pipeline to update previously-approved index rate increases because: (1) litigation concerning Pipeline’s rates did not alter the industry-wide cost changes justifying Pipeline’s annual index rate changes, *id.* P 16; (2) allowing Pipeline to retroactively increase its index rate changes “would inoculate [Pipeline] from the risk associated with its own” ratemaking strategy, *id.* P 17; (3) to do so “would thwart the simplified and streamlined oil pipeline ratemaking procedures mandated by the Energy Policy Act of 1992 and embodied in the indexing methodology,” *id.* P 18; (4) the retroactive index rate changes do not follow the Commission’s regulations for making rate changes, *id.* P 19; and (5) permitting the changes would undermine predictability and rate certainty for shippers, *id.* P 20.

The Remand Order also found that “a compliance filing is not an appropriate forum for re-litigating index filings previously accepted by the Commission.” Remand Order P 57, JA 902 (referring to East Line Order). Pipeline claims that ratepayers are always on notice of potential changes to the rates on file (Pipeline Br. 36-37), but this misses the Commission’s point. Changes made to index-rate increases in the context of cost-of-service litigation require the Commission “to consider, at each stage, potential shipper challenges to each newly-instituted index adjustment.” East Line Order P 18; *see also* Remand Order P 55, JA 901-02 (describing such challenges). Such process “goes far beyond [Pipeline’s] original cost-of-service filing, and would undermine the simplified and streamlined procedures indexing was intended to achieve.” East Line Order P 18. *See also Sw. Airlines*, 926 F.3d at 853 (index-rate system is meant to simplify oil pipeline ratemaking). Here, it also duplicates other litigation, as the merits of Pipeline’s 2011 index-rate increase remains the subject of a separate, long-running agency proceeding. Remand Order n.134, JA 902 (citing *SFPP, L.P.*, Opinion No. 527-A, 162 FERC ¶ 61,230 (2018) (granting rehearing and returning proceeding to hearing)).

Pipeline’s factual challenges are similarly unpersuasive. It correctly points out that all of its rate proposals are subject to refund, and that it did not know the outcome of its rate cases when it proposed the index rate increases. Pipeline

Br. 35-36. But this does not respond to the Commission’s findings that Pipeline is responsible for its own ratemaking strategy, and that cost-of-service changes are meant to be an alternative to the indexing methodology. East Line Order P 17; *see also Ass’n of Oil Pipe Lines*, 876 F.3d at 339 (cost-of-service ratemaking to be used if there is a “substantial divergence” between a pipeline’s costs and the rate that results from use of the index). The Commission’s ruling merely holds Pipeline to its choices. *See* Remand Order P 57, JA 902; *see also* Opinion No. 511-A P 405 (limiting SFPP to one-quarter of the index rate increase it claimed, on compliance, for a prior year in which it had demonstrated its cost of service); *reh’g denied*, Opinion No. 511-B PP 27-33; *United Airlines*, 827 F.3d at 133 (“discern[ing] no error in FERC’s decision-making” on this subject, especially in light of deference afforded the agency in complex ratemaking decisions).

VI. The Commission reasonably allocated recovery of litigation expenses over three years.

In 2018, Pipeline proposed to recover the litigation expenses it had incurred in connection with its rate case over the previous three years. Compliance Filing Implementing Opinion No. 511-C, Transmittal Letter at 5, R. 1081, JA 939. To do this, Pipeline updated a previously-approved surcharge that it assessed on shipments made between August 2008 and July 2011. *Id.* Shippers protested, arguing that it was more reasonable to spread the cost of the litigation over the entire duration of the rate case, which they defined as August 2008 to May 2018.

Comments and Protests of the Joint Shippers at 24-25, R. 1087, JA 992-93. They now appeal the Commission’s approval of the revised three-year surcharge as unjustified. Shippers Br. 34-36 (citing Remand Rehearing Order PP 117-18, JA 1326-27).

The Commission initially approved the three-year litigation surcharge in 2011—three years into Pipeline’s rate case. *See* Remand Rehearing Order P 118, JA 1326-27 (citing Opinion No. 511 P 35, JA 307-08; Opinion No. 511-A P 42, JA 561-62). At the time, the agency held that although it had approved a five-year recovery period in earlier cases involving Pipeline, three years was an appropriate recovery period because the litigation costs had been incurred over a three-year period. Opinion No. 511 P 35, JA 307-08; Opinion No. 511-A P 42, JA 561-62. The Commission permitted Pipeline to “develop the surcharge to reflect the costs incurred in this proceeding . . . during the hearing, rehearing, and compliance phases,” none of which had yet occurred at the time of its initial ruling. Opinion No. 511 P 35, JA 307-08. In the orders on review, the Commission affirmed the continued use of the three-year surcharge, explaining that while litigation has continued, almost 86 percent of the litigation expenses associated with the case were incurred in those first three years. Remand Rehearing Order P 118, JA 1326-27.

That Pipeline’s litigation expenses were not incurred linearly throughout the rate proceeding highlights the logic of the three-year recovery period. *See id.* (most expenses incurred between 2008 and 2011). “Where significant litigation costs have been incurred and it is uncertain whether those litigation costs will continue into future years, a surcharge based upon actual litigation costs provides an appropriate means to avoid both over-recovery and under-recovery.” Opinion No. 511 P 35, JA 307-08 (approving three-year surcharge); Opinion No. 511-A P 39, JA 560-61 (same); *see also BP West Coast*, 374 F.3d at 1293-94 (upholding use of temporary surcharge, instead of rate increase, to recover litigation costs, in part because nothing in the record suggested that unusually high litigation costs related to rate case would persist). If the Commission had accepted the shippers’ contention that a 10-year recovery period is more reasonable than a three-year period, shippers who used Pipeline’s system after 2011 would bear considerably more litigation costs than Pipeline incurred during that period of time. *See* Remand Rehearing Order P 118, JA 1326-27. The Commission therefore reasonably found that shippers had not substantiated their arguments in favor of a longer recovery period, *id.*, and Shippers’ brief provides no further support for this idea.

Conclusion

For the foregoing reasons, the Court should deny the petitions for review.

Respectfully submitted,

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FINAL BRIEF: February 19, 2020

Certificate of Compliance

In accordance with Fed. R. App. P. 32(g) and Circuit Rule 32(e) and this Court's August 9, 2019 Order, which limited Respondents' brief to 13,600 words, I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,497 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 type-face 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.

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February 19, 2020

ADDENDUM
Statutes & Regulations

TABLE OF CONTENTS

STATUTES:	PAGE
Administrative Procedure Act:	
5 U.S.C. § 706(2).....	A1
Interstate Commerce Act:	
49 U.S.C. § 60502.....	A2
49 U.S.C. app. §§ 1(1)(b), 1(5)(a)	A3
49 U.S.C. app. §§ 6(1), 6(7)	A5
49 U.S.C. app. § 15(7).....	A7
REGULATIONS:	
18 C.F.R. § 154.305(d).....	A9
18 C.F.R. § 342.4(a)	A11
18 C.F.R. § 385.214(d)(3)(ii)	A12
18 C.F.R. § 385.716.....	A14

§ 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

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

HISTORICAL AND REVISION NOTES

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

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

AMENDMENTS

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

§ 704. Actions reviewable

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

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

HISTORICAL AND REVISION NOTES

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

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

§ 705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such

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

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

HISTORICAL AND REVISION NOTES

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

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

§ 706. Scope of review

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

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

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

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

HISTORICAL AND REVISION NOTES

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

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

ABBREVIATION OF RECORD

Pub. L. 85-791, Aug. 28, 1958, 72 Stat. 941, which authorized abbreviation of record on review or enforcement of orders of administrative agencies and review on the original papers, provided, in section 35 thereof,

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

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
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

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
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

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
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.

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].....	301	(a) "Railroad" defined.
13.	Interstate Commerce Act, Part IV; Freight Forwarders [Repealed]	401	(b) Order to install systems, etc.; modification; negligence of railroad.....
14.	Federal Aid for Public Airport Development [Repealed or Transferred]	751	(c) Filing report on rules, standards, and instructions; time; modification.
15.	International Aviation Facilities	781	(d) Inspection by Secretary of Transportation; personnel.
16.	Development of Commercial Aircraft [Omitted]	901	(e) Unlawful use of system, etc.
17.	Medals of Honor for Acts of Heroism..	1001	(f) Report of failure of system, etc., and accidents.
18.	Airways Modernization [Repealed].....	1101	(g) Repealed.
19.	Interstate Commerce Act, Part V; Loan Guaranties [Repealed]	1151	(h) Penalties; enforcement.
20.	Federal Aviation Program.....	1181	26a to 27. Repealed.
21.	Urban Mass Transportation	1201	§ 1. Repealed. Pub. L. 95-473, § 4(b), (c), Oct. 17, 1978, 92 Stat. 1466, 1470; Pub. L. 96-258, § 3(b), June 3, 1980, 94 Stat. 427.
22.	High-Speed Ground Transportation [Omitted or Repealed]	1211	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.
23.	Department of Transportation	1231	Prior to repeal, section read as follows:
24.	Natural Gas Pipeline Safety.....	1301	§ 1. Regulation in general; car service; alteration of line
25.	Aviation Facilities Expansion and Improvement.....	1601	(1) Carriers subject to regulation
26.	Hazardous Materials Transportation Control [Repealed]	1631	The provisions of this chapter shall apply to common carriers engaged in—
27.	Hazardous Materials Transportation....	1651	(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
28.	National Transportation Safety Board.	1671	(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
29.	Hazardous Liquid Pipeline Safety	1701	(c) Repealed. June 19, 1934, ch. 652, title VI, § 602(b), 48 Stat. 1102;
30.	Abatement of Aviation Noise	1761	
31.	Airport and Airway Improvement	1801	
32.	Commercial Motor Vehicles.....	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.

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:

§ 15. Determination of rates, routes, etc.; routing of traffic; disclosures, etc.

(1) Commission empowered to determine and prescribe rates, classifications, etc.

Whenever, after full hearing, upon a complaint made as provided in section 13 of this Appendix, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property, as defined in section 1 of this Appendix, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

(2) Orders of Commission

Except as otherwise provided in this chapter, all orders of the Commission, other than orders for the payment of money, shall take effect within such reasonable time as the Commission may prescribe. Such orders shall continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order, unless the same shall be suspended or modified or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction.

(3) Establishment of through routes, joint classifications, joint rates, fares, etc.

The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this chapter, or by carriers by railroad subject to this chapter and common carriers by water subject to chapter 12 of this Appendix, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancelation to show that it is consistent with the

public interest, without regard to the provisions of paragraph (4) of this section. With respect to carriers by railroad, in determining whether any such cancellation or proposed cancellation involving any common carrier by railroad is consistent with the public interest, the Commission shall, to the extent applicable, (a) compare the distance traversed and the average transportation time and expense required using the through route, and the distance traversed and the average transportation time and expense required using alternative routes, between the points served by such through route, (b) consider any reduction in energy consumption which may result from such cancellation, and (c) take into account the overall impact of such cancellation on the shippers and carriers who are affected thereby.

(4) Through routes to embrace entire length of railroad; temporary through routes

In establishing any such through route the Commission shall not (except as provided in section 3 of this Appendix, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however,* That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b) of this paragraph, give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs. In time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest.

(5) Transportation of livestock in carload lots; services included

Transportation wholly by railroad of ordinary livestock in carload lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee, or owner, except in cases where the unloading or reloading en route is at the request of the shipper, consignee, or owner, or to try an intermediate market, or to comply with quarantine regulations. The Commission may prescribe or approve just and reasonable rules governing each of such excepted services. Nothing in this paragraph shall be construed to affect the duties and liabilities of the carriers existing on February 28, 1920, by virtue of law respecting the transportation of other than ordinary livestock, or the duty of performing service as to shipments other than those to or from public stockyards.

(6) Commission to establishment just divisions of joint rates, fares, or charges; adjustments; procedures applicable

(a) Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares, and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare, or charge.

(b) Notwithstanding any other provision of law, the Commission shall, within 180 days after February 5, 1976, establish, by rule, standards and procedures for the conduct of proceedings for the adjustment of divisions of joint rates or fares (whether prescribed by the Commission or otherwise) in accordance with the provisions of this paragraph. The Commission shall issue a final order in all such proceedings within 270 days after the submission to the Commission of a case. If the Commission is unable to issue such a final order within such time, it shall issue a report to the Congress setting forth the reasons for such inability.

(c) All evidentiary proceedings conducted pursuant to this paragraph shall be completed, in a case brought upon a complaint, within 1 year following the filing of the complaint, or, in a case brought upon the Commission's initiative, within 2 years following the commencement of such proceeding, unless the Commission finds that such a proceeding must be extended to permit a fair and expeditious completion of the proceeding. If the Commission is unable to meet any such time requirement, it shall issue a report to the Congress setting forth the reasons for such inability.

(d) Whenever a proceeding for the adjustment of divisions of joint rates or fares (whether prescribed by the Commission or otherwise established) is commenced by the filing of a complaint with the Commission, the complaining carrier or carriers shall (i) attach thereto all of the evidence in support of their position, and (ii) during the course of such proceeding, file only rebuttal or reply evidence unless otherwise directed by order of the Commission. Upon receipt of a notice of intent to file a complaint pursuant to this paragraph, the Commission shall accord, to the party filing such notice, the same right to discovery that would be accorded to a party filing a complaint pursuant to this paragraph.

(7) Commission to determine lawfulness of new rates; suspension; refunds; nonapplicability to common carriers by railroad subject to chapter

Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate,

fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order 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 within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible. This paragraph shall not apply to common carriers by railroad subject to this chapter.

(8) Commission to determine lawfulness of new rates; applicability to common carrier by railroad; suspensions; accounts; hearing and basis of decision

(a) Whenever a schedule is filed with the Commission by a common carrier by railroad stating a new individual or joint rate, fare, or charge, or a new individual or joint classification, regulation, or practice affecting a rate, fare, or charge, the Commission may, upon the complaint of an interested party or upon its own initiative, order a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice. The hearing may be conducted without answer or other formal pleading, but reasonable notice shall be provided to interested parties. Such hearing shall be completed and a final decision rendered by the Commission not later than 7 months after such rate, fare, charge, classification, regulation, or practice was scheduled to become effective, unless, prior to the expiration of such 7-month period, the Commission reports in writing to the Congress that it is unable to render a decision within such period, together with a full explanation of the reason for the delay. If such a report is made to the Congress, the final decision shall be made not later than 10 months after the date of the filing of such schedule. If the final decision of the Commission is not made within the applicable time period, the rate, fare, charge, classification, regulation, or practice shall go into effect

Federal Energy Regulatory Commission

§ 154.305

(c)(1) Adjustments to base period experience, or to estimates where 12 months' experience is not available, may include the costs for facilities for which either a permanent or temporary certificate has been granted, provided such facilities will be in service within the test period; or a certificate application is pending. The filing must identify facilities, related costs and the docket number of each such outstanding certificate. Subject to paragraph (c)(2) of this section, adjustments to base period experience, or to estimates where 12 months' experience is not available, may include any amounts for facilities that require a certificate of public convenience and necessity, where a certificate has not been issued by the filing date but is expected to be issued before the end of the test period. Adjustments to base period may include costs for facilities that do not require a certificate and are in service by the end of the test period.

(2) When a pipeline files a motion to place the rates into effect, the filing must be revised to exclude the costs associated with any facilities that will not be in service as of the end of the test period, or for which certificate authorization is required but will not be granted as of the end of the test period. At the end of the test period, the pipeline must remove from its rates costs associated with any facility that is not in service or for which certificate authority is required but has not been granted.

(d) The Commission may allow reasonable deviation from the prescribed test period.

[Order 582, 60 FR 52996, Oct. 11, 1995, as amended by Order 582-A, 61 FR 9629, Mar. 11, 1996]

§ 154.304 Format of statements, schedules, workpapers and supporting data.

(a) All statements, schedules, and workpapers must be prepared in accordance with the Commission's Uniform System of Accounts.

(b) The data in support of the proposed rate change must include the required particulars of book data, adjustments, and other computations and information on which the company re-

lies, including a detailed narrative explanation placed at the beginning of the specific statement or schedule to which they apply, explaining each proposed adjustment to base period actual volumes and costs.

(c) Book data included in statements and schedules required to be prepared or submitted as part of the filing must be reported in a separate column or columns. All adjustments to book data must also be reported in a separate column or columns so that book amounts, adjustments thereto, and adjusted amounts will be clearly disclosed. All adjustments must be supported by a narrative explanation placed at the beginning of the specific statement or schedule to which they apply.

(d) Certain of the statements and schedules of §154.313 are workpapers. Any data or summaries reflecting the books of account must be supported by accounting workpapers setting forth all necessary particulars from which an auditor may readily identify the book data included in the filing and verify that such data are in agreement with the company's books of account.

[Order 582, 60 FR 52996, Oct. 11, 1995, as amended by Order 582-A, 61 FR 9629, Mar. 11, 1996]

§ 154.305 Tax normalization.

(a) *Applicability.* An interstate pipeline must compute the income tax component of its cost-of-service by using tax normalization for all transactions.

(b) *Definitions.* (1) *Tax normalization* means computing the income tax component as if transactions recognized in each period for ratemaking purposes are also recognized in the same amount and in the same period for income tax purposes.

(2) *Commission-approved ratemaking method* means a ratemaking method approved by the Commission in a final decision. This includes a ratemaking method that is part of an approved settlement or arbitration providing that the ratemaking method is to be effective beyond the term of the settlement or arbitration.

(3) *Income tax purposes* means for the purpose of computing actual income tax under the provisions of the Internal

Revenue Code or the income tax provisions of the laws of a State or political subdivision of a State (including franchise taxes).

(4) *Income tax component* means that part of the cost-of-service that covers income tax expenses allowable by the Commission.

(5) *Ratemaking purposes* means for the purpose of fixing, modifying, accepting, approving, disapproving, or rejecting rates under the Natural Gas Act.

(6) *Tax effect* means the tax reduction or addition associated with a specific expense or revenue transaction.

(7) *Transaction* means an activity or event that gives rise to an accounting entry.

(c) *Reduction of, and addition to, Rate Base.* (1) The rate base of an interstate pipeline using tax normalization under this section must be reduced by the balances that are properly recordable in Account 281, “Accumulated deferred income taxes—accelerated amortization property”; Account 282, “Accumulated deferred income taxes—other property”; and Account 283, “Accumulated deferred income taxes—other.” Balances that are properly recordable in Account 190, “Accumulated deferred income taxes,” must be treated as an addition to rate base. Include, as an addition or reduction, as appropriate, amounts in Account 182.3, Other regulatory assets, and Account 254, Other regulatory liabilities, that result from a deficiency or excess in the deferred tax accounts (see paragraph (d) of this section) and which have been, or are soon expected to be, authorized for recovery or refund through rates.

(2) Such rate base reductions or additions must be limited to deferred taxes related to rate base, construction, or other costs and revenues affecting jurisdictional cost-of-service.

(d) *Special rules.* (1) This paragraph applies:

(i) If the rate applicant has not provided deferred taxes in the same amount that would have accrued had tax normalization always been applied; or

(ii) If, as a result of changes in tax rates, the accumulated provision for deferred taxes becomes deficient in, or in excess of, amounts necessary to meet future tax liabilities.

(2) The interstate pipeline must compute the income tax component in its cost-of-service by making provision for any excess or deficiency in deferred taxes.

(3) The interstate pipeline must apply a Commission-approved ratemaking method made specifically applicable to the interstate pipeline for determining the cost-of-service provision described in paragraph (d)(2) of this section. If no Commission-approved ratemaking method has been made specifically applicable to the interstate pipeline, then the interstate pipeline must use some ratemaking method for making such provision, and the appropriateness of such method will be subject to case-by-case determination.

(4) An interstate pipeline must continue to include, as an addition or reduction to rate base, any deficiency or excess attributable to prior flow-through or changes in tax rates (paragraphs (d)(1)(i) and (d)(1)(ii) of this section), until such deficiency or excess is fully amortized in accordance with a Commission approved ratemaking method.

§ 154.306 Cash working capital.

A natural gas company that files a tariff change under this part may not receive a cash working capital adjustment to its rate base unless the company or other participant in a rate proceeding under this part demonstrates, with a fully developed and reliable lead-lag study, a net revenue receipt lag or a net expense payment lag (revenue lead). Any demonstrated net revenue receipt lag will be credited to rate base; and, any demonstrated net expense payment lag will be deducted from rate base.

§ 154.307 Joint facilities.

The Statements required by §154.312 must show all costs (investment, operation, maintenance, depreciation, taxes) that have been allocated to the natural gas operations involved in the subject rate change and are associated with joint facilities. The methods used in making such allocations must be provided.

Federal Energy Regulatory Commission

§ 343.2

a revised tariff publication with the Commission to be effective July 1 of the index year to which the reduced ceiling level applies.

[Order 561, 58 FR 58779, Nov. 4, 1993, as amended by Order 561-A, 59 FR 40256, Aug. 8, 1994; 59 FR 59146, Nov. 16, 1994; Order 606, 64 FR 44405, Aug. 16, 1999; Order 650, 69 FR 53801, Sept. 3, 2004]

§ 342.4 Other rate changing methodologies.

(a) *Cost-of-service rates.* A carrier may change a rate pursuant to this section if it shows that there is a substantial divergence between the actual costs experienced by the carrier and the rate resulting from application of the index such that the rate at the ceiling level would preclude the carrier from being able to charge a just and reasonable rate within the meaning of the Interstate Commerce Act. A carrier must substantiate the costs incurred by filing the data required by part 346 of this chapter. A carrier that makes such a showing may change the rate in question, based upon the cost of providing the service covered by the rate, without regard to the applicable ceiling level under § 342.3.

(b) *Market-based rates.* A carrier may attempt to show that it lacks significant market power in the market in which it proposes to charge market-based rates. Until the carrier establishes that it lacks market power, these rates will be subject to the applicable ceiling level under § 342.3.

(c) *Settlement rates.* A carrier may change a rate without regard to the ceiling level under § 342.3 if the proposed change has been agreed to, in writing, by each person who, on the day of the filing of the proposed rate change, is using the service covered by the rate. A filing pursuant to this section must contain a verified statement by the carrier that the proposed rate change has been agreed to by all current shippers.

[Order 561, 58 FR 58779, Nov. 4, 1993, as amended at 59 FR 59146, Nov. 16, 1994]

PART 343—PROCEDURAL RULES APPLICABLE TO OIL PIPELINE PROCEEDINGS

Sec.

343.0 Applicability.

343.1 Definitions.

343.2 Requirements for filing interventions, protests and complaints.

343.3 Filing of protests and responses.

343.4 Procedure on complaints.

343.5 Required negotiations.

AUTHORITY: 5 U.S.C. 571-583; 42 U.S.C. 7101-7352; 49 U.S.C. 60502; 49 App. U.S.C. 1-85.

SOURCE: Order 561, 58 FR 58780, Nov. 4, 1993, unless otherwise noted.

§ 343.0 Applicability.

(a) *General rule.* The Commission's Rules of Practice and Procedure in part 385 of this chapter will govern procedural matters in oil pipeline proceedings under part 342 of this chapter and under the Interstate Commerce Act, except to the extent specified in this part.

§ 343.1 Definitions.

For purposes of this part, the following definitions apply:

(a) *Complaint* means a filing challenging an existing rate or practice under section 13(1) of the Interstate Commerce Act.

(b) *Protest* means a filing, under section 15(7) of the Interstate Commerce Act, challenging a tariff publication.

[Order 561, 58 FR 58780, Nov. 4, 1993, as amended by Order 578, 60 FR 19505, Apr. 19, 1995]

§ 343.2 Requirements for filing interventions, protests and complaints.

(a) *Interventions.* Section 385.214 of this chapter applies to oil pipeline proceedings.

(b) *Standing to file protest.* Only persons with a substantial economic interest in the tariff filing may file a protest to a tariff filing pursuant to the Interstate Commerce Act. Along with the protest, a verified statement that the protestor has a substantial economic interest in the tariff filing in question must be filed.

(c) *Other requirements for filing protests or complaints*—(1) *Rates established under § 342.3 of this chapter.* A protest or complaint filed against a rate proposed or

Federal Energy Regulatory Commission

§ 385.214

(i) Admit or deny, specifically and in detail, each material allegation of the pleading answered; and

(ii) Set forth every defense relied on.

(3) General denials of facts referred to in any order to show cause, unsupported by the specific facts upon which the respondent relies, do not comply with paragraph (a)(1) of this section and may be a basis for summary disposition under Rule 217, unless otherwise required by statute.

(4) An answer to a complaint must include documents that support the facts in the answer in possession of, or otherwise attainable by, the respondent, including, but not limited to, contracts and affidavits. An answer is also required to describe the formal or consensual process it proposes for resolving the complaint.

(5) When submitting with its answer any request for privileged treatment of documents and information in accordance with this chapter, a respondent must provide a public version of its answer without the information for which privileged treatment is claimed and its proposed form of protective agreement to each entity that has either been served pursuant to § 385.206(c) or whose name is on the official service list for the proceeding compiled by the Secretary.

(d) *Time limitations.* (1) Any answer to a motion or to an amendment to a motion must be made within 15 days after the motion or amendment is filed, except as described below or unless otherwise ordered.

(i) If a motion requests an extension of time or a shortened time period for action, then answers to the motion to extend or shorten the time period shall be made within 5 days after the motion is filed, unless otherwise ordered.

(ii) [Reserved]

(2) Any answer to a pleading or amendment to a pleading, other than a complaint or an answer to a motion under paragraph (d)(1) of this section, must be made:

(i) If notice of the pleading or amendment is published in the FEDERAL REGISTER, not later than 30 days after such publication, unless otherwise ordered; or

(ii) If notice of the pleading or amendment is not published in the

FEDERAL REGISTER, not later than 30 days after the filing of the pleading or amendment, unless otherwise ordered.

(e) *Failure to answer.* (1) Any person failing to answer a complaint may be considered in default, and all relevant facts stated in such complaint may be deemed admitted.

(2) Failure to answer an order to show cause will be treated as a general denial to which paragraph (c)(3) of this section applies.

[Order 225, 47 FR 19022, May 3, 1982; 48 FR 786, Jan. 7, 1983, as amended by Order 376, 49 FR 21705, May 23, 1984; Order 602, 64 FR 17099, Apr. 8, 1999; Order 602-A, 64 FR 43608, Aug. 11, 1999; Order 769, 77 FR 65476, Oct. 29, 2012]

§ 385.214 Intervention (Rule 214).

(a) *Filing.* (1) The Secretary of Energy is a party to any proceeding upon filing a notice of intervention in that proceeding. If the Secretary's notice is not filed within the period prescribed under Rule 210(b), the notice must state the position of the Secretary on the issues in the proceeding.

(2) Any State Commission, the Advisory Council on Historic Preservation, the U.S. Departments of Agriculture, Commerce, and the Interior, any state fish and wildlife, water quality certification, or water rights agency; or Indian tribe with authority to issue a water quality certification is a party to any proceeding upon filing a notice of intervention in that proceeding, if the notice is filed within the period established under Rule 210(b). If the period for filing notice has expired, each entity identified in this paragraph must comply with the rules for motions to intervene applicable to any person under paragraph (a)(3) of this section including the content requirements of paragraph (b) of this section.

(3) Any person seeking to intervene to become a party, other than the entities specified in paragraphs (a)(1) and (a)(2) of this section, must file a motion to intervene.

(4) No person, including entities listed in paragraphs (a)(1) and (a)(2) of this section, may intervene as a matter of right in a proceeding arising from an investigation pursuant to Part 1b of this chapter.

(b) *Contents of motion.* (1) Any motion to intervene must state, to the extent

§ 385.215

18 CFR Ch. I (4–1–19 Edition)

known, the position taken by the movant and the basis in fact and law for that position.

(2) A motion to intervene must also state the movant’s interest in sufficient factual detail to demonstrate that:

(i) The movant has a right to participate which is expressly conferred by statute or by Commission rule, order, or other action;

(ii) The movant has or represents an interest which may be directly affected by the outcome of the proceeding, including any interest as a:

- (A) Consumer,
- (B) Customer,
- (C) Competitor, or
- (D) Security holder of a party; or

(iii) The movant’s participation is in the public interest.

(3) If a motion to intervene is filed after the end of any time period established under Rule 210, such a motion must, in addition to complying with paragraph (b)(1) of this section, show good cause why the time limitation should be waived.

(c) *Grant of party status.* (1) If no answer in opposition to a timely motion to intervene is filed within 15 days after the motion to intervene is filed, the movant becomes a party at the end of the 15 day period.

(2) If an answer in opposition to a timely motion to intervene is filed not later than 15 days after the motion to intervene is filed or, if the motion is not timely, the movant becomes a party only when the motion is expressly granted.

(d) *Grant of late intervention.* (1) In acting on any motion to intervene filed after the period prescribed under Rule 210, the decisional authority may consider whether:

(i) The movant had good cause for failing to file the motion within the time prescribed;

(ii) Any disruption of the proceeding might result from permitting intervention;

(iii) The movant’s interest is not adequately represented by other parties in the proceeding;

(iv) Any prejudice to, or additional burdens upon, the existing parties might result from permitting the intervention; and

(v) The motion conforms to the requirements of paragraph (b) of this section.

(2) Except as otherwise ordered, a grant of an untimely motion to intervene must not be a basis for delaying or deferring any procedural schedule established prior to the grant of that motion.

(3)(i) The decisional authority may impose limitations on the participation of a late intervener to avoid delay and prejudice to the other participants.

(ii) Except as otherwise ordered, a late intervener must accept the record of the proceeding as the record was developed prior to the late intervention.

(4) If the presiding officer orally grants a motion for late intervention, the officer will promptly issue a written order confirming the oral order.

[Order 225, 47 FR 19022, May 3, 1982; 48 FR 786, Jan. 7, 1983, as amended by Order 376, 49 FR 21705, May 23, 1984; Order 2002, 68 FR 51142, Aug. 25, 2003; Order 718, 73 FR 62886, Oct. 22, 2008]

§ 385.215 Amendment of pleadings and tariff or rate filings (Rule 215).

(a) *General rules.* (1) Any participant, or any person who has filed a timely motion to intervene which has not been denied, may seek to modify its pleading by filing an amendment which conforms to the requirements applicable to the pleading to be amended.

(2) A tariff or rate filing may be amended or modified only as provided in the regulations under this chapter. A tariff or rate filing may not be amended, except as allowed by statute. The procedures provided in this section do not apply to amendment of tariff or rate filings.

(3)(i) If a written amendment is filed in a proceeding, or part of a proceeding, that is not set for hearing under subpart E, the amendment becomes effective as an amendment on the date filed.

(ii) If a written amendment is filed in a proceeding, or part of a proceeding, which is set for hearing under subpart E, that amendment is effective on the date filed only if the amendment is filed more than five days before the earlier of either the first prehearing conference or the first day of evidentiary hearings.

Federal Energy Regulatory Commission

§ 385.716

(6) If the presiding officer does not issue an order under paragraph (b)(1) of this section within 15 days after the motion is filed under paragraph (b)(1) of this section, the motion is denied.

(c) *Appeal of a presiding officer's denial of motion to permit appeal.* (1) If a motion to permit appeal is denied by the presiding officer, the participant who made the motion may appeal the denial to the Commissioner who is designated Motions Commissioner, in accordance with this paragraph. For purposes of this section, "Motions Commissioner" means the Chairman or a member of the Commission designated by the Chairman to rule on motions to permit interlocutory appeal. Any person filing an appeal under this paragraph must serve separate copies of the appeal on the Motions Commissioner and on the General Counsel by Express Mail or by hand delivery.

(2) A participant must submit an appeal under this paragraph not later than 7 days after the motion to permit appeal under paragraph (b) of this section is denied. The appeal must state why prompt Commission review is necessary under the standards set forth in paragraph (c)(5) of this section. The appeal must be labeled in accordance with § 385.2002(b) of this chapter.

(3) A participant who appeals under this paragraph must file with the appeal a copy of the written order denying the motion or, if the denial was issued orally, the relevant portions of the transcript.

(4) The Motions Commissioner may, in considering an appeal under this paragraph, order the presiding officer or any participant in the proceeding to provide additional information.

(5) The Motions Commissioner will permit an appeal to the Commission under this paragraph only if the Motions Commissioner finds extraordinary circumstances which make prompt Commission review of the contested ruling necessary to prevent detriment to the public interest or to prevent irreparable harm to a person. If the Motions Commissioner makes no determination within 7 days after filing the appeal under this paragraph or within the time the Motions Commissioner otherwise provides to receive and consider information under this

paragraph, the appeal to the Commission under paragraph (b) of this section will not be permitted.

(6) If appeal under paragraph (b) of this section is not permitted, the contested ruling of the presiding officer will be reviewed in the ordinary course of the proceeding as if the appeal had not been made.

(7) If the Motions Commissioner permits an appeal to the Commission, the Secretary will issue an order containing that decision.

(d) *Commission action.* Unless the Commission acts upon an appeal permitted by a presiding officer under paragraph (b) of this section, or by the Motions Commissioner under paragraph (c) of this section, within 15 days after the date on which the presiding officer or Motions Commissioner permits appeal, the ruling of the presiding officer will be reviewed in the ordinary course of the proceeding as if the appeal had not been made.

(e) *Appeal not to suspend proceeding.* Any decision by a presiding officer to permit appeal under paragraph (b) of this section or by the Motions Commissioner to permit an appeal under paragraph (c) of this section will not suspend the proceeding, unless otherwise ordered by the presiding officer or the Motions Commissioner.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 376, 49 FR 21705, May 23, 1984; Order 402, 49 FR 39539, Oct. 9, 1984; Order 725, 74 FR 41039, Aug. 14, 2009]

§ 385.716 Reopening (Rule 716).

(a) *General rule.* To the extent permitted by law, the presiding officer or the Commission may, for good cause under paragraph (c) of this section, reopen the evidentiary record in a proceeding for the purpose of taking additional evidence.

(b) *By motion.* (1) Any participant may file a motion to reopen the record.

(2) Any motion to reopen must set forth clearly the facts sought to be proven and the reasons claimed to constitute grounds for reopening.

(3) A participant who does not file an answer to any motion to reopen will be deemed to have waived any objection to the motion provided that no other participant has raised the same objection.

(c) *By action of the presiding officer or the Commission.* If the presiding officer or the Commission, as appropriate, has reason to believe that reopening of a proceeding is warranted by any changes in conditions of fact or of law or by the public interest, the record in the proceeding may be reopened by the presiding officer before the initial or revised initial decision is served or by the Commission after the initial decision or, if appropriate, the revised initial decision is served.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 375, 49 FR 21316, May 21, 1984]

Subpart H—Shortened Procedures

§ 385.801 Waiver of hearing (Rule 801).

In any proceeding in which the Commission is authorized to act after opportunity for hearing, if the parties waive hearing, such opportunity will be deemed to have been afforded by service or publication in the FEDERAL REGISTER of notice of the application or other initial pleading, request, or other filing, such notice fixing a reasonable period of time within which any person desiring to be heard may file a protest or petition. Upon the expiration of such period of time, in the absence of a request for hearing, the Commission may forthwith dispose of the matter upon the basis of the pleadings and other submittals and the studies and recommendations of the staff. A party not requesting oral hearing in its pleadings will be deemed to have waived a hearing for the purpose of such disposition, but will not be bound by such a waiver for the purposes of any request for rehearing with respect to an order so entered.

§ 385.802 Noncontested proceedings (Rule 802).

Noncontested proceedings. In any proceeding required by statute to be set for hearing, the Commission, when it appears to be in the public interest and to be in the interest of the parties to grant the relief or authority requested in the initial pleading, and to omit the intermediate decision procedure, may, after a hearing during which no opposition or contest develops, forthwith dispose of the proceedings upon consider-

ation of the pleadings and other evidence filed and incorporated in the record: *Provided,* (a) The applicant or other initial pleader requests that the intermediate decision procedure be omitted and waives oral hearing and opportunity for filing exceptions to the decision of the Commission; and (b) no issue of substance is raised by any request to be heard, protest or petition filed subsequent to publication in the FEDERAL REGISTER of the notice of the filing of an initial pleading and notice or order fixing of hearing, which notice or order will state that the Commission considers the proceeding a proper one for disposition under the provisions of this subpart. Requests for the procedure provided by this subpart may be contained in the initial pleading or subsequent request in writing to the Commission. The decision of the Commission in such proceeding after non-contested hearing, will be final, subject to reconsideration by the Commission upon request for rehearing as provided by statute.

Subpart I—Commission Review of Remedial Orders

§ 385.901 Scope (Rule 901).

(a) *Proceedings to which applicable.* The provisions of this subpart apply to proceedings of the Commission held in accordance with section 503(c) of the Department of Energy Organization Act (42 U.S.C. 7193(c)) to review orders issued by the Secretary of Energy pursuant to section 503(a) of the Department of Energy Organization Act (42 U.S.C. 7193(c)), and initiated by notices of probable violation, proposed remedial orders, or other formal administrative initiating documents issued on or after October 1, 1977, which are contested by the recipient.

(b) *Relationship to other rules.* (1) Where a provision of this subpart is inconsistent with a provision in any other subpart of this part, the provision in this subpart controls.

(2) Subpart F of this part, except Rule 601, does not apply to proceedings under this subpart.

§ 385.902 Definitions (Rule 902).

For purposes of this subpart:

SFPP, L.P. v. FERC
D.C. Cir. Nos. 19-1067, et al.

Certificate of Service

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system on February 19, 2020. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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