

ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

No. 19-1074

GULF SOUTH PIPELINE COMPANY, LP,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

**BRIEF OF RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

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CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and Amici

The parties before this Court are identified in Petitioner's Rule 28(a)(1) certificate.

B. Rulings Under Review

1. *Gulf South Pipeline Co., LP*, 163 FERC ¶ 61,124 (2018) ("Certificate Order"), JA 137; and
2. *Gulf South Pipeline Co., LP*, 166 FERC ¶ 61,089 (2019) ("Rehearing Order"), JA 193.

C. Related Cases

This case has not previously been before this Court or any other court. *Atl. Coast Pipeline, LLC v. FERC*, Nos. 18-1224, et al. (D.C. Cir. filed Aug. 16, 2018) (oral argument scheduled for Oct. 16, 2019), raises an initial rates challenge that is similar to that raised here.

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October 29, 2019

TABLE OF CONTENTS

	<u>PAGE</u>
STATEMENT OF THE ISSUE	1
STATUTES AND REGULATIONS	2
STATEMENT OF FACTS	2
I. Statutory and Regulatory Background	2
A. Natural Gas Act	2
B. Commission’s Certificate Policy Statement.....	4
C. Requirement That Shippers Have Flexible Access to Secondary Receipt and Delivery Points	5
D. Commission Policy For Setting Section 7 Initial Recourse Rates And Gulf South’s 1988 And 2015 Rate Settlements	6
II. The Westlake Expansion Project And Gulf South’s Proposed Rates	9
III. The Commission’s Orders	13
SUMMARY OF ARGUMENT	14
ARGUMENT	18
I. Standard Of Review.....	18
II. The Commission’s Rate Determinations Were Reasonable And Consistent With Precedent And Policy	19
A. The Commission Appropriately Rejected The “Incremental Plus” Rate Proposal	20

TABLE OF CONTENTS

	<u>PAGE</u>
1. The Commission Reasonably Determined That The Project Facilities Are Integrated With Existing Gulf South Facilities And Therefore That “Incremental Plus” Rates Are Inappropriate Here	20
2. The Commission Appropriately Addressed Gulf South’s Gaming Claim.....	21
3. Cost-Causation Principles Are Satisfied Here	24
B. The Commission Appropriately Rejected Gulf South’s Alternative Proposal To Create A New Rate Zone.....	29
C. The Commission Appropriately Applied Its Policy Requiring Gulf South To Use Its Most-Recently Approved Rate Of Return And Depreciation Rate In Designing Its Initial Recourse Rates For The Project.....	33
1. The Commission Appropriately Justified Its Initial Recourse Rates Policy.....	33
2. The Commission Reasonably Applied Its Initial Recourse Rates Policy To the Project’s Depreciation Rate Component.....	37
3. The Commission Reasonably Applied Its Initial Recourse Rates Policy To The Project’s Rate of Return Component.....	39
CONCLUSION.....	45

TABLE OF AUTHORITIES

<u>COURT CASES:</u>	<u>PAGE</u>
* <i>Atlantic Ref. Co. v. Pub. Serv. Comm'n of N.Y.</i> , 360 U.S. 378 (1959).....	3, 4, 34, 35, 36
<i>Big Bend Conserv. Alliance v. FERC</i> , 896 F.3d 418 (D.C. Cir. 2018).....	2
<i>Boston Edison Co. v. FERC</i> , 885 F.2d 962 (1st Cir. 1989).....	36
<i>Canadian Ass'n of Petroleum Producers v. FERC</i> , 254 F.3d 289 (D.C. Cir. 2001).....	30
* <i>Carnegie Nat. Gas Co. v. FERC</i> , 968 F.2d 1291 (D.C. Cir. 1992).....	25, 28
<i>City of Oberlin v. FERC</i> , 2019 WL 4229074 (D.C. Cir. Sept. 6, 2019)	3
<i>Columbia Gas Transmission Corp. v. FERC</i> , 477 F.3d 739 (D.C. Cir. 2007).....	30
<i>Consol. Edison Co. of N.Y. v. FERC</i> , 315 F.3d 316 (D.C. Cir. 2003).....	35
<i>Consol. Gas Transmission Corp. v. FERC</i> , 771 F.2d 1536 (D.C. Cir. 1985).....	9
<i>Consumer Fed'n of Am. v. FPC</i> , 515 F.2d 347 (D.C. Cir. 1975).....	35
<i>FERC v. Elec. Power Supply Ass'n</i> , 136 S. Ct. 760 (2016).....	18, 29, 32, 33, 44

* Cases chiefly relied upon are marked with an asterisk.

TABLE OF AUTHORITIES

<u>COURT CASES (cont'd):</u>	<u>PAGE</u>
<i>FPC v. Hunt</i> , 376 U.S. 515 (1964).....	2, 4
<i>Freeport-McMoRan Corp. v. FERC</i> , 669 F.3d 302 (D.C. Cir. 2012).....	7
* <i>KN Energy, Inc. v. FERC</i> , 968 F.3d 1295 (D.C. Cir. 1992).....	25
<i>Midcoast Interstate Transmission, Inc. v. FERC</i> , 198 F.3d 960 (D.C. Cir. 2000).....	28
<i>Minisink Residents for Envtl. Pres. & Safety v. FERC</i> , 762 F.3d 97 (D.C. Cir. 2014).....	19
* <i>Mo. Pub. Serv. Comm'n v. FERC</i> , 337 F.3d 1066 (D.C. Cir. 2003).....	3, 4, 34
* <i>Mo. Pub. Serv. Comm'n v. FERC</i> , 601 F.3d 581 (D.C. Cir. 2010).....	3, 40, 41
<i>Mo. Pub. Serv. Comm'n v. FERC</i> , 783 F.3d 310 (D.C. Cir. 2015).....	3, 35
<i>Mo. River Energy Servs. v. FERC</i> , 918 F.3d 954 (D.C. Cir. 2019).....	18
<i>Myersville Citizens for a Rural Cmty., Inc. v. FERC</i> , 783 F.3d 1301 (D.C. Cir. 2015).....	2, 5, 19
<i>NAACP v. FPC</i> , 425 U.S. 662 (1976).....	2
<i>NRG Power Mktg., LLC v. FERC</i> , 718 F.3d 947 (D.C. Cir. 2013).....	19, 32

TABLE OF AUTHORITIES

<u>COURT CASES (cont'd):</u>	<u>PAGE</u>
<i>Old Dominion Elec. Coop. v. FERC</i> , 898 F.3d 1254 (D.C. Cir. 2018).....	27, 28
<i>Permian Basin Area Rate Cases</i> , 390 U.S. 747 (1968).....	35
<i>Pub. Utils. Comm'n of Cal. v. FERC</i> , 367 F.3d 925 (D.C. Cir. 2004).....	35
<i>Save Our Sebasticook v. FERC</i> , 431 F.3d 379 (D.C. Cir. 2005).....	30
<i>*S.C. Pub. Serv. Auth. v. FERC</i> , 762 F.3d 41 (D.C. Cir. 2014).....	18, 25, 28, 32
<i>Tejas Power Corp. v. FERC</i> , 908 F.2d 998 (D.C. Cir. 1990).....	36
<i>Tenn. Gas Pipeline Co. v. FERC</i> , 871 F.2d 1099 (D.C. Cir. 1989).....	30
<i>Town of Norwood v. FERC</i> , 906 F.2d 772 (D.C. Cir. 1990).....	30
<i>Transcon. Gas Pipe Line Corp. v. FERC</i> , 518 F.3d 916 (D.C. Cir. 2008).....	4
<i>United Gas Improvement Co. v. Callery Props., Inc.</i> , 382 U.S. 223 (1965).....	34

TABLE OF AUTHORITIES

<u>ADMINISTRATIVE CASES:</u>	<u>PAGE</u>
<i>Algonquin Gas Transmission Co.</i> , 87 FERC ¶ 61,262 (1999).....	7
<i>Atl. Coast Pipeline, LLC</i> , 161 FERC ¶ 61,042 (2017), <i>on reh'g</i> , 164 FERC ¶ 61,100 (2018), <i>appeal pending</i> , <i>Atl. Coast Pipeline, LLC v. FERC</i> , Nos. 18-1224, <i>et al.</i> (D.C. Cir. filed Aug. 16, 2018).....	37
* <i>Certification of New Interstate Natural Gas Pipeline Facilities</i> , 88 FERC ¶ 61,227 (1999), <i>clarified</i> , 90 FERC ¶ 61,128, <i>further clarified</i> , 92 FERC ¶ 61,094 (2000).....	4, 5, 26
<i>Certification of New Interstate Natural Gas Pipeline Facilities</i> , 163 FERC ¶ 61,042 (2018).....	5
<i>Cheniere Creole Trail Pipeline, L.P.</i> , 151 FERC ¶ 61,012 (2015).....	31
<i>Colo. Interstate Gas Co.</i> , 122 FERC ¶ 61,256 (2008).....	21
<i>Colo. Interstate Gas Co.</i> , 131 FERC ¶ 61,086 (2010).....	31
<i>Dominion Cove Point LNG, L.P.</i> , 115 FERC ¶ 61,337 (2006).....	6
<i>Dominion Transmission, Inc.</i> , 155 FERC ¶ 61,106 (2016).....	5
<i>E. Shore Nat. Gas Co.</i> , 132 FERC ¶ 61,204 (2010).....	31
* <i>E. Shore Nat. Gas Co.</i> , 138 FERC ¶ 61,050 (2012).....	7, 37

TABLE OF AUTHORITIES

<u>ADMINISTRATIVE CASES (cont'd):</u>	<u>PAGE</u>
<i>Enbridge Pipelines (KPC),</i> 109 FERC ¶ 61,042 (2004).....	40, 42
<i>Equitrans, L.P.,</i> 115 FERC ¶ 61,007 (2006).....	7
<i>Equitrans, L.P.,</i> 117 FERC ¶ 61,184 (2006).....	7, 34
<i>Equitrans, L.P.,</i> 155 FERC ¶ 61,194 (2016).....	21
<i>Express Pipeline P'ship,</i> 76 FERC ¶ 61,245 (1996).....	23
<i>Fla. Gas Transmission Co.,</i> 132 FERC ¶ 61,040 (2010).....	6
<i>Grand Mesa Pipeline, LLC,</i> 156 FERC ¶ 61,163 (2016).....	23
<i>Gulf South Pipeline Co.,</i> 97 FERC ¶ 61,069 (2001), <i>on reh 'g</i> , 98 FERC ¶ 61,068 (2002)	24
<i>Gulf South Pipeline Co.,</i> 153 FERC ¶ 61,326 (2015).....	8, 37, 43
<i>Gulf South Pipeline Co.,</i> 153 FERC ¶ 63,016 (2015).....	8
<i>Gulf South Pipeline Co.,</i> 156 FERC ¶ 61,172 (2016).....	8
<i>Gulf South Pipeline Co., LP,</i> 163 FERC ¶ 61,124 (2018).....	6, 10-16, 20-22, 25-27, 29, 31, 33, 38, 39

TABLE OF AUTHORITIES

<u>ADMINISTRATIVE CASES (cont'd):</u>	<u>PAGE</u>
<i>Gulf South Pipeline Co., LP</i> , 166 FERC ¶ 61,089 (2019)	6, 9, 10, 13, 14, 20-29, 31-40, 42-44
<i>Koch Gateway Pipeline Co.</i> , 84 FERC ¶ 61,143, <i>reh'g denied</i> , 85 FERC ¶ 61,426 (1998)	8
<i>Mojave Pipeline Co.</i> , 69 FERC ¶ 61,244 (1994)	34, 40
<i>Nw. Pipeline Corp.</i> , 98 FERC ¶ 61,352 (2002)	6, 34, 42
<i>*Pipeline Service Obligations and Revisions to Regulations Governing Self- Implementing Transportation and Regulations of Natural Gas Pipelines After Partial Wellhead Decontrol</i> , Order No. 636, FERC Stats. & Regs. ¶ 30,939, <i>on reh'g</i> , Order No. 636-A, FERC Stats. & Regs. ¶ 30,950, <i>on reh'g</i> , Order No. 636-B, 61 FERC ¶ 61,272 (1992), <i>aff'd in part and remanded in part sub nom. United Distribution Cos. v. FERC</i> , 88 F.3d 1105 (D.C. Cir. 1996)	5-6, 20, 21
<i>Rockies Express Pipeline LLC</i> , 123 FERC ¶ 61,234 (2008)	31
<i>Texas Eastern Transmission, LP</i> , 139 FERC ¶ 61,138 (2012)	31, 32
<i>Tex. Gas Transmission Corp.</i> , 53 FERC ¶ 61,022 (1990)	7
<i>TransCanada Keystone Pipeline, LP</i> , 125 FERC ¶ 61,025 (2008)	23
<i>TransColorado Gas Transmission Co.</i> , 139 FERC ¶ 61,229 (2012)	24

TABLE OF AUTHORITIES

<u>ADMINISTRATIVE CASES (cont'd):</u>	<u>PAGE</u>
<i>*Transcon. Gas Pipe Line Co., LLC,</i> 156 FERC ¶ 61,022 (2016), <i>reh'g denied</i> , 161 FERC ¶ 61,212 (2017).....	7, 35, 42, 43
<i>Transcon. Gas Pipe Line Co., LLC,</i> 156 FERC ¶ 61,092 (2016), <i>reh'g denied</i> , 161 FERC ¶ 61,211 (2017).....	43
<i>*Transcon. Gas Pipe Line Co., LLC,</i> 158 FERC ¶ 61,125 (2016), <i>reh'g denied</i> , 161 FERC ¶ 61,250 (2017), <i>aff'd on other grounds</i> , <i>Allegheny Def. Project v. FERC</i> , Nos. 17-1098, <i>et al.</i> , 2019 WL 3518835 (D.C. Cir. Aug. 2, 2019).....	37, 43
<i>Transcon. Gas Pipe Line Corp.,</i> 73 FERC ¶ 61,361 (1995).....	6, 26, 32
<i>Transcon. Gas Pipe Line Corp.,</i> 98 FERC ¶ 61,155 (2002).....	5
<i>Trunkline Gas Co.,</i> 135 FERC ¶ 61,019 (2011).....	33
<i>*Wyo. Interstate Co.,</i> 119 FERC ¶ 61,251 (2007).....	6, 33, 38
 <u>STATUTES:</u>	
Administrative Procedure Act	
5 U.S.C. § 706(2)(A)	18
Natural Gas Act	
Section 1(b), 15 U.S.C. § 717(b)	2

TABLE OF AUTHORITIES

<u>STATUTES (cont'd):</u>	<u>PAGE</u>
Section 1(c), 15 U.S.C. § 717(c).....	2
Section 4, 15 U.S.C. § 717c.....	3, 4, 6, 8, 34-35, 42, 43
Section 5, 15 U.S.C. § 717d	3, 4, 8, 34, 35
Section 7, 15 U.S.C. § 717f.....	2-4, 6, 14, 17, 33-37, 39-42
Section 7(c), 15 U.S.C. § 717f(c)	2, 9, 34
Section 7(e), 15 U.S.C. § 717f(e)	2, 3
Section 19(b), 15 U.S.C. § 717r(b).....	30
 <u>REGULATIONS:</u>	
18 C.F.R. § 260.1	12

GLOSSARY

1998 Settlement	Settlement that established Gulf South’s most recent rate of return
2015 Settlement	Settlement that established the most recent depreciation rates for all Gulf South on-shore transmission facilities, including the facilities in its Lake Charles zone
Certificate Order	<i>Gulf South Pipeline Co., LP</i> , 163 FERC ¶ 61,124 (2018)
Commission	Federal Energy Regulatory Commission
Entergy Louisiana	Entergy Louisiana, LLC, the shipper that contracted for all of the project capacity
FERC	Federal Energy Regulatory Commission
Gulf South	Petitioner Gulf South Pipeline Company
Nov. 2017 Response	Gulf South’s Response to FERC’s October 25, 2017 Data Request
Power plant	Project shipper Entergy Louisiana’s proposed 980-megawatt natural gas-fired Lake Charles Power Plant
Project	Westlake Expansion Project
Rehearing Order	<i>Gulf South Pipeline Co., LP</i> , 166 FERC ¶ 61,089 (2019)

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ON PETITION FOR REVIEW OF ORDERS OF THE
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**BRIEF OF RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

STATEMENT OF THE ISSUE

In the proceeding below, the Federal Energy Regulatory Commission (“FERC” or “Commission”) conditionally approved the application of Gulf South Pipeline Company (“Gulf South”) to construct and operate the Westlake Expansion Project. The project adds a short pipeline lateral and new compressor and metering stations to Gulf South’s existing natural gas pipeline system, to serve a natural gas-fueled power plant in Lake Charles, Louisiana.

The issue on appeal is whether the Commission appropriately set the pipeline’s initial “recourse” rates (i.e., cost-based rates that are available as an alternative to negotiated rates), consistent with precedent and Commission policy.

STATUTES AND REGULATIONS

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

STATEMENT OF FACTS

I. Statutory And Regulatory Background

A. Natural Gas Act

The Natural Gas Act vests the Commission with jurisdiction over the transportation and wholesale sale of natural gas in interstate commerce. Natural Gas Act sections 1(b) and (c), 15 U.S.C. §§ 717(b), (c); *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1307 (D.C. Cir. 2015). The principal purpose of the Natural Gas Act is to “encourag[e] the orderly development of plentiful supplies of . . . natural gas at reasonable prices.” *Myersville*, 783 F.3d at 1307 (quoting *NAACP v. FPC*, 425 U.S. 662, 669-70 (1976)).

Congress added the statutory provision at issue here, section 7, 15 U.S.C. § 717f, to the Natural Gas Act in 1942. *FPC v. Hunt*, 376 U.S. 515, 519-20 (1964). That provision requires a company to obtain a Natural Gas Act section 7 certificate of “public convenience and necessity” from the Commission before

constructing or operating a facility that transports natural gas in interstate commerce. Natural Gas Act section 7(c), 15 U.S.C. § 717f(c); *Big Bend Conserv. Alliance v. FERC*, 896 F.3d 418, 420 (D.C. Cir. 2018). Natural Gas Act § 7(e), 15 U.S.C. § 717f(e), requires the Commission to issue a certificate to any qualified applicant if it finds that the proposed construction and operation of the pipeline facility “is or will be required by the present or future public convenience and necessity.”

The Natural Gas Act empowers the Commission to “attach to the issuance of the certificate . . . such reasonable terms and conditions as the public convenience and necessity may require.” 15 U.S.C. § 717f(e). Under that authority, the Commission determines the initial rates a pipeline may charge for newly-certificated service. *See Mo. Pub. Serv. Comm’n v. FERC*, 783 F.3d 310, 313 (D.C. Cir. 2015); *Mo. Pub. Serv. Comm’n v. FERC*, 337 F.3d 1066, 1068 (D.C. Cir. 2003). The initial tariff rates set in section 7 certificate proceedings “offer a temporary mechanism to protect the public interest until the regular rate setting provisions of the [Natural Gas Act (sections 4 and 5, 15 U.S.C. §§ 717c, 717d)] come into play.” *Mo. Pub. Serv. Comm’n*, 601 F.3d 581, 583 (D.C. Cir. 2010) (internal quotation marks omitted); *see also City of Oberlin v. FERC*, 2019 WL 4229074 at *6-7 (D.C. Cir. Sept. 6, 2019). Unlike rates set under Natural Gas Act sections 4 or 5, 15 U.S.C. §§ 717c, 717d (discussed immediately below), which

must be found to be “just and reasonable,” rates set under section 7 must simply be found to be in the “public interest.” *Mo. Pub. Serv. Comm’n*, 337 F.3d at 1068 (citing *Atl. Ref. Co. v. Pub. Serv. Comm’n of N.Y.*, 360 U.S. 378, 391 (1959)). The “‘public interest’ standard of [Natural Gas Act] § 7 is less exacting than the ‘just and reasonable’ requirement of § 4.” *Id.* at 1070 (citing *Atl. Refining*, 360 U.S. at 390-91).

Natural Gas Act sections 4 and 5, 15 U.S.C. §§ 717c and 717d, come into play after certificated projects are already moving natural gas in interstate commerce. *Hunt*, 376 U.S. at 525. Under section 4, pipelines propose new rates and have the burden to show that those proposed rates are just and reasonable. *See, e.g., Transcon. Gas Pipe Line Corp. v. FERC*, 518 F.3d 916, 918, 923 (D.C. Cir. 2008). Under Natural Gas Act section 5, the Commission, upon its own initiative or complaint by others, may change a pipeline’s existing rates if the proponent establishes that the pipeline’s existing rates are not just and reasonable and the new proposed rates are just and reasonable. *See, e.g., id.* at 918, 920-21.

B. Commission’s Certificate Policy Statement

The Commission initially reviews a natural gas pipeline certificate application under criteria set out in its Certificate Policy Statement.¹ *See*

¹ *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999) (“Certificate Policy Statement”), *clarified*, 90 FERC ¶ 61,128 (“Policy Statement Clarification”), *further clarified*, 92 FERC ¶ 61,094 (2000).

Myersville, 83 F.3d at 1309. The Certificate Policy Statement’s threshold requirement is that the applicant be prepared to financially support the project without subsidies from its existing customers. Policy Statement, 88 FERC at 61,745, 61,746. Thus, the applicant must show that the project can “‘stand on its own financially’ through investment by the applicant and support from new customers subscribed to the expanded capacity through ‘preconstruction contracts.’” *Myersville*, 783 F.3d at 1309 (quoting Policy Statement, 88 FERC at 61,746; citing Policy Statement Clarification, 90 FERC at 61,392). The Commission has determined, as a general matter, that the threshold requirement is satisfied if a pipeline proposes incremental rates for new facilities that are higher than its existing system rates. *E.g.*, *Dominion Transmission, Inc.*, 155 FERC ¶ 61,106 P 15 (2016); *Transcon. Gas Pipe Line Corp.*, 98 FERC ¶ 61,155 (2002).

C. Requirement That Shippers Have Flexible Access to Secondary Receipt and Delivery Points

The Commission has long required that shippers have access to secondary receipt and delivery points in the zone for which they pay a reservation charge without having to pay an additional charge. *See* Order No. 636 (FERC’s Open

The Commission has issued a Notice of Inquiry seeking information and stakeholder perspectives to help the Commission explore whether, and if so how, it should revise its approach under its currently effective Policy Statement. *Certification of New Interstate Natural Gas Pipeline Facilities*, 163 FERC ¶ 61,042 (2018).

Access Rulemaking),² and *Transcon. Gas Pipe Line Corp.*, 73 FERC ¶ 61,361 at 62,127 (1995), cited in *Gulf South Pipeline Co., LP*, 163 FERC ¶ 61,124 P 22 (2018) (“Certificate Order”), JA 137, *on reh’g*, 166 FERC ¶ 61,089 PP 22-23 (2019) (“Rehearing Order”), JA 203-04.

D. Commission Policy For Setting Initial Recourse Rates And Gulf South’s 1998 And 2015 Rate Settlements

Under longstanding Commission policy, in Natural Gas Act section 7 certificate proceedings an existing pipeline’s initial recourse rate for new capacity must be designed using the most recent cost-of-service rate determinants (including rate of return and depreciation rates) established in a general Natural Gas Act section 4 rate case. *See, e.g., Wyo. Interstate Co.*, 119 FERC ¶ 61,251 at P 22 (2007); *see also Fla. Gas Transmission Co.*, 132 FERC ¶ 61,040 at PP 10, 35 & n.12 (2010) (approving section 7 rates based on cost determinants, including rate of return, set in 2004 rate settlement); *Dominion Cove Point LNG, L.P.*, 115 FERC ¶ 61,337 at PP 132, 139 & n.122 (2006) (approving rates based on cost determinants, including rate of return, set in 1998 rate settlement); *Nw. Pipeline Corp.*, 98 FERC ¶ 61,352 at 62,499 (2002) (rejecting proposal to use cost

² *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation and Regulations of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 636, FERC Stats. & Regs. ¶ 30,939, *on reh’g*, Order No. 636-A, FERC Stats. & Regs. ¶ 30,950 at 30,585, *on reh’g*, Order No. 636-B, 61 FERC ¶ 61,272 (1992), *aff’d in part and remanded in part sub nom. United Distribution Cos. v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996).

determinants (for cost of debt and return on equity) that differed from those approved in pipeline's 1997 rate settlement); *Algonquin Gas Transmission Co.*, 87 FERC ¶ 61,262 at 61,990 (1999) (finding that pipeline "properly" used rate of return cost determinants approved in its last rate settlement).

This includes "black box" settlements that set specific rate determinants. Generally, black box settlements have "no underlying agreement as to the appropriate level of any individual cost categories and there are no 'working papers' showing any agreed upon allocation of costs among the various cost-of-service components." *Tex. Gas Transmission Corp.*, 53 FERC ¶ 61,022 at 61,087 (1990); *see also Freeport-McMoRan Corp. v. FERC*, 669 F.3d 302, 308 (D.C. Cir. 2012) (upholding orders approving black box rate settlement). But black box settlements can and sometimes do specify rate determinants. *See, e.g., E. Shore Nat. Gas Co.*, 138 FERC ¶ 61,050 at P 2 (2012) (approving settlement establishing rates on a "black box" basis but providing specified rate of return), *cited in Transcon. Gas Pipe Line Co., LLC*, 156 FERC ¶ 61,022 at P 25 n.30 (2016); *see also Equitrans, L.P.*, 115 FERC ¶ 61,007 at P 9 (2006) (approving settlement in which "the overall cost of service . . . was derived on a 'black box' basis"); *Equitrans, L.P.*, 117 FERC ¶ 61,184 at P 38 (2006) (requiring pipeline to use rate of return specified in settlement approved in 115 FERC ¶ 61,007).

Gulf South's most recent rate of return was established in a 1998 contested rate settlement ("1998 Settlement"), which set an overall rate of return of 10.41 percent on a pretax basis. *Koch Gateway Pipeline Co.*, 84 FERC ¶ 61,143 at 61,771, *reh'g denied*, 85 FERC ¶ 61,426 (1998).

In 2015, Gulf South entered into a rate settlement ("2015 Settlement") with its customers, resolving nearly all issues in the first general section 4 rate case it filed in more than seventeen years. *Gulf S. Pipeline Co.*, 153 FERC ¶ 61,326 (2015); *see also Gulf S. Pipeline Co.*, 153 FERC ¶ 63,016 at P 3 (2015) (Certification of Uncontested Partial Offer of Settlement); *Gulf S. Pipeline Co.*, 156 FERC ¶ 61,172 (2016) (resolving issues (that are not relevant here) carved out of settlement). The parties agreed to a black box settlement, but set forth specific depreciation rates for all of Gulf South's on-shore transmission facilities, including the facilities in its Lake Charles zone. *See Gulf S. Pipeline*, 153 FERC ¶ 61,326 at P 6. The 2015 Settlement did not specify a rate of return. The parties agreed that neither Gulf South nor any customer would make a rate filing under Natural Gas Act section 4 or 5 to revise Gulf South's rates or terms to be effective before May 1, 2023. *Id.* P 8. The 2015 Settlement was not contested by any party to the rate proceeding or by Commission staff, so in accordance with its rate settlement precedent, the Commission approved it as fair and reasonable and in the public interest. *Id.* P 14.

II. The Westlake Expansion Project And Gulf South's Proposed Rates

In March 2017, Gulf South held an open season seeking parties interested in obtaining available existing or new Gulf South capacity in the Lake Charles, Louisiana area. See R. 1, Certificate Application at 3, JA 22. Entergy Louisiana, LLC (“Entergy Louisiana”) requested 200,000 dekatherms³ per day of new firm transportation capacity, as well as all of Gulf South’s available existing Lake Charles Zone firm transportation capacity (70,000 dekatherms per day). *Id.* at 4, JA 23. In July 2017, Gulf South submitted an application under Natural Gas Act section 7(c), 15 U.S.C. § 717f(c), for a certificate of public convenience and necessity to construct and operate the Westlake Expansion Project (“project”), which would allow it to provide up to 200,000 dekatherms per day of new firm transportation service to Entergy Louisiana’s proposed 980-megawatt natural gas-fired Lake Charles Power Plant (“power plant”). Certificate Application at 1, JA 20.

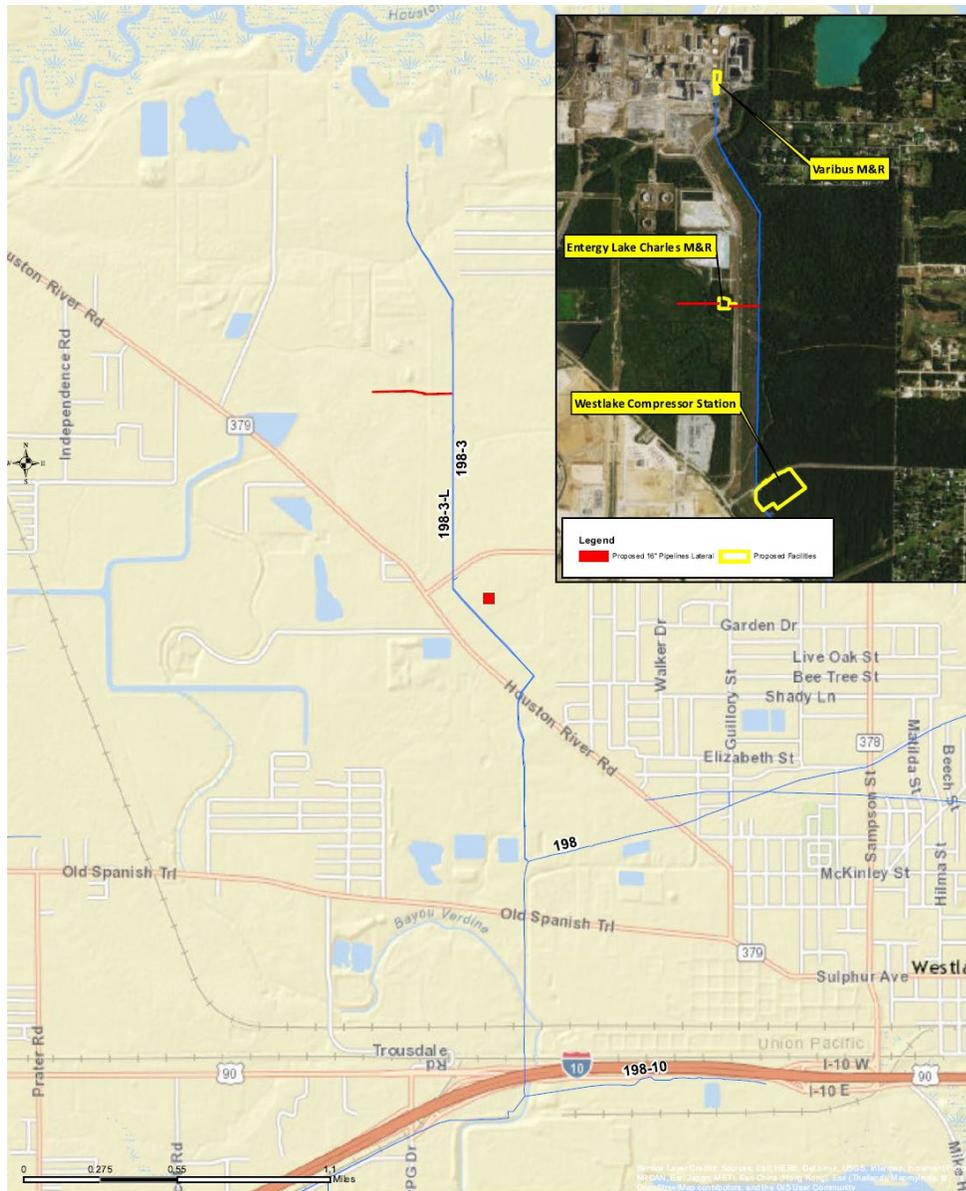
The project involves the construction and operation of: (1) a compressor station (the Westlake Compressor Station) located in Gulf South’s Lake Charles Zone; (2) a receipt point at an existing Lake Charles Zone facility site to receive

³ One dekatherm is roughly equivalent to 1,000 cubic feet of gas. *Consol. Gas Transmission Corp. v. FERC*, 771 F.2d 1536, 1541 n.3 (D.C. Cir. 1985). For perspective, 100,000 dekatherms/day fuels 500 megawatts of electric generation. See, e.g., Rehearing Order P 2, JA 193-94.

gas from Entergy Louisiana's existing Varibus pipeline; (3) a 0.3 mile, 16-inch diameter pipeline lateral from Gulf South's existing Lake Charles Zone to Entergy Louisiana's Lake Charles receipt point; and (4) a delivery point on the new lateral for the power plant. *See* Certificate Application at 7, JA 26; Certificate Order PP 4, 21, JA 138, 143-44; Rehearing Order P 2, JA 193. Gulf South stated that the primary purpose of the project is to provide 200,000 dekatherms per day of natural gas service to the power plant with natural gas supplied from existing Lake Charles Zone receipt points and the new Lake Charles Zone receipt point interconnection with the Varibus pipeline. Certificate Application at 6-7, JA 25-26.

Gulf South and Entergy Louisiana executed a binding precedent agreement for all of the project capacity for an initial 20-year term at a negotiated rate. *See* Certificate Application at 4-5, JA 23-24; Certificate Order P 29, JA 147. Gulf South stated that it would offer any available capacity on project facilities to other customers in accordance with its FERC Tariff. Certificate Application at 9, JA 28.

A map of the project facilities (in red) and Gulf South's mainline (in blue) is shown on the next page:



Application Exh. F, JA 51, *cited in* Rehearing Order P 11 n.27, JA 198.

Gulf South proposed incremental cost-of-service initial recourse rates for the new facilities: one for primary firm capacity upstream of the Westlake Compressor Station and another for primary delivery points downstream of that Station. Certificate Order P 16, JA 141; *see* Application at 9-12, JA 28-31; R. 27, Response to October 25, 2017 Data Request (“Nov. 2017 Response”), JA 102.

Gulf South designed the proposed downstream rates using a 10.81 percent rate of return and a 2.86 depreciation rate, calculating a 35-year service life for the facilities based on the 20-year contractual commitment for the Westlake Expansion Project. Certificate Order P 17, JA 142; Nov. 2017 Response, JA 102. Gulf South's November 2017 Response offered an alternative rate calculation using a 10.68 percent rate of return, which Gulf South said it derived from its 2016 submission of financial and operational information the Commission requires from major interstate pipelines. *See* Certificate Order P 18, JA 142; Nov. 2017 Response, JA 103; *cf.* 18 C.F.R. § 260.1 (FERC Form No. 2 report requirements). On appeal, Gulf South states that it now challenges only the Commission's rejection of the alternative 10.68 percent rate of return. Br. 15 n.4.

Gulf South further proposed that existing and project shippers be charged an additive, or "incremental plus," rate for using existing Lake Charles Zone and project facilities. *See* Certificate Application at 11, JA 30; Certificate Order PP 16, 21-22, JA 141, 143-44. Under the "incremental plus" rate, a customer using project and existing Lake Charles Zone facilities for a transaction would be charged both project facilities and existing facilities rates. *See* Certificate Application at 11, JA 30; *see also id.* at 9, JA 28 (the proposed project incremental rate would apply to any customer using delivery points downstream of the Westlake Compressor Station). Gulf South stated that its additive rate proposal

“ensures that the Project will have no impact on rates currently charged to Gulf South’s existing customers who do not utilize the Westlake Expansion Project facilities.” *Id.* at 11, JA 30.

III. The Commission’s Orders

The Commission approved Gulf South’s certificate application as consistent with the “public convenience and necessity” standard of the Natural Gas Act. Certificate Order P 15, JA 141. But the Commission found that Gulf South’s “incremental plus” rate, and the cost-of-service determinants it used in designing its proposed rates, were unsupported and inconsistent with Commission precedent and policy. *Id.* PP 16-24, JA 141-46; Rehearing Order PP 4-32, JA 194-209.

The Commission explained that it has allowed “incremental plus” rates for pipeline projects that are not integrated with the proponent pipeline’s existing facilities. Certificate Order P 21, JA 143; Rehearing Order PP 10-12, JA 197-99. But here the project facilities are integrated with Gulf South’s existing Lake Charles Zone facilities: project gas will enter Gulf South’s facilities via existing and new Lake Charles Zone receipt points, will be transported on existing Lake Charles Zone facilities, will be compressed at the project’s compressor station located in the existing Lake Charles Zone, and will then be transported on an existing Lake Charles Zone loop and delivered to the project’s 0.3-mile lateral for transport to the power plant. Certificate Order P 21, JA 143-44; Rehearing Order

P 11, JA 197-98. Since the project is divided by and relies on existing Lake Charles Zone facilities to effectuate service, the Commission found that it is integrated with those existing facilities and therefore that Gulf South cannot appropriately charge “incremental plus” rates. Certificate Order PP 21-22, JA 143-44; Rehearing Order PP 10-12, JA 197-99.

The Commission also rejected Gulf South’s proposals to use an overall rate of return of 10.81 (or alternatively 10.68) percent and a depreciation rate of 2.86 percent as cost determinants to develop its rates. Certificate Order PP 23-25, JA 144-46; Rehearing Order PP 26-30, JA 205-09. Longstanding Commission policy required Gulf South to use its last approved rate of return of 10.41 percent, rather than litigate a rate analysis in this Natural Gas Act section 7 certificate proceeding. Certificate Order P 24, JA 146; Rehearing Order PP 26-29, JA 205-08. Likewise, because the project is integrated with existing Gulf South facilities, Commission policy required Gulf South to use the 1.32 percent depreciation rate established in its most recent general rate case. Certificate Order P 23, JA 144-45; Rehearing Order P 30, JA 208-09.

SUMMARY OF ARGUMENT

The Commission’s initial rate determinations in this natural gas pipeline certificate case were reasonable and consistent with precedent and Commission policy, and well within the Commission’s broad ratemaking authority.

“Incremental Plus” Rates

The Commission reasonably rejected Gulf South’s proposal to charge an “incremental plus” rate, which would require customers using existing Lake Charles Zone and project facilities for a transaction to pay both project and existing facilities rates. Gulf South asserted that “incremental plus” rates were appropriate because project facilities are not integrated with existing Lake Charles Zone facilities. But the Commission determined, based on substantial record evidence, that the project facilities are integrated, since the project is divided by and relies on existing Gulf South facilities to effectuate service. Under a longstanding Commission rule, existing shippers with primary rights in a zone must have access to new integrated project facilities on a secondary basis, and new project shippers must have access to existing facilities within that zone on a secondary basis, without additional charge. Allowing “incremental plus” rates in the circumstances here would have violated the Commission’s precedent and rule.

The Commission considered but found no merit to Gulf South’s claim that without “incremental plus” rates shippers would game the system by contracting for existing capacity and then attempting to obtain project capacity on a secondary basis. As the Commission explained, it would be very risky and thus highly unlikely for shippers to count on project capacity being regularly and reliably available on a secondary basis.

Cost-causation principles are satisfied here. Cost-causation requires that rates to some degree reflect the costs caused by the customer who must pay them; rates need not precisely match cost-causation and responsibility. The Commission reasonably found it appropriate that the project shipper pay the project costs since: the project will be constructed to meet the needs of the project shipper to transport natural gas to its power plant; the Commission's Certificate Policy Statement requires that projects be financially supported without shifting project costs to existing shippers; and the Commission's open access rule requires that shippers have secondary access, without additional charge, to other receipt and delivery points in the zone for which they pay a reservation charge.

New Rate Zone

Gulf South challenges the Commission's rejection of its alternative proposal that it be allowed to create a new rate zone for project facilities. But Gulf South raised that alternative proposal for the first time in its petition for rehearing of the Certificate Order, and did not petition for rehearing of the Rehearing Order's rejection of that proposal. So Gulf South is jurisdictionally barred from challenging that ruling on appeal.

In any event, the Commission appropriately rejected Gulf South's alternative proposal for a new rate zone. While the Commission has permitted new rate zones for substantial system extensions that are operationally and geographically distinct

from the pipelines' mainlines, the project facilities here are segmented by, and not readily distinguishable from, Gulf South's existing mainline facilities.

Depreciation Rate and Rate of Return

The Commission also reasonably determined that Gulf South's Natural Gas Act section 7 initial recourse rates should be designed in accordance with the Commission's longstanding initial rates policy, i.e., using the most recent Commission-approved rate of return and depreciation rate.

Gulf South proposed to use a 2.86 percent depreciation rate for the project facilities rather than the 1.32 percent depreciation rate approved in Gulf South's 2015 rate case based solely on its claim that the project is a stand-alone delivery lateral. But since the record established that the project was integrated with Gulf South's existing system, the Commission reasonably determined that its general policy should apply here, and that Gulf South needed to use its already-approved 1.32 percent depreciation rate to design the project's initial rates.

Likewise, the Commission properly applied its general policy to the project's rate of return. As the Commission determined, Gulf South failed to support its proposals to use rates of return (10.81 or 10.68 percent) other than its last-approved 10.41 percent rate of return. And while Gulf South asserts that its 10.41 percent rate of return no longer reflects its capital structure, the Commission pointed out that Gulf South could have addressed any concerns it had regarding its

rate of return in its 2015 rate settlement, just as it did in updating its depreciation rate in that settlement.

Applying its longstanding policy for initial recourse rates was an appropriate exercise of the Commission's discretion to protect the public interest while avoiding unnecessary delays in providing needed project capacity.

ARGUMENT

I. Standard Of Review

The Commission's determinations are reviewed under the Administrative Procedure Act's "arbitrary and capricious" standard. 5 U.S.C. § 706(2)(A). Review under this standard is narrow. *FERC v. Elec. Power Supply Ass'n*, 136 S.Ct. 760, 782 (2016). "A court is not to ask whether a regulatory decision is the best one possible or even whether it is better than the alternatives." *Id.* Rather, the court must uphold the Commission's determination "if the agency has examine[d] the relevant [considerations] and articulated a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made." *Id.* (internal quotation marks omitted; alterations by Court); *see also Mo. River Energy Servs. v. FERC*, 918 F.3d 954, 957 (D.C. Cir. 2019) (same).

The Court's review of the Commission's rate determinations "is particularly deferential because such matters are either fairly technical or involve policy judgments that lie at the core of the regulatory mission." *S.C. Pub. Serv. Auth. v.*

FERC, 762 F.3d 41, 54-55 (D.C. Cir. 2014) (internal quotation marks omitted).

Moreover, since the grant or denial of a certificate of public convenience and necessity is “peculiarly within the discretion of the Commission,” the Court does not “substitute its judgment for that of the Commission.” *Myersville*, 783 F.3d at 1308 (internal quotation marks omitted). Likewise, the Court gives “substantial deference” to the Commission’s interpretation of its own precedent. *NRG Power Mktg., LLC v. FERC*, 718 F.3d 947, 953, 957 (D.C. Cir. 2013).

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

II. The Commission’s Rate Determinations Were Reasonable And Consistent With Precedent And Policy

Gulf South challenges three rate determinations the Commission made in this natural gas certificate proceeding. But as is shown below, the rate determinations were reasonable, consistent with precedent and policy, and well within the Commission’s considerable ratemaking discretion, and should be affirmed.

A. The Commission Appropriately Rejected The “Incremental Plus” Rate Proposal

1. The Commission Reasonably Determined That The Project Facilities Are Integrated With Existing Gulf South Facilities And Therefore That “Incremental Plus” Rates Are Inappropriate Here

Gulf South proposed to charge an “incremental plus” rate under which a customer using existing Lake Charles Zone and project facilities for a transaction would be charged both project and existing facilities rates. *See* Certificate Application at 11, JA 30; Certificate Order PP 16, 21-22, JA 141, 143-44.

The Commission rejected that proposal because substantial record evidence established that the project facilities are integrated with Gulf South’s existing Lake Charles Zone facilities. Certificate Order PP 21-22, JA 143-44; Rehearing Order PP 10-12, JA 197-99. Specifically, the project is divided by and relies on existing Gulf South facilities to effectuate service: project gas will enter Gulf South’s facilities via existing and new Lake Charles Zone receipt points, will be transported on existing Lake Charles Zone facilities, will be compressed at the project’s compressor station located in the existing Lake Charles Zone, and will then be transported on an existing Lake Charles Zone loop and delivered to the project’s 0.3-mile lateral for transport to the power plant. Certificate Order PP 21-22, JA 143-44; Rehearing Order P 11, JA 197-98. Under the Commission’s longstanding rule, established in its 1992 Order No. 636 natural gas pipeline open

access rulemaking, existing shippers with primary rights within a zone have access to new integrated project facilities on a secondary basis, and new project shippers have access to existing facilities within that zone on a secondary basis, without additional charge. Rehearing Order P 22, JA 204 (citing Order No. 636-A at 30,585).

Gulf South argues that the facilities are not integrated because, in its view, the existing and project facilities will not operate as a single system. Br. 29-31, 40-45. But as the Commission explained, facilities operate as a single system if expansion facilities are not operationally isolated and rely on existing facilities to effectuate service. Rehearing Order P 10 & n.23, JA 197 (citing *Colo. Interstate Gas Co.*, 122 FERC ¶ 61,256 P 61 (2008)); *id.* P 12, JA 198 (citing *Equitrans, L.P.*, 155 FERC ¶ 61,194 P 11 (2016)). The project facilities here are divided by and rely upon existing Gulf South facilities to effectuate service. Rehearing Order P 11, JA 197-98; Certificate Order P 21, JA 143-44.

2. The Commission Appropriately Addressed Gulf South’s Gaming Claim

Gulf South argues that, even if the facilities are integrated, the Commission should have permitted it to charge “incremental plus” rates because otherwise shippers purportedly will have an incentive to game the system by “reserv[ing] existing system capacity at the lower Lake Charles Zone rate and then attempt[ing] to use the expansion facilities for free on a secondary basis” Br. 33 (internal

quotation marks omitted); *see also id.* 33-36. But Gulf South acknowledges (Br. 33) that shippers who solely contract for existing Gulf South capacity would be able to access project capacity only on a secondary basis, i.e., only if the project shipper, which has contracted for all the project capacity for an initial term of 20 years, chooses not to use that capacity. Rehearing Order PP 22, 24, JA 203-05; Certificate Order P 5, JA 138. And as the Commission found, it would be very risky and thus highly unlikely for shippers to count on this secondary capacity being regularly and reliably available. Rehearing Order P 24, JA 205.

This remains true in light of Gulf South's point, raised for the first time on brief (at 35), that the project shipper has scheduling priority only during the first (11:30 a.m. to 4:30 p.m.) daily nomination cycle. As Gulf South acknowledges, during that initial five-hour period each day, "a nomination by a primary-firm shipper is scheduled ahead of a nomination by a secondary-firm shipper." Br. 9.

The Commission also found no merit to Gulf South's assertion that secondary access rights would discourage future shipper support for pipeline infrastructure expansion projects (*see* Br. 33, 36-37). Rehearing Order P 24, JA 205. A potential shipper needing service but electing not to subscribe to an expansion during the open season process would face the risk that the expansion would be fully subscribed (as occurred here) and that limited capacity would be available on a secondary basis. *Id.*

At bottom, Gulf South’s gaming claim challenges the longstanding rule that shippers have secondary access, without additional charge, to other receipt and delivery points in the zone for which they pay a reservation charge. *See* Rehearing Order P 22, JA 204 (citing FERC Order No. 636-A at 30,585). The ability to attempt to use other zonal facilities on a secondary basis without additional charge is not system gaming, but simply the open access flexibility long granted to natural gas pipeline shippers.

Gulf South cites to *Grand Mesa Pipeline, LLC*, 156 FERC ¶ 61,163 P 16 (2016), for the proposition that “[n]ot *all* shippers are averse to taking ‘significant risks.’” Br. 35. In that case, the Commission granted an oil pipeline’s proposal to charge long-term shippers lower rates than short-term shippers. As the orders the Commission cited to in *Grand Mesa Pipeline* explain, oil shippers committing to longer terms face greater risks because 10- and 15-year terms are very long lead times in the oil business (*TransCanada Keystone Pipeline, LP*, 125 FERC ¶ 61,025 PP 19-22 (2008); *Express Pipeline P’ship*, 76 FERC ¶ 61,245 at 62,254 (1996)). *See Grand Mesa Pipeline*, 156 FERC ¶ 61,163 P 16 & n.14. The Commission’s recognition that some oil shippers are willing to enter into long-term contracts does not support the notion that natural gas shippers will take on the high risk of regularly relying on the availability of secondary market access to satisfy their transportation needs.

Next, Gulf South claims that the Commission has previously rejected the argument that shippers will refrain from gaming due to the significant risks gaming might entail. Br. 35-36. But the orders Gulf South cites in support of that claim (*TransColorado Gas Transmission Co.*, 139 FERC ¶ 61,229 P 31 (2012), and *Gulf S. Pipeline Co.*, 97 FERC ¶ 61,069 (2001), *on reh'g*, 98 FERC ¶ 61,068 (2002)) do not stand for that proposition. In *TransColorado*, the Commission approved a pipeline's proposal to prevent gaming of its reservation charge crediting provisions after finding that the pipeline's shippers would *not* face a significant risk that would prevent them from gaming those provisions. *TransColorado*, 139 FERC ¶ 61,229 PP 37-38. And in *Gulf South*, the Commission approved Gulf South's proposal to modify its shipper imbalance cash-out methodology to eliminate shipper gaming, finding that the existing methodology provided "obvious opportunity and incentive to game the system" *Gulf S.*, 98 FERC ¶ 61,068 at 61,179. Risk to shippers from gaming is not discussed in *Gulf South*.

3. Cost-Causation Principles Are Satisfied Here

Gulf South contends that cost-causation requires existing Lake Charles Zone shippers to pay project costs if they use project facilities on a secondary basis. Br. 38-40. But the Commission reasonably found otherwise. Rehearing Order PP 19-23, JA 202-05.

Entergy Louisiana contracted for all of the project capacity for an initial 20-year term to transport natural gas to its proposed Lake Charles power plant. Rehearing Order PP 3, 25, JA 194, 205; Certificate Order P 5, JA 138; Certificate Application at 1, 4, JA 20, 23. Since the project will be constructed to meet Entergy Louisiana's needs, the Commission determined, consistent with its policies and the cost-causation principle, that Entergy Louisiana should pay the project costs. Rehearing Order PP 19-23, JA 202-05.

Cost-causation requires that rates "to some degree reflect the costs actually caused by the customer who must pay them." Rehearing Order P 19, JA 202 (quoting *KN Energy, Inc. v. FERC*, 968 F.3d 1295, 1300 (D.C. Cir. 1992)); see also *S.C. Pub. Serv. Auth.*, 762 F.3d at 88 (same). "There is no requirement in the [Natural Gas] Act itself that rates precisely match cost causation and responsibility." *Carnegie Nat. Gas Co. v. FERC*, 968 F.2d 1291, 1293 (D.C. Cir. 1992); see also *S.C. Pub. Serv. Auth.*, 762 F.3d at 88 (same). Rather, "the Commission may rationally emphasize other, competing policies and approve measures that do not best match cost responsibility and causation." *Carnegie Nat. Gas Co.*, 968 F.2d at 1293; see also *S.C. Pub. Serv. Auth.*, 762 F.3d at 88 (same).

Thus, in making its "incremental plus" rate determination here, the Commission appropriately considered both its Certificate Policy Statement's requirement that projects must be financially supported without shifting project

costs to existing shippers, and its open access rule's requirement that shippers have secondary access, without additional charge, to other receipt and delivery points in the zone for which they pay a reservation charge. *See* Rehearing Order PP 19, 21, 22, JA 202-04 (citing Certificate Policy Statement, 88 FERC at 61,746; Order No. 636-A at 30,585). As the Commission explained, the Policy Statement requirement ensures that only needed or financially viable projects are certificated. *Id.* P 19, JA 202. And the secondary point rule recognizes that existing shippers are paying for the existing pipeline facilities project shippers rely on for their service. *Id.* PP 19, 22, JA 202-04.

Gulf South contends that the project shipper will subsidize service to existing Lake Charles Zone shippers if the existing shippers are able to access project facilities on a secondary basis without additional charge. Br. 33, 37, 39-45. But as the Commission found, there would be no subsidy; existing shippers pay for the existing pipeline facilities the project shipper will rely on for service, and the project shipper will have access to existing Lake Charles Zone facilities on a secondary basis without additional charge. Rehearing Order PP 19, 22, JA 202-04. Again, this is simply the open access flexibility long granted to natural gas pipeline shippers. *See Id.* P 22, JA 204 (citing Order No. 636-A at 30,585); *id.* P 23, JA 204 (citing *Transcon. Gas*, 73 FERC ¶ 61,361 at 62,127); Certificate Order P 22, JA 144 (same).

Gulf South also argues that cost-causation is not satisfied because the project purportedly is “much more similar to non-integrated lateral expansions, for which FERC routinely allows additive pricing.” Br. 43; *see also id.* 40-45. But again, the Commission reasonably found, based on substantial record evidence, that the project is integrated with existing Gulf South facilities. *See supra* pp. 13-14, 20; Certificate Order PP 21-22, JA 143-44; Rehearing Order PP 10-12, JA 197-99. Since project gas will enter Gulf South’s existing facilities via existing and new Lake Charles Zone receipt points, will be transported on existing Lake Charles Zone facilities, will be compressed at the project’s compressor station located in the existing Lake Charles Zone, and will then be transported on an existing Lake Charles Zone loop and delivered to the project’s 0.3-mile lateral for transport to the power plant, the Commission found that the project is more similar to projects it has found are integrated than to those the Commission has found were non-integrated lateral expansion projects. Certificate Order P 21, JA 143-44; Rehearing Order PP 11-12, JA 197-99 (citing cases).

The circumstances here are not like those in *Old Dominion Elec. Coop. v. FERC*, 898 F.3d 1254, 1261 (D.C. Cir. 2018). *See* Br. 39. In that case, this Court found that it would violate cost-causation principles to have only one zone on a pipeline system pay the costs of high-voltage facilities, because high-voltage facilities provide significant benefits to all users of the pipeline system (i.e.,

improved reliability; reduced congestion, power losses and operating reserve requirements; greater carrying capacity; and improved access to generation) and no Commission policies justified that cost allocation. *Old Dominion*, 898 F.3d at 1260-63 (citing *S.C. Pub. Serv. Auth.*, 762 F.3d at 88). Here, by contrast, the project facilities are not regionally beneficial, but would be constructed to enable the project shipper, Entergy Louisiana, to transport natural gas to its power plant. Rehearing Order P 19, JA 202. Moreover, in making the rate determination here, the Commission appropriately considered its policies that the pipeline and/or the project shipper (but not existing shippers) must financially support the project, and that shippers have secondary access, without additional charge, to other receipt and delivery points in the zone for which they pay a reservation charge. *See S.C. Pub. Serv. Auth.*, 762 F.3d at 88; *Carnegie Nat. Gas*, 968 F.2d at 1293; Rehearing Order PP 19-23, JA 202-05.

The Commission's "incremental plus" rate determination falls well within this Court's deferential standard of review. "[T]he question of how to allocate costs among a pipeline's customers is a difficult issue of fact, and one on which the Commission enjoys broad discretion." *Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 971 (D.C. Cir. 2000) (internal quotation marks omitted). 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.” *Elec. Power Supply Ass’n*, 136 S. Ct. at 784; *see also id.* (“not our job” to supplant the agency’s reasoned, explained choice). The Commission amply satisfied that standard here.

B. The Commission Appropriately Rejected Gulf South’s Alternative Proposal To Create A New Rate Zone

In its request for rehearing of the Certificate Order, Gulf South raised for the first time, as an alternative to “incremental plus” rates, its proposal that the Commission allow it to create a new rate zone for the project facilities. R. 48 at 16-18, JA 174-76; *see also* Br. 45 (citing Rehearing Request at 18, JA 176); Rehearing Order P 13, JA 199. The Rehearing Order rejected Gulf South’s alternative proposal, Rehearing Order PP 13-16, JA 199-201, and Gulf South challenges that rejection on appeal, Br. 45-49. But Gulf South is jurisdictionally barred from challenging that ruling on appeal, since it first raised its alternative proposal in its request for rehearing of the Certificate Order (Rehearing Request at 18, JA 176), and failed to seek rehearing of the Rehearing Order’s rejection of that proposal.

The Natural Gas Act provides that “[n]o objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is

reasonable ground for failure to do so.” Natural Gas Act section 19(b), 15 U.S.C. § 717r(b). Courts strictly construe this jurisdictional requirement. *Columbia Gas Transmission Corp. v. FERC*, 477 F.3d 739, 741 (D.C. Cir. 2007); *Town of Norwood v. FERC*, 906 F.2d 772, 774 (D.C. Cir. 1990).

When, as in other cases, a rehearing order simply provides additional rationale for a ruling made in the Commission’s initial order, a party need not petition for rehearing of the new rationale in order to challenge it on appeal. *See Columbia Gas*, 477 F.3d at 741-42. But where, as here, a “rehearing order introduces a new source of complaint,” a party must raise that complaint in a second request for rehearing in order to raise that complaint on appeal. *Id.* at 741; *see also Canadian Ass’n of Petroleum Producers v. FERC*, 254 F.3d 289, 296-97 (D.C. Cir. 2001) (same); *Town of Norwood*, 906 F.2d at 774-75 (same); *Tenn. Gas Pipeline Co. v. FERC*, 871 F.2d 1099, 1109-10 (D.C. Cir. 1989) (same). In addition to being a jurisdictional prerequisite, this requirement “enables the Commission to correct its own errors, which might obviate judicial review, or to explain why in its expert judgment the party’s objection is not well taken, which facilitates judicial review.” *Save Our Sebasticook v. FERC*, 431 F.3d 379, 381 (D.C. Cir. 2005).

Even if Gulf South’s challenge to the Rehearing Order’s rejection of its alternative request for a new rate zone were properly before the Court, it lacks

merit. *See* Rehearing Order PP 13-16, JA 199-201. The Commission has permitted new rate zones for substantial system extensions that access areas not previously served by a pipeline where the extensions were operationally and geographically distinct from the pipelines' mainlines. *Id.* P 16 & n. 42, JA 200-01 (citing cases⁴). The project facilities here, in contrast, are segmented by, and not readily distinguishable from, existing Gulf South mainline facilities. *Id.* PP 11, 15-16 & n.42, JA 197-98, 200-01; *see also* Certificate Order PP 21-22, JA 143-44.

Gulf South argues that this case is like *Texas Eastern Transmission, LP*, 139 FERC ¶ 61,138 (2012), in which the Commission suggested that a pipeline create a new rate zone for a proposed extension. Br. 45-48. But as the Commission explained, there was a critical difference in *Texas Eastern* that made a new rate zone appropriate in that case but not here: while the proposed 15-mile contiguous extension in *Texas Eastern* was easily distinguishable from the rest of the mainline system there, the project here is segmented by, and not readily distinguishable

⁴ Citing, *e.g.*, *Cheniere Creole Trail Pipeline, L.P.*, 151 FERC ¶ 61,012 PP 12, 14, 50 (2015) (approving different rate zone for contiguous 48-mile extension); *Tex. E. Transmission, LP*, 139 FERC ¶ 61,138 PP 7, 33 (2012) (indicating Commission would consider creation of new rate zone for contiguous 15-mile extension); *E. Shore Nat. Gas Co.*, 132 FERC ¶ 61,204 PP 36-38 (2010) (approving different rate zone for contiguous 8-mile extension); *Colo. Interstate Gas Co.*, 131 FERC ¶ 61,086 PP 12, 32-33 (2010) (approving new rate zones over contiguous 118-mile extension); *Rockies Express Pipeline LLC*, 123 FERC ¶ 61,234 PP 8, 54-56 (2008) (approving different rate zone for contiguous 639-mile extension).

from, Gulf South's mainline system. Rehearing Order PP 11, 14-16 & n.42, JA 197-98, 200-01; *see also Texas Eastern*, 139 FERC ¶ 61,138 PP 32 (explaining that "the bulk" of the project there was the 15-mile pipeline extension). The Commission's reasonable interpretation of its own precedent is due deference and should be affirmed. *See NRG Power Mktg.*, 718 F.3d at 953, 957.

Gulf South also asserts that the Commission concluded in Rehearing Order P 23, JA 205, that creating a new rate zone would balkanize Gulf South's pipeline system. Br. 45, 48-49. Gulf South is mistaken. The cited paragraph discusses *Transcontinental Gas*, 73 FERC ¶ 61,361 at 62,127, in which the Commission found that, unless the pipeline created and obtained approval of a new rate zone for its Leidy facilities, which were located in rate zone 6, zone 6 shippers would have secondary receipt point rights to access those facilities. "Any other approach, the Commission explained, would unduly balkanize the system and inhibit open-access operations." Rehearing Order P 23, JA 204 (quoting *Transcon. Gas*, 73 FERC ¶ 61,361 at 62,127).

The Rehearing Order's rejection of Gulf South's alternative proposal to create a new rate zone should be affirmed. It is supported by the record, consistent with precedent, and, as a technical ratemaking matter, deserves substantial deference from this Court. *See, e.g., Elec. Power Supply Ass'n*, 136 S. Ct. at 782; *S.C. Pub Serv. Auth.*, 762 F.3d at 54-55.

C. The Commission Appropriately Applied Its Policy Requiring Gulf South To Use Its Most-Recently Approved Rate Of Return And Depreciation Rate In Designing Its Initial Recourse Rates For The Project

Gulf South challenges the Commission’s initial recourse rate of return and depreciation rate determinations. Br. 49-55. But as is shown below, the Commission’s application of its initial recourse rates policy in the circumstances here was reasonable and within its broad ratemaking discretion. *See generally Elec. Power Supply Ass’n*, 136 S. Ct. at 784.

1. The Commission Appropriately Justified Its Initial Recourse Rates Policy

In Natural Gas Act section 7 proceedings, longstanding Commission policy requires that an existing pipeline’s initial recourse rates for new capacity must be designed using the cost-of-service rate determinants (including rate of return and depreciation rates) that were established in the pipeline’s most recent Natural Gas Act general section 4 rate case that specified those determinants. *See* Rehearing Order P 27 & nn.68-69, JA 206-07 (citing cases); Certificate Order P 24 & n.21, JA 146 (same); *see also, e.g., Trunkline Gas Co.*, 135 FERC ¶ 61,019 at P 33 (2011) (citing “Commission policy to design initial rates using a pipeline’s existing cost factors”); *Wyo. Interstate Co.*, 119 FERC ¶ 61,251 at P 22 (2007) (“The Commission’s general policy with respect to pipeline expansions is to use the depreciation rate and rate of return approved in the pipeline’s last general rate

proceeding.”); *Equitrans, L.P.*, 117 FERC ¶ 61,184 at P 38 (2006) (“Commission policy requires that rates for incremental expansion projects in an NGA section 7(c) proceeding be designed based on the pipeline’s approved capital structure and rate of return.”); *Nw. Pipeline Corp.*, 98 FERC ¶ 61,352 at 62,499 (2002) (rejecting proposal to use cost of debt and return on equity figures that differed from those approved in previous rate settlement); *Mojave Pipeline Co.*, 69 FERC ¶ 61,244 at 61,925 (1994) (rejecting proposal to use a different rate of return on equity than that reflected in pipeline’s existing rates).

The Commission has often explained the underlying rationale for this policy and, notwithstanding Gulf South’s claims to the contrary (Br. 49, 51, 55), the Commission did so again in this case. *See* Rehearing Order PP 27-28, JA 206-07. As the Commission explained, it reviews Natural Gas Act section 7 initial recourse rates under the “public interest” standard, which is less exacting than the “just and reasonable” standard of Natural Gas Act sections 4 and 5, 15 U.S.C. §§ 717c, 717d. Rehearing Order P 27, JA 206 (citing *Atl. Ref.*, 360 U.S. at 390-91); *see also Mo. Pub. Serv. Comm’n*, 337 F.3d at 1068 (same). Indeed, the delay inherent in determining just and reasonable rates under sections 4 and 5 makes that standard inappropriate for regulating initial rates under Natural Gas Act section 7. *See United Gas Improvement Co. v. Callery Props., Inc.*, 382 U.S. 223, 228 (1965) (“We said in [*Atlantic Refining*] that [section] 7 procedures are designed ‘to hold

the line awaiting adjudication of a just and reasonable rate’ . . . and that ‘the inordinate delay’ in [section] 5 proceedings . . . should not cripple them.”) (citations omitted); *Consumer Fed’n of Am. v. FPC*, 515 F.2d 347, 356 n.56 (D.C. Cir. 1975) (“the delay inherent in determining just and reasonable rates [makes] such a requirement inappropriate for regulation of initial rates under [section] 7”); Rehearing Order P 27 n.67, JA 206 (discussing *Atl. Refining*); *see also, e.g., Transco*, 156 FERC ¶ 61,022 at P 24 n.28. Therefore, as discussed *supra* at pp. 3-4, the Commission approves initial rates as a “temporary mechanism” until the Natural Gas Act’s regular rate setting provisions come into effect. *Mo. Pub. Serv. Comm’n*, 783 F.3d at 313; *see* Rehearing Order PP 27-28, JA 206-07 (Commission approves initial rates under NGA section 7 to “hold the line” until a full evidentiary hearing can be conducted under Natural Gas Act section 4 or 5).

The Commission appropriately may consider non-cost factors, including the need for project capacity, in setting rates. *See Pub. Utils. Comm’n of Cal. v. FERC*, 367 F.3d 925, 929 (D.C. Cir. 2004) (citing *Permian Basin Area Rate Cases*, 390 U.S. 747, 791 (1968)); *see also Consol. Edison Co. of N.Y. v. FERC*, 315 F.3d 316, 325 (D.C. Cir. 2003) (Commission may consider administrative convenience in determining whether to apply policy in Natural Gas Act proceeding); *Tejas Power Corp. v. FERC*, 908 F.2d 998, 1003 (D.C. Cir. 1990) (“the public interest that the Commission must protect always includes the interest of consumers in

having access to an adequate supply of gas at a reasonable price”). *Cf. Atl. Refining*, 360 U.S. at 391 (proposed initial rates are not “the only factor bearing on the public convenience and necessity”), *cited in* Rehearing Order P 27 n.67, JA 206.

Thus, the Commission appropriately considers the fact, as it did here, that it would be difficult, if not impossible, to timely complete a discounted cash flow analysis hearing (requiring testimony and analysis regarding proxy group composition, growth rates, and the pipeline’s risk position within the resulting zone of reasonableness) in this section 7 certificate proceeding, and that attempting to do so would unnecessarily delay the needed project capacity.⁵ Rehearing Order P 28, JA 207. “Given the timelines associated with certificate projects and the number of applications filed,” the Commission found that using previously-approved cost determinants is “more effective and efficient in determining” the appropriate cost of service “compared to other methods” that may be used in ratemaking proceedings. Rehearing Order P 27, JA 206-07; *see also id.* P 28, JA 207 (“The Commission does not believe that conducting a full evidentiary hearing for an individual certificate proceeding would be the most effective or efficient way for determining the appropriate rate of return for proposed pipeline expansions.”);

⁵ *See, e.g., Boston Edison Co. v. FERC*, 885 F.2d 962, 965 (1st Cir. 1989) (Breyer, J.) (explaining the complicated discounted cash flow method of establishing cost-based rates).

accord Atl. Coast Pipeline, LLC, 161 FERC ¶ 61,042 at P 101 (2017), *on reh'g*, 164 FERC ¶ 61,100 at P 73 (2018), *appeal pending*, *Atl. Coast Pipeline, LLC v. FERC*, Nos. 18-1224, *et al.* (D.C. Cir. filed Aug. 16, 2018); *Transcon. Gas Pipe Line Co., LLC*, 158 FERC ¶ 61,125 at P 39 (2016), *reh'g denied*, 161 FERC ¶ 61,250 P 19 (2017), *aff'd on other grounds*, *Allegheny Def. Project v. FERC*, Nos. 17-1098, *et al.*, 2019 WL 3518835 (D.C. Cir. Aug. 2, 2019). Therefore, the “less exacting standard of review” under Natural Gas Act section 7 “mitigates against the delay associated with a full evidentiary rate proceeding.” Rehearing Order P 28, JA 207; *accord Transcon. Gas*, 161 FERC ¶ 61,250 at P 19.

2. The Commission Reasonably Applied Its Initial Recourse Rates Policy To The Project’s Depreciation Rate Component

As discussed *supra* at p. 8, Gulf South specified depreciation rates for its various facilities—including those in the Lake Charles Zone—in the 2015 Settlement. *See Gulf S. Pipeline Co.*, 153 FERC ¶ 61,326 at P 6 (“Appendix E sets forth all other depreciation rates.”); *cf. E. Shore Nat. Gas Co.*, 138 FERC ¶ 61,050 at P 2 (noting that a black box settlement included a schedule listing depreciation rates). The specified and approved depreciation rate for the Lake Charles Zone facilities is 1.32 percent, based on a 76-year service life. Nov. 2017 Response, JA 102.

Claiming that the project is a “stand-alone delivery lateral,” Gulf South proposed initial recourse rates here using a higher 2.86 percent depreciation rate, based on a shorter 35-year service life. *Id.*; *see* Rehearing Order P 30, JA 208.

As already discussed (*supra* at pp. 13-14, 20, 27, 31), however, the Commission reasonably found that the project “is not a stand-alone lateral” but rather “is an integrated expansion of Gulf South’s existing system.” Certificate Order P 23, JA 144; *see also id.* P 21, JA 143-44; Rehearing Order P 30, JA 208. Therefore, Gulf South’s reliance on Commission precedents regarding depreciation rates for lateral facilities (*see* Br. 49-50) is misplaced. *See* Rehearing Order P 30, JA 208. As Gulf South’s sole basis for not applying the Commission’s general policy to determine the project’s depreciation rate lacked merit, the Commission reasonably determined that its general policy should apply here. *Id.*; Certificate Order P 23, JA 144; *see Wyo. Interstate*, 119 FERC ¶ 61,251 at P 22 (general policy is to use the pipeline’s most-recently approved depreciation rate). Because the 2015 Settlement established a 1.32 percent depreciation rate for Lake Charles Zone facilities, the Commission appropriately required Gulf South to use that figure in calculating the project’s initial recourse rate. Certificate Order PP 19-20, JA 142-43.

3. The Commission Reasonably Applied Its Initial Recourse Rates Policy To The Project's Rate of Return Component

The Commission also reasonably rejected Gulf South's proposal to design the project's initial recourse rates using a new rate of return that the Commission had not previously approved. Certificate Order PP 18, 24, JA 142, 146; Rehearing Order PP 26-29, JA 205-08.

Gulf South initially calculated its proposed rates using a rate of return of 10.81 percent. Application, Ex. N at 3, JA 62. When the Commission requested further information—reminding Gulf South of its policy and asking whether and when the proposed rate of return had been approved—Gulf South conceded that its last specified rate of return (10.41 percent) was approved in the 1998 Settlement. R. 26, Oct. 25, 2017 Data Request, JA 97-99; Nov. 2017 Response, JA 102-03. Gulf South offered an alternative 10.68 percent rate of return proposal, which it claimed was supported by its most recently-filed report of financial and operational information (i.e., "Form 2 data"). Nov. 2017 Response, JA 103; *see supra* p. 8.

But the Commission found that Gulf South had not supported its rate of return proposals: Gulf South provided no support at all for its proposed 10.81 percent rate of return; and it did not (and still has not) explained how the financial and operational Form 2 data, submitted in support of its alternative 10.68 rate of return, was relevant to the matter here—setting an overall rate of return for Natural Gas Act section 7 initial rate purposes. Rehearing Order P 29, JA 207-08. While

Gulf South appears to believe the Commission should have simply accepted its proposed rate of return because no shippers objected to it (Br. 54-55), the Commission reasonably rejected Gulf South's insufficiently supported rate of return proposals and instead applied its longstanding initial rates policy. *Cf. Mojave Pipeline Co.*, 69 FERC ¶ 61,244 at 61,925 (rejecting initial rate proposed in a section 7 proceeding, notwithstanding the absence of opposition, and requiring the pipeline to use its existing Commission-approved cost-of-service methodology), *cited in* Rehearing Order P 27 n.68, JA 206.

In doing so, the Commission appropriately considered that determining a new rate of return supported by evidence and proper analysis would require a potentially lengthy hearing process. *Id.* P 29, JA 208; *see also id.* P 28, JA 207 (“It would be difficult, if not impossible, to complete this type of analysis, including growth rates and reasonable risk, in a section 7 proceeding in a timely manner, and attempting to do so would unnecessarily delay proposed projects with time-sensitive in-service schedules.”).

Gulf South disagrees with the Commission's expert judgment and insists that the rate of return can be adjusted without an evidentiary hearing. Br. 53. In support, Gulf South cites to *Missouri Public Service Commission v. FERC*, 601 F.3d 581 (D.C. Cir. 2010), and *Enbridge Pipelines (KPC)*, 109 FERC ¶ 61,042 (2004). Br. 53-54. But the circumstances in those cases are not like those here.

Missouri involved the determination of initial rates for a new pipeline formed through the merger of two state-regulated intrastate pipelines and one FERC-regulated interstate pipeline. 601 F.3d at 582. This Court found that the Commission had not adequately explained why it allowed the interstate pipeline’s acquisition premium costs (i.e., the difference between the price paid for a facility and the seller’s depreciated original cost for that facility) to be included in calculating the merged pipeline’s initial rates, since a proper benefits analysis required by Commission precedent to justify including these acquisition premium costs was never conducted. *Id.* at 583, 586. This Court found it “highly noteworthy” that, in this same initial rate proceeding, the Commission was able to conduct a benefits inquiry regarding the acquisition premiums embedded in the intrastate pipelines’ costs and that, based on that analysis, the Commission rejected the inclusion of those premiums in the merged pipeline’s initial rates. *Id.* at 586-87; *see also id.* at 588. On the specific record there, the Court found there was nothing to suggest that it would have been impracticable to address the interstate pipeline’s acquisition premium issue in the section 7 certificate proceeding. *Id.* at 583, 588.

In the very different circumstances here, the Commission reasonably was concerned that changing Gulf South’s rate of return would require a potentially lengthy evidentiary hearing to consider the pipeline’s capital structure, growth, and

risk. Rehearing Order PP 28-29, JA 207-08. Changing a pipeline’s overall, system-wide rate of return is precisely the sort of rate setting issue that should be determined in a general rate case under Natural Gas Act section 4 using the “just and reasonable” standard, rather than in a certificate proceeding under Natural Gas Act section 7’s less rigorous “public interest” standard. *See id.* PP 27-28, JA 206-07. *Cf. Nw. Pipeline*, 98 FERC ¶ 61,352 at 62,499 (concluding that the pipeline’s “next general rate case is the proper forum in which to contemplate issues related to cost allocation and rate design”); *Transcon. Gas*, 156 FERC ¶ 61,022 at P 25 & n.30 (advising parties to “use th[e] opportunity” of the pipeline’s next general rate case “to address issues of concern relating to the rate of return that should be used in calculating initial rates in Transco’s future certificate proceedings”).

Enbridge, 109 FERC ¶ 61,042, does not help Gulf South either. In that case, unlike here, the pipeline was operating existing facilities but was newly subject to the Commission’s jurisdiction and had no previously-approved rates. *See* 109 FERC ¶ 61,042 at P 2.

Gulf South further asserts that its rate of return, approved in 1998, no longer reflects its capital structure. Br. 28, 52. But as the Commission pointed out, “Gulf South had the opportunity to address any issues concerning its rate of return” in its 2015 Settlement—which resolved its first general rate case since 1997—“and failed to do so,” even as it *did* in that settlement specifically update its depreciation

rates. Rehearing Order P 28, JA 207; *see Gulf S. Pipeline Co.*, 153 FERC ¶ 61,326 at P 14. Applying the Commission’s general policy to a rate of return that Gulf South itself left unchanged for two decades was reasonable.

Moreover, application of the Commission’s policy does not depend on the vintage of a particular rate determinant. Indeed, in a 2016-2017 series of orders certifying three separate projects proposed by a pipeline, the Commission approved recourse rates that were based on a rate of return approved in that pipeline’s 2002 rate settlement because its more recent Natural Gas Act section 4 rate cases (in 2008 and 2013) resulted in black box settlements that did not specify a rate of return.⁶ Given its policy, “the Commission encourages companies and parties in rate cases to address concerns relating to the rate of return that should be used in calculating initial rates in future rate proceedings.” Rehearing Order P 28, JA 207 (citing *Transcon. Gas*, 156 FERC ¶ 61,022 at P 25).

Gulf South further argues that the policy should not apply in this case because the initial recourse rates will remain in place until at least 2023, due to the rate filing moratorium in its 2015 Settlement. *See* Br. 53, 55. But Gulf South agreed to that moratorium even as it failed to update its rate of return. In any

⁶ *See Transcon. Gas Pipe Line*, 158 FERC ¶ 61,125 at P 38 & n.61; *Transcon. Gas Pipe Line Co., LLC*, 156 FERC ¶ 61,092 at P 26 (2016), *reh’g denied*, 161 FERC ¶ 61,211 (2017); *Transcon. Gas Pipe Line Co., LLC*, 156 FERC ¶ 61,022 at P 23 (2016), *reh’g denied*, 161 FERC ¶ 61,212 (2017).

event, the Commission found Gulf South’s argument “unavailing” because the Westlake Expansion Project is fully subscribed, at negotiated rates, under a 20-year contract (extending far beyond the remaining length of the moratorium).

Rehearing Order P 25, JA 205. “Gulf South contracted for and accepted that rate and assumes the risk of any under recovery until its next rate proceeding in 5 years.” *Id.*

The Commission addressed Gulf South’s arguments “seriously and carefully” and “intelligibly explained the reasons” for its decision to follow its longstanding policy in this case. *Elec. Power Supply Ass’n*, 136 S. Ct. at 784. That decision should be respected.

CONCLUSION

For the foregoing reasons the petition for review should be denied.

Respectfully submitted,

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October 29, 2019

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g) and Circuit Rule 32(e), I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 10,151 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

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

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ADDENDUM

**STATUTES
AND
REGULATIONS**

TABLE OF CONTENTS

STATUTES:

PAGE

Administrative Procedure Act

5 U.S.C. § 706(2)(A) A-1

Natural Gas Act

Section 1, 15 U.S.C. § 717 A-2

Section 4, 15 U.S.C. § 717c..... A-4

Section 5, 15 U.S.C. § 717d A-5

Section 7, 15 U.S.C. § 717f..... A-6

Section 19, 15 U.S.C. § 717r..... A-8

REGULATIONS:

18 C.F.R. § 260.1 A-10

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

HISTORICAL AND REVISION NOTES

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

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

AMENDMENTS

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

§ 704. Actions reviewable

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

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

HISTORICAL AND REVISION NOTES

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

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

§ 705. Relief pending review

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

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

HISTORICAL AND REVISION NOTES

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

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

§ 706. Scope of review

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

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

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

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

HISTORICAL AND REVISION NOTES

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

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

ABBREVIATION OF RECORD

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

CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

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

§ 801. Congressional review

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

DELEGATION OF FUNCTIONS

Delegation of President's authority to Secretary of the Interior, see note set out under section 715j of this title.

CHAPTER 15B—NATURAL GAS

- Sec.
- 717. Regulation of natural gas companies.
- 717a. Definitions.
- 717b. Exportation or importation of natural gas; LNG terminals.
- 717b-1. State and local safety considerations.
- 717c. Rates and charges.
- 717c-1. Prohibition on market manipulation.
- 717d. Fixing rates and charges; determination of cost of production or transportation.
- 717e. Ascertainment of cost of property.
- 717f. Construction, extension, or abandonment of facilities.
- 717g. Accounts; records; memoranda.
- 717h. Rates of depreciation.
- 717i. Periodic and special reports.
- 717j. State compacts for conservation, transportation, etc., of natural gas.
- 717k. Officials dealing in securities.
- 717l. Complaints.
- 717m. Investigations by Commission.
- 717n. Process coordination; hearings; rules of procedure.
- 717o. Administrative powers of Commission; rules, regulations, and orders.
- 717p. Joint boards.
- 717q. Appointment of officers and employees.
- 717r. Rehearing and review.
- 717s. Enforcement of chapter.
- 717t. General penalties.
- 717t-1. Civil penalty authority.
- 717t-2. Natural gas market transparency rules.
- 717u. Jurisdiction of offenses; enforcement of liabilities and duties.
- 717v. Separability.
- 717w. Short title.
- 717x. Conserved natural gas.
- 717y. Voluntary conversion of natural gas users to heavy fuel oil.
- 717z. Emergency conversion of utilities and other facilities.

§ 717. Regulation of natural gas companies

(a) Necessity of regulation in public interest

As disclosed in reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) Transactions to which provisions of chapter applicable

The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, and to the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation, but shall not apply to any other transportation or sale of nat-

ural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

(c) Intrastate transactions exempt from provisions of chapter; certification from State commission as conclusive evidence

The provisions of this chapter shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this chapter by this subsection are declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction.

(d) Vehicular natural gas jurisdiction

The provisions of this chapter shall not apply to any person solely by reason of, or with respect to, any sale or transportation of vehicular natural gas if such person is—

- (1) not otherwise a natural-gas company; or
- (2) subject primarily to regulation by a State commission, whether or not such State commission has, or is exercising, jurisdiction over the sale, sale for resale, or transportation of vehicular natural gas.

(June 21, 1938, ch. 556, §1, 52 Stat. 821; Mar. 27, 1954, ch. 115, 68 Stat. 36; Pub. L. 102-486, title IV, §404(a)(1), Oct. 24, 1992, 106 Stat. 2879; Pub. L. 109-58, title III, §311(a), Aug. 8, 2005, 119 Stat. 685.)

AMENDMENTS

2005—Subsec. (b). Pub. L. 109-58 inserted “and to the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation,” after “such transportation or sale.”

1992—Subsec. (d). Pub. L. 102-486 added subsec. (d).

1954—Subsec. (c). Act Mar. 27, 1954, added subsec. (c).

TERMINATION OF FEDERAL POWER COMMISSION;
TRANSFER OF FUNCTIONS

Federal Power Commission terminated and functions, personnel, property, funds, etc., transferred to Secretary of Energy (except for certain functions transferred to Federal Energy Regulatory Commission) by sections 7151(b), 7171(a), 7172(a), 7291, and 7293 of Title 42, The Public Health and Welfare.

STATE LAWS AND REGULATIONS

Pub. L. 102-486, title IV, §404(b), Oct. 24, 1992, 106 Stat. 2879, provided that: “The transportation or sale of natural gas by any person who is not otherwise a public utility, within the meaning of State law—

- “(1) in closed containers; or
 - “(2) otherwise to any person for use by such person as a fuel in a self-propelled vehicle,
- shall not be considered to be a transportation or sale of natural gas within the meaning of any State law, regu-

lation, or order in effect before January 1, 1989. This subsection shall not apply to any provision of any State law, regulation, or order to the extent that such provision has as its primary purpose the protection of public safety.”

EMERGENCY NATURAL GAS ACT OF 1977

Pub. L. 95-2, Feb. 2, 1977, 91 Stat. 4, authorized President to declare a natural gas emergency and to require emergency deliveries and transportation of natural gas until the earlier of Apr. 30, 1977, or termination of emergency by President and provided for antitrust protection, emergency purchases, adjustment in charges for local distribution companies, relationship to Natural Gas Act, effect of certain contractual obligations, administrative procedure and judicial review, enforcement, reporting to Congress, delegation of authorities, and preemption of inconsistent State or local action.

EXECUTIVE ORDER NO. 11969

Ex. Ord. No. 11969, Feb. 2, 1977, 42 F.R. 6791, as amended by Ex. Ord. No. 12038, Feb. 3, 1978, 43 F.R. 4957, which delegated to the Secretary of Energy the authority vested in the President by the Emergency Natural Gas Act of 1977 except the authority to declare and terminate a natural gas emergency, was revoked by Ex. Ord. No. 12553, Feb. 25, 1986, 51 F.R. 7237.

PROCLAMATION NO. 4485

Proc. No. 4485, Feb. 2, 1977, 42 F.R. 6789, declared that a natural gas emergency existed within the meaning of section 3 of the Emergency Natural Gas Act of 1977, set out as a note above, which emergency was terminated by Proc. No. 4495, Apr. 1, 1977, 42 F.R. 18053, formerly set out below.

PROCLAMATION NO. 4495

Proc. No. 4495, Apr. 1, 1977, 42 F.R. 18053, terminated the natural gas emergency declared to exist by Proc. No. 4485, Feb. 2, 1977, 42 F.R. 6789, formerly set out above.

§ 717a. Definitions

When used in this chapter, unless the context otherwise requires—

- (1) “Person” includes an individual or a corporation.
- (2) “Corporation” includes any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, receiver or receivers, trustee or trustees of any of the foregoing, but shall not include municipalities as hereinafter defined.
- (3) “Municipality” means a city, county, or other political subdivision or agency of a State.
- (4) “State” means a State admitted to the Union, the District of Columbia, and any organized Territory of the United States.
- (5) “Natural gas” means either natural gas unmixed, or any mixture of natural and artificial gas.
- (6) “Natural-gas company” means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.
- (7) “Interstate commerce” means commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States.
- (8) “State commission” means the regulatory body of the State or municipality hav-

ing jurisdiction to regulate rates and charges for the sale of natural gas to consumers within the State or municipality.

(9) “Commission” and “Commissioner” means the Federal Power Commission, and a member thereof, respectively.

(10) “Vehicular natural gas” means natural gas that is ultimately used as a fuel in a self-propelled vehicle.

(11) “LNG terminal” includes all natural gas facilities located onshore or in State waters that are used to receive, unload, load, store, transport, gasify, liquefy, or process natural gas that is imported to the United States from a foreign country, exported to a foreign country from the United States, or transported in interstate commerce by waterborne vessel, but does not include—

- (A) waterborne vessels used to deliver natural gas to or from any such facility; or
- (B) any pipeline or storage facility subject to the jurisdiction of the Commission under section 717f of this title.

(June 21, 1938, ch. 556, § 2, 52 Stat. 821; Pub. L. 102-486, title IV, § 404(a)(2), Oct. 24, 1992, 106 Stat. 2879; Pub. L. 109-58, title III, § 311(b), Aug. 8, 2005, 119 Stat. 685.)

AMENDMENTS

2005—Par. (11). Pub. L. 109-58 added par. (11).
1992—Par. (10). Pub. L. 102-486 added par. (10).

TERMINATION OF FEDERAL POWER COMMISSION;
TRANSFER OF FUNCTIONS

Federal Power Commission terminated and functions, personnel, property, funds, etc., transferred to Secretary of Energy (except for certain functions transferred to Federal Energy Regulatory Commission) by sections 7151(b), 7171(a), 7172(a)(1), 7291, and 7293 of Title 42, The Public Health and Welfare.

§ 717b. Exportation or importation of natural gas; LNG terminals

(a) Mandatory authorization order

After six months from June 21, 1938, no person shall export any natural gas from the United States to a foreign country or import any natural gas from a foreign country without first having secured an order of the Commission authorizing it to do so. The Commission shall issue such order upon application, unless, after opportunity for hearing, it finds that the proposed exportation or importation will not be consistent with the public interest. The Commission may by its order grant such application, in whole or in part, with such modification and upon such terms and conditions as the Commission may find necessary or appropriate, and may from time to time, after opportunity for hearing, and for good cause shown, make such supplemental order in the premises as it may find necessary or appropriate.

(b) Free trade agreements

With respect to natural gas which is imported into the United States from a nation with which there is in effect a free trade agreement requiring national treatment for trade in natural gas, and with respect to liquefied natural gas—

- (1) the importation of such natural gas shall be treated as a “first sale” within the meaning of section 3301(21) of this title; and

(d) Inspections

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

(e) Emergency Response Plan

(1) In any order authorizing an LNG terminal the Commission shall require the LNG terminal operator to develop an Emergency Response Plan. The Emergency Response Plan shall be prepared in consultation with the United States Coast Guard and State and local agencies and be approved by the Commission prior to any final approval to begin construction. The Plan shall include a cost-sharing plan.

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

(A) at the LNG terminal; and

(B) in proximity to vessels that serve the facility.

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

REFERENCES IN TEXT

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

§ 717c. Rates and charges

(a) Just and reasonable rates and charges

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

(b) Undue preferences and unreasonable rates and charges prohibited

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

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

Under such rules and regulations as the Commission may prescribe, every natural-gas com-

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

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

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

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

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

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

(f) Storage services

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

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

(B) customers are adequately protected.

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

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

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

REFERENCES IN TEXT

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

AMENDMENTS

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

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

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

Pub. L. 102-104, title III, Aug. 17, 1991, 105 Stat. 531, authorized Federal Energy Regulatory Commission, pursuant to this section, to allow recovery, in advance, of expenses by natural-gas companies for research, development and demonstration activities by Gas Research Institute for projects on use of natural gas in

motor vehicles and on use of natural gas to control emissions from combustion of other fuels, subject to Commission finding that benefits, including environmental benefits, to both existing and future ratepayers resulting from such activities exceed all direct costs to both existing and future ratepayers, prior to repeal by Pub. L. 102-486, title IV, §408(c), Oct. 24, 1992, 106 Stat. 2882.

§ 717c-1. Prohibition on market manipulation

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

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

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

(a) Decreases in rates

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

(b) Costs of production and transportation

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

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

§ 717e. Ascertainment of cost of property

(a) Cost of property

The Commission may investigate and ascertain the actual legitimate cost of the property

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

(b) Inventory of property; statements of costs

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

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

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

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

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

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

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

(c) Certificate of public convenience and necessity

(1)(A) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission

authorizing such acts or operations: *Provided, however*, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

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

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

- (A) natural gas sold by the producer to such person; and
- (B) natural gas produced by such person.

(d) Application for certificate of public convenience and necessity

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

(e) Granting of certificate of public convenience and necessity

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

cation shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

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

(1) The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization; and

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

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

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

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

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

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

AMENDMENTS

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

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

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

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

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

EFFECTIVE DATE OF 1988 AMENDMENT

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

TRANSFER OF FUNCTIONS

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

§ 717g. Accounts; records; memoranda

(a) Rules and regulations for keeping and preserving accounts, records, etc.

Every natural-gas company shall make, keep, and preserve for such periods, such accounts, records of cost-accounting procedures, correspondence, memoranda, papers, books, and other records as the Commission may by rules and regulations prescribe as necessary or appropriate for purposes of the administration of this chapter: *Provided, however*, That nothing in this chapter shall relieve any such natural-gas company from keeping any accounts, memoranda, or records which such natural-gas company may be required to keep by or under authority of the laws of any State. The Commission may prescribe a system of accounts to be kept by such natural-gas companies, and may classify such natural-gas companies and prescribe a system of accounts for each class. The Commission, after notice and opportunity for hearing, may determine by order the accounts in which particular outlays or receipts shall be entered, charged, or credited. The burden of proof to justify every accounting entry questioned by the Commission shall be on the person making, authorizing, or requiring such entry, and the Commission may suspend a charge or credit pending submission of satisfactory proof in support thereof.

(b) Access to and inspection of accounts and records

The Commission shall at all times have access to and the right to inspect and examine all ac-

(b) Conference with State commissions regarding rate structure, costs, etc.

The Commission may confer with any State commission regarding rate structures, costs, accounts, charges, practices, classifications, and regulations of natural-gas companies; and the Commission is authorized, under such rules and regulations as it shall prescribe, to hold joint hearings with any State commission in connection with any matter with respect to which the Commission is authorized to act. The Commission is authorized in the administration of this chapter to avail itself of such cooperation, services, records, and facilities as may be afforded by any State commission.

(c) Information and reports available to State commissions

The Commission shall make available to the several State commissions such information and reports as may be of assistance in State regulation of natural-gas companies. Whenever the Commission can do so without prejudice to the efficient and proper conduct of its affairs, it may, upon request from a State commission, make available to such State commission as witnesses any of its trained rate, valuation, or other experts, subject to reimbursement of the compensation and traveling expenses of such witnesses. All sums collected hereunder shall be credited to the appropriation from which the amounts were expended in carrying out the provisions of this subsection.

(June 21, 1938, ch. 556, §17, 52 Stat. 830.)

§ 717q. Appointment of officers and employees

The Commission is authorized to appoint and fix the compensation of such officers, attorneys, examiners, and experts as may be necessary for carrying out its functions under this chapter; and the Commission may, subject to civil-service laws, appoint such other officers and employees as are necessary for carrying out such functions and fix their salaries in accordance with chapter 51 and subchapter III of chapter 53 of title 5.

(June 21, 1938, ch. 556, §18, 52 Stat. 831; Oct. 28, 1949, ch. 782, title XI, § 1106(a), 63 Stat. 972.)

CODIFICATION

Provisions that authorized the Commission to appoint and fix the compensation of such officers, attorneys, examiners, and experts as may be necessary for carrying out its functions under this chapter "without regard to the provisions of other laws applicable to the employment and compensation of officers and employees of the United States" are omitted as obsolete and superseded.

As to the compensation of such personnel, sections 1202 and 1204 of the Classification Act of 1949, 63 Stat. 972, 973, repealed the Classification Act of 1923 and all other laws or parts of laws inconsistent with the 1949 Act. The Classification Act of 1949 was repealed by Pub. L. 89-554, Sept. 6, 1966, §8(a), 80 Stat. 632, and reenacted as chapter 51 and subchapter III of chapter 53 of Title 5, Government Organization and Employees. Section 5102 of Title 5 contains the applicability provisions of the 1949 Act, and section 5103 of Title 5 authorizes the Office of Personnel Management to determine the applicability to specific positions and employees.

Such appointments are now subject to the civil service laws unless specifically excepted by those laws or

by laws enacted subsequent to Executive Order 8743, Apr. 23, 1941, issued by the President pursuant to the Act of Nov. 26, 1940, ch. 919, title I, §1, 54 Stat. 1211, which covered most excepted positions into the classified (competitive) civil service. The Order is set out as a note under section 3301 of Title 5.

"Chapter 51 and subchapter III of chapter 53 of title 5" substituted in text for "the Classification Act of 1949, as amended" on authority of Pub. L. 89-554, §7(b), Sept. 6, 1966, 80 Stat. 631, the first section of which enacted Title 5.

AMENDMENTS

1949—Act Oct. 28, 1949, substituted "Classification Act of 1949" for "Classification Act of 1923".

REPEALS

Act Oct. 28, 1949, ch. 782, cited as a credit to this section, was repealed (subject to a savings clause) by Pub. L. 89-554, Sept. 6, 1966, §8, 80 Stat. 632, 655.

§ 717r. Rehearing and review

(a) Application for rehearing; time

Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Review of Commission order

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with

it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which is supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(c) Stay of Commission order

The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(d) Judicial review

(1) In general

The United States Court of Appeals for the circuit in which a facility subject to section 717b of this title or section 717f of this title is proposed to be constructed, expanded, or operated shall have original and exclusive jurisdiction over any civil action for the review of an order or action of a Federal agency (other than the Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit, license, concurrence, or approval (hereinafter collectively referred to as "permit") required under Federal law, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.).

(2) Agency delay

The United States Court of Appeals for the District of Columbia shall have original and exclusive jurisdiction over any civil action for the review of an alleged failure to act by a Federal agency (other than the Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit required under Federal law, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.), for a facility subject to section 717b of this title or section 717f of this

title. The failure of an agency to take action on a permit required under Federal law, other than the Coastal Zone Management Act of 1972, in accordance with the Commission schedule established pursuant to section 717n(c) of this title shall be considered inconsistent with Federal law for the purposes of paragraph (3).

(3) Court action

If the Court finds that such order or action is inconsistent with the Federal law governing such permit and would prevent the construction, expansion, or operation of the facility subject to section 717b of this title or section 717f of this title, the Court shall remand the proceeding to the agency to take appropriate action consistent with the order of the Court. If the Court remands the order or action to the Federal or State agency, the Court shall set a reasonable schedule and deadline for the agency to act on remand.

(4) Commission action

For any action described in this subsection, the Commission shall file with the Court the consolidated record of such order or action to which the appeal hereunder relates.

(5) Expedited review

The Court shall set any action brought under this subsection for expedited consideration.

(June 21, 1938, ch. 556, §19, 52 Stat. 831; June 25, 1948, ch. 646, §32(a), 62 Stat. 991; May 24, 1949, ch. 139, §127, 63 Stat. 107; Pub. L. 85-791, §19, Aug. 28, 1958, 72 Stat. 947; Pub. L. 109-58, title III, §313(b), Aug. 8, 2005, 119 Stat. 689.)

REFERENCES IN TEXT

The Coastal Zone Management Act of 1972, referred to in subsec. (d)(1), (2), is title III of Pub. L. 89-454, as added by Pub. L. 92-583, Oct. 27, 1972, 86 Stat. 1280, as amended, which is classified generally to chapter 33 (§1451 et seq.) of Title 16, Conservation. For complete classification of this Act to the Code, see Short Title note set out under section 1451 of Title 16 and Tables.

CODIFICATION

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

AMENDMENTS

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

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

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

CHANGE OF NAME

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

Federal Energy Regulatory Commission

§ 260.2

the specifications and format contained in Form No. 592, which can be obtained at the Federal Energy Regulatory Commission, Public Reference and Files Maintenance Branch, Washington, DC 20426.

(e) *Penalty for failure to comply.* (1) Any person who transports gas for others pursuant to subpart B or G of part 284 of this chapter and who knowingly violates the requirements of §§ 358.4 and 358.5, §250.16, or §284.13 of this chapter will be subject, pursuant to sections 311(c), 501, and 504(b)(6) of the Natural Gas Policy Act of 1978, to a civil penalty, which the Commission may assess, of not more than \$1,269,500 for any one violation.

(2) For purposes of this paragraph, in the case of a continuing violation, each day of the violation will constitute a separate violation.

[Order 566, 59 FR 32898, June 27, 1994, as amended by Order 566-A, 59 FR 52904, Oct. 20, 1994; Order 581, 60 FR 53071, Oct. 11, 1996; 61 FR 39068, July 26, 1996; Order 637, 65 FR 10220, Feb. 25, 2000; Order 2004, 68 FR 69157, Dec. 11, 2003; Order 826, 81 FR 43940, July 6, 2016; Order 834, 82 FR 8139, Jan. 24, 2017; Order 839, 83 FR 1552, Jan. 12, 2018; Order 853, 84 FR 968, Feb. 1, 2019]

PART 260—STATEMENTS AND REPORTS (SCHEDULES)

- Sec.
- 260.1 FERC Form No. 2, Annual report for Major natural gas companies.
- 260.2 FERC Form No. 2-A, Annual report for Nonmajor natural gas companies.
- 260.4-260.7 [Reserved]
- 260.8 System flow diagrams: Format No. FERC 567.
- 260.9 Reports by natural gas pipeline companies on service interruptions and damage to facilities.
- 260.11-260.15 [Reserved]
- 260.200 Original cost statement of utility property.
- 260.300 FERC Form No. 3-Q, Quarterly financial report of electric utilities, licensees, and natural gas companies.
- 260.400 Cash management programs.
- 260.401 FERC Form No. 552, Annual Report of Natural Gas Transactions.
- 260.402 FERC Form No. 501-G, One-time Report on Rate Effect of the Tax Cuts and Jobs Act.

AUTHORITY: 15 U.S.C. 717-717w, 3301-3432; 42 U.S.C. 7101-7352.

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting forms listed in part 260, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at www.govinfo.gov.

§ 260.1 FERC Form No. 2, Annual report for Major natural gas companies.

(a) *Prescription.* The form of Annual Report of Natural Gas Companies (Class A and Class B), designated herein as FERC Form No. 2, is prescribed.

(b) *Filing requirements.* Each natural gas company, as defined by the Natural Gas Act (15 U.S.C. 717, *et seq.*) which is a major company (a natural gas company whose combined gas transported or stored for a fee exceed 50 million Dth in each of the three previous calendar years) must prepare and file with the Commission, as follows:

(1) The annual report for the year ending December 2004 must be filed on April 25, 2005.

(2) The annual report for each year thereafter must be filed on April 18 of the subsequent year.

(3) Newly established entities must use projected data to determine whether FERC Form No. 2 must be filed.

(4) The form must be filed in electronic format only, as indicated in the general instructions set out in that form. The format for the electronic filing can be obtained at the Federal Energy Regulatory Commission, Division of Information Services, Public Reference and Files Maintenance Branch, Washington, DC 20426. One copy of the report must be retained by the respondent in its files.

[Order 121, 46 FR 6887, Jan. 22, 1981, as amended by Order 390, 49 FR 32527, Aug. 14, 1984; Order 493, 53 FR 15030, Apr. 27, 1988; Order 581, 60 FR 53071, Oct. 11, 1995; Order 628, 68 FR 269, Jan. 3, 2003; 69 FR 9044, Feb. 26, 2004]

§ 260.2 FERC Form No. 2-A, Annual report for Nonmajor natural gas companies.

(a) *Prescription.* The form of Annual Report for Nonmajor Natural Gas Companies, designated herein as FERC Form No. 2-A, is prescribed.

(b) *Filing requirements.* Each natural gas company, as defined by the Natural Gas Act, not meeting the filing threshold for FERC Form No. 2, but having total gas sales or volume transactions

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 29th day of October, 2019, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system except for the following counsel, which I have served via U.S. Mail:

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