ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

No. 10-1098

EXXONMOBIL GAS & POWER MARKETING COMPANY, *ET AL.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

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CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and Amici

The parties before this Court, and those that appeared before the agency, are identified in the brief of Petitioners.

B. Rulings Under Review

1. *Sea Robin Pipeline Company, LLC*, "Order on Tariff Filing," 128 FERC ¶ 61,286 (2009), JA 1; and

2. *Sea Robin Pipeline Company, LLC*, "Order on Request for Rehearing," 130 FERC ¶ 61,191 (2010), JA 19.

C. Related Cases

This case has not previously been before this Court or any other court, and Counsel is not aware of any other related cases pending before this or any other court.

/s/ Kathrine L. Henry
Kathrine L. Henry
Attorney

May 5, 2011

TABLE OF CONTENTS

PAGES

STATEMENT OF THE ISSUES…………..…………………………………1

STATUTES AND REGULATIONS……………………………………......2

COUNTERSTATEMENT OF JURISDICTION………………………….2

INTRODUCTION……………………………………………………......2

STATEMENT OF FACTS………………………………………………..4

I. STATUTORY AND REGULATORY BACKGROUND…………4

II. THE CHALLENGED ORDERS…………………………………..6

A. The Tariff Order…………………………………………….6

B. The Rehearing Order……………………….……………….8

SUMMARY OF ARGUMENT…………………………………………10

ARGUMENT……………………………………………………………11

I. THE COURT LACKS JURISDICTION TO REVIEW THE CHALLENGED ORDERS..………………………………..11

A. The Challenged Orders Are Interlocutory And Non-Final……………………………………………..12

B. No Legitimate Reason Exists Here For Immediate Review……………………………………………………..15

II. STANDARD OF REVIEW………………………………………18

TABLE OF CONTENTS

PAGES

III. ASSUMING JURISDICTION, THE COMMISSION PROPERLY ALLOWED SEA ROBIN TO FILE, SUBJECT TO HEARING AND FURTHER AGENCY CONSIDERATION, ITS PROPOSED HURRICANE SURCHARGE……………………………………………….……..19

A. The Commission's Decision Was Fully Consistent with NGA Section 4 and the Commission's Policy Permitting Cost Recovery Through A Limited Rate Filing In Appropriate Circumstances…………………..……19

B. The Commission's Decision Did Not Violate The Rule Against Retroactive Ratemaking………………23

C. The Commission's Decision Was Fully Consistent With Its Periodic Rate Adjustment Regulations…………25

CONCLUSION……………………………………………………..29

TABLE OF AUTHORITIES

PAGES

COURT CASES:

**Abbott Labs. v. Gardner,*
387 U.S. 136 (1967)……………………………………………….………14

**Aluminum Co. of Am. v. United States,*
790 F.2d 938 (D.C. Cir. 1986)………….……………………………16

Am. Gas Ass'n v. FERC,
593 F.3d 14 (D.C. Cir. 2010)…………………………………….....5

**Bennett v. Spear,*
520 U.S. 154 (1997)…………………………………………………13

Bellsouth Corp. v. FCC,
17 F.3d 1487 (D.C. Cir. 1994)……………………………………17

Canadian Ass'n of Petroleum Producers v. FERC,
254 F.3d 289 (D.C. Cir. 2001)……………………………………13

Cities of Anaheim v. FERC,
723 F.2d 656 (9th Cir. 1984)…………………..……….13, 15, 17

City of Idaho Falls v. FERC,
629 F.3d 222 (D.C. Cir. 2011)……………………………………19

Colorado Interstate Gas Co. v. FERC,
599 F.3d 698 (D.C. Cir. 2010)……………………………………27

Consol. Edison Co. of N.Y. v. FERC,
347 F.3d 964 (D.C. Cir. 2003)……………………………………23

---

* Cases chiefly relied upon are marked with an asterisk.

TABLE OF AUTHORITIES

PAGES

COURT CASES: (cont.)

CTIA – The Wireless Ass'n v. FCC,
530 F.3d 984 (D.C. Cir. 2008)……………………………….. 14

Delmarva Power & Light Co. v. FERC,
671 F.2d 587 (D.C. Cir. 1982)………………………………..23

**DRG Funding Corp. v. Sec'y of Housing & Urban Dev.,*
76 F.3d 1212 (D.C. Cir. 1996)……………………………13, 17

Electricity Consumers Res. Council v. FERC,
407 F.3d 1232 (D.C. Cir. 2005)……………………….….18, 19

FTC v. Standard Oil Co.,
449 U.S. 232 (1980)……………….……………………….….…14, 15

Fourth Branch Assocs. v. FERC,
253 F.3d 741 (D.C. Cir. 2001)……………….………….……...12

**Hunter v. FERC,*
2010 U.S. App. LEXIS 26034 (D.C. Cir. Dec. 2010)………......17

Mississippi Valley Gas Co. v. FERC,
68 F.3d 503 (D.C. Cir. 1995)…………………………………15

Municipal Elec. Util. Ass'n of Ala. v. FPC,
485 F.2d 967 (D.C. Cir. 1973)………………………………..28

**Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No. 1,*
554 U.S. 527 (2008)…………………………………………..18

Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29 (1983)………………………………….18

TABLE OF AUTHORITIES

PAGES

COURT CASES: (cont.)

Nat'l Treasury Employees Union v. United States,
101 F.3d 1423 (D.C. Cir. 1996)…………………..……………..14

Northern States Power Co. v. FERC,
30 F.3d 177 (D.C. Cir. 1994)……………………………………18

**Papago Tribal Util. Auth. v. FERC,*
628 F.2d 235 (D.C. Cir. 1980)…………………………..13, 15, 23

Petal Gas Storage, L.L.C. v. FERC,
496 F.3d 695 (D.C. Cir. 2007)………..……………………….…...4

Pub. Serv. Comm. of N.Y. v. FERC,
866 F.2d 487 (D.C. Cir. 1989)……………………………………4

Pub. Util. Comm'n of Cal. v. FERC,
988 F.2d 154 (D.C. Cir. 1993)……………………..……………24

**Sithe/Independence Power Partner, L.P. v. FERC,*
165 F.3d 944 (D.C. Cir. 1999)………………………………..18

Texas v. United States,
523 U.S. 296 (1998)…………………..……..…………………...14

**Toca Producers v. FERC,*
411 F.3d 262 (D.C. Cir. 2005)………………..…………………14

Western Resources, Inc. v. FERC,
72 F.3d 147 (D.C. Cir. 1995)…………………………………....24

TABLE OF AUTHORITIES

PAGES

ADMINISTRATIVE CASES:

ANR Pipeline Co.,
128 FERC ¶ 61,128 (2009)……………………………….……..20

CenterPoint Energy Gas Transmission Co.,
127 FERC ¶ 61,096 (2009)………………………………20, 26, 27

Chandeleur Pipe Line Co.,
117 FERC ¶ 61,250 (2006)……………..…..………………..20, 22

Columbia Gas Transmission, LLC,
129 FERC ¶ 61,037 (2009)………………………………………24

Columbia Gulf Transmission Co.,
123 FERC ¶ 61,216 (2008)………………………………………20

Sea Robin Pipeline Company, LLC
128 FERC ¶ 61,286 (2009)……………………………….……3

130 FERC ¶ 61,191 (2010)……………………………….……3

133 FERC ¶ 63,009 (2010)……………………………….…...12

Tarpon Transmission Co.,
58 FERC ¶ 61,354 (1992)………………………………………..24

TABLE OF AUTHORITIES

PAGES

STATUTES:

Natural Gas Act

Section 1, 15 U.S.C. § 717(b)……………………………………………4

Section 4, 15 U.S.C. § 717c………...............2, 3, 4, 5, 7, 8, 9, 10, 11, 15, 19, 20, 21, 22, 27

Section 4, 15 U.S.C. § 717c(c)……………………………………..4

Section 4, 15 U.S.C. § 717c(e)……………………………………..4

Section 5, 15 U.S.C. § 717d………………………..……………5

Section 19, 15 U.S.C. § 717r……………………………………...19

REGULATIONS:

18 C.F.R. § 154.403…………………………………….…….…….5, 6, 25

18 C.F.R. § 154.403(a)……….……………………………….………..5

18 C.F.R. § 154.403(d)……….……………………………….………..5

18 C.F.R. § 154.403(d)(4)….…….…………………………….….…....28

18 C.F.R. § 385.711……………….……………………………….………12

GLOSSARY

Term	Definition
Br.	Initial brief of Petitioners/Shippers
Commission or FERC	Federal Energy Regulatory Commission
Hurricane Surcharge	Rate mechanism to record and recover hurricane-related expenses not recovered from third parties or insurance proceeds
JA	Joint Appendix
NGA	Natural Gas Act
R.	Record
Rehearing Order	*Sea Robin Pipeline Company, LLC*, 130 FERC ¶ 61,191 (2010), JA 19
Sea Robin	Sea Robin Pipeline Company
Shippers	Petitioners ExxonMobil Gas & Power Marketing Company, a Division of Exxon Mobil Corporation, and Hess Corporation
Tariff Order	*Sea Robin Pipeline Company, LLC*, 128 FERC ¶ 61,286 (2009), JA 1

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

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No. 10-1098

EXXONMOBIL GAS & POWER MARKETING COMPANY, *ET AL.*, PETITIONERS,

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

STATEMENT OF THE ISSUES

1. Whether the petition for review filed by ExxonMobil Gas & Power Marketing Company, a Division of Exxon Mobil Corporation, and Hess Corporation (collectively "Shippers") should be dismissed for lack of jurisdiction, as it seeks review of non-final agency orders that are not ripe for appellate review.

2. Assuming jurisdiction, whether the Federal Energy Regulatory Commission ("FERC" or "Commission") reasonably accepted and suspended,

subject to refund and the outcome of a hearing, proposed tariff sheets filed by Sea Robin Pipeline Company ("Sea Robin"), a natural gas pipeline regulated by the Commission, to recover hurricane-related costs through a rate surcharge mechanism.

STATUTES AND REGULATIONS

The relevant statutes and regulations are contained in the Addendum to this brief.

COUNTERSTATEMENT OF JURISDICTION

As explained further *infra* in Part I of the Argument, this appeal is not ripe for immediate review. The orders underlying Shippers' appeal accepted and suspended, subject to refund, proposed tariff sheets submitted pursuant to Section 4 of the Natural Gas Act ("NGA"), 15 U.S.C. § 717c, and established a hearing. The hearing process concluded in December 2010 with the issuance of an initial decision from an Administrative Law Judge. The matter is now before the Commission, which will decide whether to adopt, reject, or modify the initial decision. The ongoing agency proceedings thus render the orders on review insufficiently final.

INTRODUCTION

In this appeal, certain shippers of natural gas on Sea Robin's pipeline challenge interlocutory orders issued by the Commission accepting and

suspending, subject to refund, proposed tariff sheets submitted by Sea Robin pursuant to NGA Section 4. The orders allowed Sea Robin, which transports natural gas supplies from various points offshore Louisiana to its onshore terminus and other connecting pipelines, to file to recover certain hurricane-related costs through a Hurricane Surcharge. *Sea Robin Pipeline Company, LLC*, 128 FERC ¶ 61,286 (2009), JA 1 ("Tariff Order"), *on reh'g*, 130 FERC ¶ 61,191 (2010), JA 19 ("Rehearing Order").[1] The orders also established a hearing to address the recovery of specific costs through, and the precise method of calculating, the Surcharge. That proceeding is currently ongoing before the Commission.

Shippers argue that Sea Robin's proposed Hurricane Surcharge should have been summarily rejected. The Commission explained that it would allow for the consideration of the Hurricane Surcharge even though it was submitted alone, not as part of a general NGA Section 4 rate case. The Commission held that allowing such a stand-alone filing is consistent with the NGA, as well as current Commission policy. In addition, the Commission concluded that the Hurricane Surcharge did not violate the rule against retroactive ratemaking to the extent the costs recovered were incurred to provide current or future, rather than past, service.

[1] "P" refers to the internal paragraph number within a FERC order. "R" refers to the item number in the certified index to the record. "Br." refers to Petitioners' initial brief, and "JA" refers to the joint appendix.

Whether the Surcharge reflects costs incurred to repair the Sea Robin system and allow the pipeline to provide current or future service was an issue set for hearing.

STATEMENT OF FACTS

I. STATUTORY AND REGULATORY BACKGROUND

The Natural Gas Act grants the Commission jurisdiction over the transportation and wholesale sale of natural gas in interstate commerce. 15 U.S.C. § 717(b). The Act charges the Commission with the duty "to ensure 'just and reasonable' rates in the natural gas industry." *Petal Gas Storage, L.L.C. v. FERC*, 496 F.3d 695, 698 (D.C. Cir. 2007). In order to permit the Commission to fulfill this obligation, each interstate pipeline must file "schedules" setting forth "all rates and charges for any [jurisdictional] transportation or sale," along with all "practices and regulations affecting such rates and charges." 15 U.S.C. § 717c(c).

The pipeline may not change the rates, terms, and conditions of FERC-jurisdictional service without the Commission's review and approval. *See, e.g., Pub. Serv. Comm. of N.Y. v. FERC*, 866 F.2d 487, 488 (D.C. Cir. 1989) ("Under § 4, 15 U.S.C. § 717c, a company may file rate changes, but these are subject to Commission review to determine whether they are 'just and reasonable.'").

NGA Section 4 authorizes the Commission to establish a hearing concerning the lawfulness of such rates. *Id.* § 717c(e). Section 4 provides further that the Commission may suspend the effectiveness of the new rates pending the outcome

of the hearing for a maximum period of five months, and that the pipeline has the burden of proving the lawfulness of any increased rate. *Id.*

Section 5 of the NGA, 15 U.S.C. § 717d, provides that when the Commission, after a hearing on its own initiative or a third-party complaint, determines that an existing rate is unjust, unreasonable, or unduly discriminatory or preferential, the Commission must determine a new just and reasonable rate. In proceedings under Section 5, the Commission or the complainant has the burden of proving that the existing rate is unjust or unreasonable. *Am. Gas Ass'n v. FERC*, 593 F.3d 14, 16 (D.C. Cir. 2010) (under Section 5, "FERC or the complaining customer has the burden of showing the existing rate or practice is unjust or unreasonable and that the rate proposed is just and reasonable").

Part 154 of the Commission's regulations governs rate schedules and tariffs filed pursuant to NGA Section 4. 18 C.F.R. § 154.403 concerns periodic rate adjustments, also known as "trackers," described as "the passthrough, on a periodic basis, of a single cost item or revenue item for which passthrough is not regulated under another section of this subpart . . . ." *Id.* § 154.403(a). The Commission may permit an exception to the general rule against including costs that predate the effectiveness of the proposed surcharge mechanism. *Id.* § 154.403(d).

II. THE CHALLENGED ORDERS

A. The Tariff Order

On August 31, 2009, pursuant to 18 C.F.R. § 154.403, Sea Robin filed revised tariff sheets to establish a mechanism to record and recover hurricane-related expenses not recovered from insurance proceeds or from third parties ("Hurricane Surcharge"). R. 1, JA 28. Sea Robin, which transports natural gas from the Outer Continental Shelf in the Gulf of Mexico to onshore facilities, stated that in September 2008, after its recent rate case settlement, Hurricane Ike caused considerable damage to Sea Robin's offshore pipeline infrastructure. *Id.* at 2-3, JA 29-30. Sea Robin further stated that it could not accurately predict the timing or frequency of hurricanes or the cost of damage repair and facility replacement, and that such volatility in costs is more appropriately managed through a surcharge mechanism than through adjustment of base tariff rates. *Id*. at 5, JA 32. Accordingly, consistent with other recent Commission rulings, Sea Robin proposed to establish a volumetric surcharge to recover actual costs incurred and to provide Sea Robin with the revenue certainty needed to rebuild and repair its pipeline facilities in the event of significant damage from any significant hurricane or tropical storm (named by the U.S. National Oceanic and Atmospheric Administration or the U.S. National Weather Service). *Id*.

Several shippers protested Sea Robin's limited rate filing. They argued that hurricane-related costs should be recovered through a general NGA Section 4 rate proceeding, where rates are designed to recover costs on the basis of projected units of service and all costs and revenues can be examined, as opposed to a limited Section 4 rate proceeding. R. 5, 6, 7, 10, JA 98, 150, 80, 159.

On September 30, 2009, the Commission issued its Tariff Order. R. 12, JA 1. The Commission accepted and suspended the proposed tariff sheets, effective March 1, 2010, subject to refund and subject to the outcome of the hearing established in the order. Consistent with current policy, the Commission found it reasonable to permit Sea Robin to recover costs related to hurricane damage through a mechanism established in a limited NGA Section 4 rate case. *Id*. P 39, JA 14-15. This finding was based on the fact that such costs are outside the pipeline's control and could not reasonably have been predicted when the pipeline filed its last general Section 4 rate case. In addition, the Commission found that Sea Robin's incurrence of such costs benefits its customers by allowing it to resume full service as quickly as possible. *Id*.

The Commission further found that the cases relied upon by the protestors were distinguishable. *Id.* PP 40-42, JA 15. In addition, the Commission disagreed with the protestors that the Hurricane Surcharge violates the filed rate doctrine and

the rule against retroactive ratemaking by including costs incurred prior to Sea Robin's filing. *Id.* P 43, JA 16.

The Commission found, however, that Sea Robin's filing raised issues that warranted further investigation. *Id.* P 44, JA 16. Accordingly, the Commission established a hearing to explore the following issues: the proper design of the surcharge and the reasonableness of the costs initially included therein; the types of existing and future hurricane-related costs which should be eligible for inclusion in the surcharge (e.g., capital costs, depreciation, damage prevention costs, carrying costs); the throughput to be used to calculate the surcharge; the role of insurance; and application of the surcharge with respect to discount and negotiated rate agreements. *Id.* Shippers filed a timely joint request for rehearing. R. 17, JA 184.

B. The Rehearing Order

On March 18, 2010, the Commission issued its Rehearing Order. R. 31, JA 19. The Commission determined that nothing in NGA Section 4 prohibits the Commission from allowing a pipeline to make a limited Section 4 rate filing to recover a particular type of cost in appropriate circumstances. Rehearing Order P 11, JA 22. The Commission's general policy is to require pipelines seeking to increase their rates to file a general Section 4 rate case in which a pipeline's entire cost of service can be considered and to take into account any offsetting cost of service decreases. Nevertheless, current Commission policy permits pipelines to

establish a surcharge via a limited Section 4 rate filing to recover extraordinary, one-time losses resulting from events outside the pipeline's control, including hurricane-related expenses to place a pipeline system back in service. *Id.*

Sea Robin's proposal was designed to recover costs incurred to place its system back in service as a result of Hurricane Ike and other, future storms. *Id.* P 12, JA 23. The Commission found that such costs are extraordinary, outside the pipeline's control, and unpredictable. *Id.* Sea Robin's incurrence of this type of costs benefits its customers by allowing it to resume service as quickly as possible. *Id.* Sea Robin's customers also benefit from advance notice and additional certainty of a tariff mechanism designed to recover hurricane-related costs. *Id.* PP 13, 21, JA 23, 26-27.

The Commission continued to disagree with the assertion that the Hurricane Surcharge necessarily violates the filed rate doctrine and the rule against retroactive ratemaking because it includes costs incurred prior to Sea Robin's filing. *Id.* P 14, JA 23-24. To the extent Sea Robin incurs repair costs to provide future service, those costs may be treated as current costs because the pipeline will be using the repaired facilities to provide current and future service. *Id.* Whether the costs Sea Robin proposed to include in the Hurricane Surcharge were, in fact, incurred to provide future service is a material issue of fact that is more appropriately addressed in the hearing established in the Tariff Order. *Id.*

Similarly, the particular costs Sea Robin proposed to include in the Hurricane Surcharge, and their consistency with the Commission's surcharge regulations and policy, are matters for hearing and further consideration. *Id.* P 20, JA 26.

SUMMARY OF ARGUMENT

1. Appellate review is premature at this time. The challenged orders represent a preliminary disposition of Sea Robin's rate filing pursuant to NGA Section 4. Such preliminary dispositions of rate filings are not final decisions on the reasonableness of proposed rates. The orders accepted and suspended, subject to refund, Sea Robin's proposed Hurricane Surcharge to recover hurricane-related costs incurred to place its pipeline system back in service, and established a hearing to consider the design of the surcharge and the types of existing and future hurricane-related costs eligible for recovery through the surcharge. That hearing has concluded and the Administrative Law Judge has issued an Initial Decision. The Commission must now review that decision and affirm, reverse or modify it.

Shippers are mistaken in arguing that the issues on appeal are entirely different from the issues still before the Commission. Even if the issues were different, there still would be no basis for interlocutory review of non-final orders. Shippers, if they remain aggrieved, can raise all their issues at the conclusion of the administrative proceeding. Because Shippers are protected by the possibility of refunds once the proceeding concludes, they suffer no harm from delayed judicial

review of the issues other than the time and expense of continued litigation – unremarkable grounds, hardly justifying judicial intrusion into the ongoing administrative proceeding.

2. Assuming jurisdiction, the Commission reasonably permitted Sea Robin to file to recover hurricane-related costs through a surcharge mechanism outside of a general NGA Section 4 rate case. To the extent Sea Robin proposed to recover past costs incurred to provide future service, the Hurricane Surcharge did not violate the rule against retroactive ratemaking. Whether Sea Robin actually incurred hurricane-related repair costs to provide future service is an issue for hearing and further agency consideration. In giving Sea Robin the opportunity to justify the particular costs it seeks to recover through the surcharge mechanism, the Commission acted entirely in accord with the rate filing sections of the Natural Gas Act and current Commission policy allowing pipelines to recover hurricane-related costs through a limited Section 4 rate filing. In addition, the Commission properly exercised its discretion in the rate tracker regulations to permit Sea Robin to include both previously-incurred and prospective hurricane-related costs.

ARGUMENT

I. THE COURT LACKS JURISDICTION TO REVIEW THE CHALLENGED ORDERS.

On July 6, 2010, the Commission filed a motion to dismiss Shippers' petition for lack of jurisdiction or, in the alternative, to hold the petition in

abeyance until completion of the ongoing agency proceeding. The Court issued an order on October 5, 2010, referring the motion to the merits panel to which the petition is assigned and directing the parties to address in their briefs the issues presented in the motion.

A. The Challenged Orders Are Interlocutory and Non-Final.

As asserted previously in the Commission's motion, the orders challenged in Shippers' petition for review are not final for purposes of judicial review. The orders set for hearing certain issues relating to the recovery by Sea Robin of hurricane-related costs through a surcharge mechanism. That hearing has been completed and the Administrative Law Judge issued an initial decision in December 2010. *See Sea Robin Pipeline Co.*, 133 FERC ¶ 63,009 (2010) (addressing numerous issues concerning the design of the Hurricane Surcharge mechanism and the precise costs to be recovered through that mechanism). The parties, including Shippers, have submitted briefs on and opposing exceptions to the initial decision. Final resolution of those issues awaits the Commission's review of the initial decision. *See* 18 C.F.R. § 385.711 (review by Commission of briefs on and opposing exceptions to the judge's initial decision).

"A party may only petition for judicial review of a final agency action. If the agency's action is not final, [the court] cannot reach the merits of the petition." *Fourth Branch Assocs. v. FERC*, 253 F.3d 741, 746 (D.C. Cir. 2001) (citations

omitted). The Supreme Court has established a two-part test for determining what constitutes final agency action: "[f]irst, [an] action must mark the 'consummation' of the agency's decisionmaking process – it must not be of a merely tentative or interlocutory nature," and "second, [an] action must be one by which 'rights or obligations' have been determined, or from which 'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (citations omitted). The challenged orders satisfy neither condition.

As this Court has found, the "quintessential reviewable order" is a final order on the merits, made after hearing, that fixes the obligations of the parties. *Papago Tribal Util. Auth. v. FERC*, 628 F.2d 235, 240 (D.C. Cir. 1980). In contrast, orders setting matters for hearing are "undeniably interlocutory" and "decide[] nothing concerning the merits of the case." *Id.* Scheduling of a hearing "is the initiation of an administrative proceeding; judicial review properly follows the conclusion of the proceeding." *Id. See also, e.g., Canadian Ass'n of Petroleum Producers v. FERC*, 254 F.3d 289, 296 (D.C. Cir. 2001) (finding it "obvious" that order sending matter to ALJ was not final); *DRG Funding Corp. v. Sec'y of Housing & Urban Dev.*, 76 F.3d 1212, 1215 (D.C. Cir. 1996) (orders setting matters for hearing "have long been considered nonfinal"); *Cities of Anaheim v. FERC*, 723 F.2d 656, 661 (9th Cir. 1984) (preliminary rate filing dispositions, including denials of summary rejection, are not reviewable).

Similarly, here the challenged orders, which accepted and suspended Sea Robin's rate filing, subject to refund, and established a hearing on cost recovery topics, are insufficiently final for immediate judicial review.

This Court and others invoke the doctrines of ripeness and finality to avoid "piecemeal review which at the least is inefficient and upon completion might prove to have been unnecessary." *FTC v. Standard Oil Co.*, 449 U.S. 232, 242 (1980); *accord Toca Producers v. FERC*, 411 F.3d 262, 266 (D.C. Cir. 2005) (deferring judicial review until conclusion of agency proceedings could avoid "piecemeal, duplicative, tactical and unnecessary appeal[s]") (citation and internal quotation marks omitted); *see also Nat'l Treasury Employees Union v. United States*, 101 F.3d 1423, 1431 (D.C. Cir. 1996) (noting "the usually unspoken element of the rationale underlying the ripeness doctrine: If we do not decide it now, we may never need to."). Thus, even where a purely legal issue is presented, this Court has nonetheless found claims unripe where a petitioner's claim rests upon events "that may not occur as anticipated, or indeed may not occur at all." *CTIA – The Wireless Ass'n v. FCC*, 530 F.3d 984, 987 (D.C. Cir. 2008) (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998)).

The ripeness doctrine also is intended "to protect the agencies from judicial interference" in administrative decisionmaking. *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967). Where, as here, the agency proceedings are still ongoing, the

effect of immediate judicial review "is likely to be interference with the proper functioning of the agency and a burden for the courts." *Standard Oil*, 449 U.S. at 242. *See also Mississippi Valley Gas Co. v. FERC*, 68 F.3d 503, 509 (D.C. Cir. 1995) (dismissing challenge to FERC ratemaking policy as unripe and allowing later challenge as applied to specific rates when ratemaking proceeding finalized).

B. No Legitimate Reason Exists Here For Immediate Review.

Shippers claim that the challenged orders are ripe for judicial review because they (1) have current legal and practical effect; and (2) are definitive and discrete from the issues set for hearing. Br. at 41-46. Both claims are without merit.

First, the fact that Sea Robin is currently imposing the Hurricane Surcharge on its shippers does not render this appeal ripe for review. The Hurricane Surcharge does not differ in this respect from any other proposed rate increase filed pursuant to NGA Section 4 that is allowed to go into effect by the Commission subject to refund pending the outcome of a hearing. *See Papago Tribal Util. Auth.*, 628 F.2d at 241 ("Congress devised the suspension and refund provisions [of the statute] to protect . . . customers from the interlocutory consequences of an unjust or unreasonable rate increase, and this court has neither reason nor authority to augment those protections by holding that FERC's order accepting the rate filing is reviewable at this time."); *Cities of Anaheim*, 723 F.2d at 661 (judicial review of preliminary rate filing disposition denied where "customers are protected by the

right to a refund with interest"). *See also* Tariff Order P 38 and ordering para. (A) (surcharge goes into effect, after period of suspension, subject to refund and the outcome of the hearing), JA 14, 17.

Nor does the time and expense of continued administrative litigation justify immediate judicial review. *See, e.g., Aluminum Co. of Am. v. United States*, 790 F.2d 938, 941 (D.C. Cir. 1986) ("It is firmly established that agency action is not final merely because it has the effect of requiring a party to participate in an agency proceeding.") Shippers can raise all their objections upon completion of the agency proceeding; they have no basis to insist upon judicial review now.

Second, Shippers' claim that the issues in this appeal are separate and discrete from the issues pending before the Commission is only partially correct. The Commission did not set for hearing the issues of whether Sea Robin generally may file to recover hurricane-related costs through a surcharge established in a limited Section 4 rate filing or whether such a surcharge necessarily violates the rule against retroactive ratemaking. However, the Commission did establish a hearing to determine whether the specific costs Sea Robin proposed to include in the surcharge were, in fact, incurred to provide future service and thus do not violate the rule against retroactive ratemaking. Rehearing Order P 14, JA 23-24. In addition, the Commission set for hearing whether, and to what extent, Sea Robin should be allowed to include any particular hurricane-related costs, including

capital costs, in the Hurricane Surcharge. *Id*. P 20, JA 26. This issue is identical to Shippers' claim in this appeal that the surcharge is inconsistent with Commission policy and its regulations limiting the use of a surcharge to a single cost item. Br. at 27-30, 37.

Moreover, even assuming absolute segmentation of issues, that Shippers may wish to pursue on judicial review particular issues that are different from related issues they are litigating before the agency does not rehabilitate their petition; finality in this Court is party-based, not issue-based. *See Bellsouth Corp. v. FCC*, 17 F.3d 1487, 1489 (D.C. Cir. 1994) ("a party that stays before the agency" to litigate issues arising from an order "cannot at the same time appear before a court to seek review of that same order, any more than the party could literally be in two places at the same time. Or from another perspective, an agency action cannot be considered nonfinal for one purpose and final for another."). That Shippers claim that Sea Robin did not have the right to file in the first instance, and that the Commission should not have set any issues for hearing, is of no matter; even interlocutory objections "to the agency's jurisdiction have long been considered nonfinal." *DRG Funding Corp.*, 76 F.3d at 1215; *see also Hunter v. FERC*, 2010 U.S. App. LEXIS 26,034 (D.C. Cir. Dec. 22, 2010) (unpublished) (appeal of FERC order subjecting petitioner to a hearing dismissed as non-final,

despite objection to agency's authority to initiate a hearing, when issues remain before the Commission on review of the ALJ's initial decision).

II. STANDARD OF REVIEW

The Court's review of FERC orders is governed by the arbitrary and capricious standard of the Administrative Procedure Act. *See, e.g.*, *Sithe/Independence Power Partner, L.P. v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999). The relevant inquiry is whether the agency has "examine[d] the relevant data and articulate[d] a rational connection between the facts found and the choice made." *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

This case involves review of Sea Robin's rates. "The statutory requirement that rates be 'just and reasonable' is obviously incapable of precise judicial definition, and [the Court] afford[s] great deference to the Commission in its rate decisions." *Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 532 (2008). "Because [i]ssues of rate design are fairly technical, and, insofar as they are not technical, involve policy judgments that lie at the core of the [agency's] regulatory mission, [the court's] review of whether a particular rate design is just and reasonable is highly deferential." *Northern States Power Co. v. FERC*, 30 F.3d 177, 180 (D.C. Cir. 1994) (internal quotation marks and citations omitted). *See also Electricity Consumers Res. Council v. FERC*, 407 F.3d 1232,

1236 (D.C. Cir. 2005) (same). The Commission's factual findings are conclusive if supported by substantial evidence. NGA § 19(b), 15 U.S.C. § 717r(b).

This case also involves interpretation of the Commission's periodic rate adjustment regulations. The Court gives substantial deference to FERC's reasonable interpretations of its own regulations. *See, e.g., City of Idaho Falls v. FERC*, 629 F.3d 222, 228 (D.C. Cir. 2011) ("[W]e owe an agency's interpretation of its own regulation substantial deference, giving the interpretation 'controlling weight' unless it is 'plainly erroneous or inconsistent with the regulation.'") (internal citations omitted).

III. ASSUMING JURISDICTION, THE COMMISSION PROPERLY ALLOWED SEA ROBIN TO FILE, SUBJECT TO HEARING AND FURTHER AGENCY CONSIDERATION, ITS PROPOSED HURRICANE SURCHARGE.

A. The Commission's Decision Was Fully Consistent With NGA Section 4 And The Commission's Policy Permitting Cost Recovery Through A Limited Rate Filing In Appropriate Circumstances.

Shippers claim that the Commission improperly permitted Sea Robin to file to increase its rates under NGA Section 4, 15 U.S.C. § 717c, without filing a complete rate case in which all of the pipeline's costs could be examined. Br. at 20-24. As the Commission found, nothing in NGA Section 4 prohibits the Commission from allowing a pipeline to make a limited Section 4 filing, in appropriate circumstances, to recover a particular type of cost. Rehearing Order

P 11, JA 22. Although the Commission's general policy is to require pipelines seeking a rate increase to file a general Section 4 rate case, there are exceptions to this policy. *Id.*

As the Commission explained, current Commission policy permits pipelines to establish a surcharge, through a limited Section 4 rate filing, to recover extraordinary, one-time losses resulting from events outside the pipeline's control. Rehearing Order P 11 & n.10, JA 22. *See ANR Pipeline Co.*, 128 FERC ¶ 61,128 (2009) (limited Section 4 filing is appropriate vehicle to recover extraordinary, hurricane-related losses); *CenterPoint Energy Gas Transmission Co.*, 127 FERC ¶ 61,096 (2009) (pipelines may establish surcharge through a limited Section 4 filing to recover costs related to damage resulting from events outside the pipeline's control, such as a hurricane); and *Columbia Gulf Transmission Co.*, 123 FERC ¶ 61,216 (2008) (where a pipeline suffers an extraordinary, one-time loss that could not reasonably have been predicted when it filed its last Section 4 rate case, it may be able to recover that cost in a separate, limited Section 4 proceeding). The Commission found particularly instructive its decision to allow a surcharge to account for special pipeline costs related to Hurricane Katrina. *See Chandeleur Pipe Line Co.*, 117 FERC ¶ 61,250 (2006) (pipeline permitted to establish surcharge through a limited Section 4 rate filing to recover expenses incurred to place system back in service after hurricane).

Here, the Commission found that hurricane-related costs of the type Sea Robin proposed to recover are, as a general matter, extraordinary and outside the pipeline's control. Tariff Order P 39, JA 14; Rehearing Order P 12, JA 23. Hurricanes, of course, repeatedly occur in the Gulf of Mexico region. It can be expected that offshore pipelines such as Sea Robin will, at times, suffer hurricane damage that requires repair. Rehearing Order PP 12, 21, JA 23, 26. Nevertheless, the impact and cost implications of any such damage at any particular time are unpredictable. *Id.* P 12, JA 23 ("While hurricanes may be expected to occur in the Gulf of Mexico at irregular intervals, no two hurricanes cause the same damage, nor is it predictable when and how often they will occur."). It is reasonable to allow Sea Robin a special rate tracker, through a limited NGA Section 4 rate filing, to recover such extraordinary costs – provided the pipeline can justify at hearing the recovery of particular types of costs. *See* Tariff Order PP 39, 44, JA 14-15, 16, Rehearing Order P 12, JA 23.

Shippers do not dispute the Commission's factual findings on the extraordinary nature of hurricane-related costs. Instead, they claim generally that the Commission's action undermines the NGA's purpose of protecting consumers by permitting the recovery of such costs through a limited Section 4 proceeding without review of the cost of service underlying Sea Robin's general rates. Br. at 24. But there is no such problem here. Shippers and other Sea Robin customers

benefit when the pipeline makes necessary repairs and resumes service as quickly as possible following a catastrophic event. Tariff Order P 39, JA 14; Rehearing Order P 12, JA 23; *see also* Tariff Order P 41, JA 15; Rehearing Order P 21, JA 26-27 (shippers benefit from notice of how Sea Robin intends to recover hurricane-related repair costs before next general rate case). To the extent Shippers believe they do not benefit from particular costs otherwise recovered through the Hurricane Surcharge, they have the ability to challenge particular cost items at hearing. And if any of their challenges are successful following hearing and Commission review, Shippers are protected through the availability of refunds. Tariff Order P 38 and ordering para. (A), JA 14, 17.

Shippers respond that this case is different, and that earlier cases on hurricane cost recovery – in particular, the *Chandeleur* case – offer little support. The Commission recognized that Sea Robin's filing was different from *Chandeleur*, to the extent it sought the recovery of both past hurricane-related costs and future costs. Tariff Order P 41, JA 15; Rehearing Order P 13, JA 23. But the Commission did not find this difference meaningful enough to, as Shippers requested, summarily reject Sea Robin's filing. Instead, the Commission found it appropriate to set the matter for hearing and to give Sea Robin the opportunity to justify recovery of particular cost items before its next general Section 4 rate case. Tariff Order PP 41, 44, JA 15, 16, Rehearing Order PP 13, 20, JA 23, 26.

In these circumstances, the Court should decline the invitation to review the Commission's exercise of discretion to consider further, rather than reject as defective on its face, Sea Robin's filing. *See Delmarva Power & Light Co. v. FERC*, 671 F.2d 587, 594 (D.C. Cir. 1982), quoting *Papago Tribal Util. Auth.*, 628 F.2d at 242 ("The agency's choice of procedure – whether to dispose of a case summarily or to schedule a hearing – is not a proper concern of the courts in the absence of substantial prejudice to a party.").

B. The Commission's Decision Did Not Violate The Rule Against Retroactive Ratemaking.

Before the agency, Shippers argued that the filed rate doctrine and the rule against retroactive ratemaking bar the Commission's consideration of Sea Robin's filing to the extent it seeks recovery of hurricane-related costs incurred prior to filing. *See* Tariff Order P 43, JA 16; Rehearing Order P 14, JA 23-24. On appeal, Shippers have dropped the filed rate doctrine argument but persist in their retroactive ratemaking objection. Br. at 25-27. This objection remains without merit.

Under the rule against retroactive ratemaking, the Commission is prohibited from adjusting current rates to make up for previous overcollections or undercollections of costs in prior periods. *E.g.*, *Consol. Edison Co. of N.Y. v. FERC*, 347 F.3d 964, 969 (D.C. Cir. 2003). Here, the Commission found that the Hurricane Surcharge did not necessarily violate the rule against retroactive

ratemaking, to the extent Sea Robin is recovering past costs incurred to provide current and future service. The Commission explained that such costs may be treated as current costs because the pipeline will be using the repaired facilities to provide current and future service, to the benefit of Shippers and other Sea Robin customers. Tariff Order P 43 & n.27, JA 16; Rehearing Order P 14 & n.13, JA 23-24.

In support of its finding, the Commission cited two decisions of this Court, *Pub. Util. Comm'n of Cal. v. FERC*, 988 F.2d 154, 160-61 (D.C. Cir. 1993), and *Western Resources, Inc. v. FERC*, 72 F.3d 147, 152 (D.C. Cir. 1995). In both cases, the Commission approved the recovery of take-or-pay settlement costs incurred by pipelines as a result of the transition to open access transportation. Various shippers argued that, because the costs accrued before the Commission's approval, the orders violated the rule against retroactive ratemaking. The Court affirmed as reasonable the Commission's treatment of such costs as current, as they represented costs of making the transition to open access transportation, which benefitted current shippers. *See also Columbia Gas Transmission, LLC*, 129 FERC ¶ 61,037 at P 27 & n.23 (2009) (costs of repairing damage to facilities caused by a hurricane may be treated as current costs, because the pipeline will be using the repaired facilities to provide current and future service); *Tarpon Transmission Co.*, 58 FERC ¶ 61,354 at 62,182-83 (1992) (pipeline allowed to

recover previously incurred litigation expenses that related to future services, since the expenses were incurred in litigating the extent to which a particular tariff provision would govern future rates).

The Commission further stated that whether the hurricane-related costs proposed by Sea Robin represent, in fact, past costs incurred to provide future service is a material fact that is more appropriately addressed at hearing. Rehearing Order P 14, JA 24. The Commission is now considering briefs filed in response to the Administrative Law Judge's December 13, 2010 initial decision, and Shippers await a final agency decision, on this and other cost recovery issues.

C. The Commission's Decision Was Fully Consistent With Its Periodic Rate Adjustment Regulations.

Finally, Shippers persist in arguing that the challenged orders were inconsistent with the Commission's periodic rate adjustment regulations. *See* 18 C.F.R. § 154.403. Shippers are incorrect.

Section 154.403 applies to "the passthrough, on a periodic basis, of a single cost item or revenue item for which passthrough is not regulated under another section of this subpart . . . ." (It also applies to "revisions on a periodic basis of a gas reimbursement percentage," which are not at issue here.) Shippers claim that the Hurricane Surcharge is not limited to "a single cost item or revenue item," because Sea Robin filed to recover both capital costs and operation and maintenance expenses. Br. at 27. In addition, Shippers assert that the periodic rate

adjustment regulations are not designed for the recovery of costs, such as hurricane-related costs, that reflect, by their nature a "rare, catastrophic, and non-recurring event," *Id*. at 29 (citing *CenterPoint Energy Gas Transmission Co.*, 127 FERC ¶ 61,096 at P 23 (2009)). Shippers also argue that the periodic rate adjustment regulations prohibit the recovery of costs incurred before the tracker has become effective. Br. at 30-33.

Shippers ignore the fact that the Commission set for hearing, among other issues, the particular types of hurricane-related costs that are eligible for recovery through the Hurricane Surcharge, including capital costs. Tariff Order P 44, JA 16; Rehearing Order P 20, JA 26. To the extent Sea Robin initially included certain costs in the surcharge that later are found to be ineligible, following the hearing, the Commission accepted Sea Robin's proposed surcharge subject to refund. Thus, it is premature for Shippers to raise this issue now. In addition, the Commission reasonably found that the costs to be included in the surcharge are limited to costs incurred as a result of a hurricane and, in that sense, "may be treated as a single cost item." Rehearing Order P 20, JA 26.

Moreover, the Commission disagreed that hurricanes are non-recurring events. *Id*. P 21, JA 26. The Commission reasonably found that, although unpredictable, hurricanes do repeatedly occur in the Gulf of Mexico area and that offshore pipelines, such as Sea Robin, in that area will likely suffer hurricane

damage at recurring, if irregular, levels. *Id*. In addition, Shippers' reliance on *CenterPoint* is misplaced. As the Commission explained, in that proceeding, the pipeline made a limited Section 4 rate filing to recover through a surcharge natural gas losses associated with a rupture of the pipeline's line caused by corrosion. Tariff Order P 40, JA 15; Rehearing Order PP 22-23, JA 27. The Commission held that, since the pipeline failure causing the loss was within CenterPoint's control, the pipeline could not recover the gas loss either in a limited NGA § 4 rate filing to recover a one-time extraordinary loss or as part of the pipeline's fuel cost tracker. *See CenterPoint*, 127 FERC ¶ 61,096 at PP 22-23.

The Commission distinguished CenterPoint's proposal from *Chandeleur*, where the costs incurred as a result of hurricane damage were outside the pipeline's control. *Id*. Here, the Commission reasonably concluded that, having found that pipelines may seek to recover costs associated with hurricane-related damage in a limited NGA Section 4 rate filing and that offshore pipelines may suffer such damage on a recurring basis, a pipeline may include in its tariff a tracking mechanism to recover such costs. Rehearing Order P 23, JA 27. *See also Colorado Interstate Gas Co. v. FERC*, 599 F.3d 698 (D.C. Cir. 2010) (affirming the Commission's conclusion that the non-recurring costs of natural gas lost because of a storage facility leak are not recoverable in a fuel tracking mechanism).

Finally, the periodic rate adjustment regulations expressly allow the Commission to make exceptions to the general rule that a pipeline may not recover costs that pre-date the surcharge mechanism. *See* 18 C.F.R. § 154.403(d)(4) (pipelines may not recover such costs "unless permitted or required to do so by the Commission"). Here, the Commission reasonably exercised its discretion to permit Sea Robin to include previously incurred costs from past hurricanes. The Commission explained that, to the extent Sea Robin is using the repaired facilities to provide current and future service, the hurricane-related costs, as is true of all pipeline investments in used and useful facilities, would be recoverable from customers taking current and future service over such facilities. Tariff Order P 43, JA 16; Rehearing Order PP 18-19, JA 25-26. *See also Municipal Elec. Util. Ass'n of Ala. v. FPC*, 485 F.2d 967, 973 (D.C. Cir. 1973) (whether discretion reserved to agency under regulation is "soundly exercised will, of course, depend on the circumstances of the case" and is subject to abuse of discretion standard of review).

CONCLUSION

For the reasons stated, the petition for review of non-final orders should be dismissed for lack of jurisdiction. In the event the Court proceeds to the merits, the petition for review should be denied and the Commission's orders should be affirmed in all respects.

Respectfully submitted,

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ADDENDUM

STATUTES

AND

REGULATIONS

ADDENDUM

PAGE

STATUTES:

Natural Gas Act

Section 1, 15 U.S.C. § 717(b)…………………………. A1

Section 4, 15 U.S.C. § 717c…………………………… A2

Section 4, 15 U.S.C. § 717c(c)………………………… A2

Section 4, 15 U.S.C. § 717c(e)………………………… A2

Section 5, 15 U.S.C. § 717d………………………….... A3-A4

Section 19, 15 U.S.C. § 717r………………………….. A5-A7

REGULATIONS:

18 C.F.R. § 154.403…………………………….………. A8

18 C.F.R. § 154.403(a)……………………………………….. A8

18 C.F.R. § 154.403(d)……………………………………….. A9

18 C.F.R. § 154.403(d)(4)….………………………………… A9-A10

18 C.F.R. § 385.711………………………………………….. A11-A12

§ 715m. Cooperation between Secretary of the Interior and Federal and State authorities

The Secretary of the Interior, in carrying out this chapter, is authorized to cooperate with Federal and State authorities.

(June 25, 1946, ch. 472, § 3, 60 Stat. 307.)

CODIFICATION

Section was not enacted as a part act Feb. 22, 1935, which comprises this chapter.

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.
717*l*. Complaints.
717m. Investigations by Commission.
717n. Process coordination; hearings; rules of procedure.
717*o*. 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 natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

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

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

(d) Vehicular natural gas jurisdiction

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

(1) not otherwise a natural-gas company; or

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

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

AMENDMENTS

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

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

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

TERMINATION OF FEDERAL POWER COMMISSION; TRANSFER OF FUNCTIONS

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

order authorizing an applicant to site, construct, expand, or operate an LNG terminal, the Commission shall review and respond specifically to the issues raised by the State agency described in subsection (b) of this section in the advisory report. This subsection shall apply to any application filed after August 8, 2005. A State agency has 30 days after August 8, 2005 to file an advisory report related to any applications pending at the Commission as of August 8, 2005.

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

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

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

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

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a

proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

(f) Storage services

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

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

(B) customers are adequately protected.

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

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

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

REFERENCES IN TEXT

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

AMENDMENTS

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

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

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

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

§ 717c–1. Prohibition on market manipulation

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

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

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

(a) Decreases in rates

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

(b) Costs of production and transportation

The Commission upon its own motion, or upon the request of any State commission, whenever

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

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

§ 717e. Ascertainment of cost of property

(a) Cost of property

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

(b) Inventory of property; statements of costs

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

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

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

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

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

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

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

(c) Certificate of public convenience and necessity

(1)(A) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however*, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

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

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

(A) natural gas sold by the producer to such person; and

(B) natural gas produced by such person.

(d) Application for certificate of public convenience and necessity

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

(e) Granting of certificate of public convenience and necessity

Except in the cases governed by the provisos contained in subsection (c)(1) of this section, a

proceedings shall be conducted in such manner as the Commission shall by regulations prescribe. The Board shall be appointed by the Commission from persons nominated by the State commission of each State affected, or by the Governor of such State if there is no State commission. Each State affected shall be entitled to the same number of representatives on the board unless the nominating power of such State waives such right. The Commission shall have discretion to reject the nominee from any State, but shall thereupon invite a new nomination from that State. The members of a board shall receive such allowances for expenses as the Commission shall provide. The Commission may, when in its discretion sufficient reason exists therefor, revoke any reference to such a board.

(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.)

REFERENCES IN TEXT

The civil-service laws, referred to in text, are set forth in Title 5, Government Organization and Employees. See, particularly, section 3301 et seq. of Title 5.

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) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Review of Commission order

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission

in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which is supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(c) Stay of Commission order

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

(d) Judicial review

(1) In general

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

(2) Agency delay

The United States Court of Appeals for the District of Columbia shall have original and exclusive jurisdiction over any civil action for the review of an alleged failure to act by a Federal agency (other than the Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit required under Federal law, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.), for a facility subject to section 717b of this title or section 717f of this title. The failure of an agency to take action on a permit required under Federal law, other than the Coastal Zone Management Act of 1972, in accordance with the Commission schedule established pursuant to section 717n(c) of this title shall be considered inconsistent with Federal law for the purposes of paragraph (3).

(3) Court action

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

(4) Commission action

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

(5) Expedited review

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

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

REFERENCES IN TEXT

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

CODIFICATION

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

AMENDMENTS

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

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

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

CHANGE OF NAME

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

§ 717s. Enforcement of chapter

(a) Action in district court for injunction

Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper district court of the United States, or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this chapter or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices or concerning apparent violations of the Federal antitrust laws to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings.

(b) Mandamus

Upon application of the Commission the district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction to issue writs of mandamus commanding any person to comply with the provisions of this chapter or any rule, regulation, or order of the Commission thereunder.

(c) Employment of attorneys by Commission

The Commission may employ such attorneys as it finds necessary for proper legal aid and service of the Commission or its members in the conduct of their work, or for proper representation of the public interest in investigations made by it, or cases or proceedings pending before it, whether at the Commission's own instance or upon complaint, or to appear for or represent the Commission in any case in court; and the expenses of such employment shall be paid out of the appropriation for the Commission.

(d) Violation of market manipulation provisions

In any proceedings under subsection (a) of this section, the court may prohibit, conditionally or unconditionally, and permanently or for such period of time as the court determines, any individual who is engaged or has engaged in practices constituting a violation of section 717c–1 of this title (including related rules and regulations) from—

(1) acting as an officer or director of a natural gas company; or

(2) engaging in the business of—

(A) the purchasing or selling of natural gas; or

(B) the purchasing or selling of transmission services subject to the jurisdiction of the Commission.

(June 21, 1938, ch. 556, §20, 52 Stat. 832; June 25, 1948, ch. 646, §1, 62 Stat. 875, 895; Pub. L. 109–58, title III, §318, Aug. 8, 2005, 119 Stat. 693.)

CODIFICATION

The words ''the District Court of the United States for the District of Columbia'' in subsec. (a) following ''district court of the United States'' and in subsec. (b) following ''district courts of the United States'' omitted as superfluous in view of section 132(a) of Title 28, Judiciary and Judicial Procedure, which states that ''There shall be in each judicial district a district court which shall be a court of record known as the United States District Court for the district'', and section 88 of title 28 which states that ''The District of Columbia constitutes one judicial district''.

AMENDMENTS

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

§ 717t. General penalties

(a) Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this chapter required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished by a fine of not more than $1,000,000 or by imprisonment for not more than 5 years, or both.

(b) Any person who willfully and knowingly violates any rule, regulation, restriction, condition, or order made or imposed by the Commission under authority of this chapter, shall, in addition to any other penalties provided by law, be punished upon conviction thereof by a fine of not exceeding $50,000 for each and every day during which such offense occurs.

(June 21, 1938, ch. 556, §21, 52 Stat. 833; Pub. L. 109–58, title III, §314(a)(1), Aug. 8, 2005, 119 Stat. 690.)

AMENDMENTS

2005—Subsec. (a). Pub. L. 109–58, §314(a)(1)(A), substituted ''$1,000,000'' for ''$5,000'' and ''5 years'' for ''two years''.

Subsec. (b). Pub. L. 109–58, §314(a)(1)(B), substituted ''$50,000'' for ''$500''.

§ 717t–1. Civil penalty authority

(a) In general

Any person that violates this chapter, or any rule, regulation, restriction, condition, or order made or imposed by the Commission under authority of this chapter, shall be subject to a civil penalty of not more than $1,000,000 per day per violation for as long as the violation continues.

not otherwise reflect the costs of annual charges assessed by the Commission under §382.106(a) of this chapter. The applicable annual charge, required by §382.103 of this chapter, must be paid before the company applies the ACA unit charge.

(b) *Application for Rate Treatment Authorization.* A company seeking authorization to use an ACA unit charge must file with the Commission a separate ACA tariff sheet or section containing:

(1) A statement that the company is collecting an ACA per unit charge, as approved by the Commission, applicable to all the pipeline's sales and transportation rate schedules,

(2) The per unit charge of the ACA,

(3) The proposed effective date of the tariff change (30 days after the filing of the tariff sheet or section, unless a shorter period is specifically requested in a waiver petition and approved), and

(4) A statement that the pipeline will not recover any annual charges recorded in FERC Account 928 in a proceeding under subpart D of this part.

(c) Changes to the ACA unit charge must be filed annually, to reflect the annual charge unit rate authorized by the Commission each fiscal year.

[Order 582, 60 FR 52996, Oct. 11, 1995, as amended by Order 714, 73 FR 57535, Oct. 3, 2008]

§ 154.403 Periodic rate adjustments.

(a) This section applies to the passthrough, on a periodic basis, of a single cost item or revenue item for which passthrough is not regulated under another section of this subpart, and to revisions on a periodic basis of a gas reimbursement percentage.

(b) Where a pipeline recovers fuel use and unaccounted-for natural gas in kind, the fuel reimbursement percentage must be stated in the tariff either on the tariff sheet stating the currently effective rate or on a separate tariff sheet or section in such a way that it is clear what amount of natural gas must be tendered in kind for each service rendered.

(c) A natural gas company that passes through a cost or revenue item or adjusts its fuel reimbursement percentage under this section, must state within the general terms and conditions of its tariff, the methodology and timing of any adjustments. The following must be included in the general terms and conditions:

(1) A statement of the nature of the revenue or costs to be flowed through to the customer;

(2) A statement of the manner in which the cost or revenue will be collected or returned, whether through a surcharge, offset, or otherwise;

(3) A statement of which customers are recipients of the revenue credit and which rate schedules are subject to the cost or fuel reimbursement percentage;

(4) A statement of the frequency of the adjustment and the dates on which the adjustment will become effective;

(5) A step-by-step description of the manner in which the amount to be flowed through is calculated and a step-by-step description of the flowthrough mechanism, including how the costs are classified and allocated. Where the adjustment modifies a rate established under subpart D of this part, the methodology must be consistent with the methodology used in the proceeding under subpart D of this part;

(6) Where costs or revenue credits are accumulated over a past period for periodic recovery or return, the past period must be defined and the mechanism for the recovery or return must be detailed on a step-by-step basis. Where the natural gas company proposes to use a surcharge to clear an account in which the difference between costs or revenues, recovered through rates, and actual costs and revenues accumulate, a statement must be included detailing, on a step-by-step basis, the mechanism for calculating the entries to the account and for passing through the account balance.

(7) Where carrying charges are computed, the calculations must be consistent with the methodology and reporting requirements set forth in §154.501 using the carrying charge rate required by that section. A natural gas company must normalize all income tax timing differences which are the result of differences between the period in which expense or revenue enters into the determination of taxable income and the period in which the expense or revenue enters into the determination of pre-tax book income. Any balance

upon which the natural gas company calculates carrying charges must be adjusted for any recorded deferred income taxes.

(8) Where the natural gas company discounts the rate component calculated pursuant to this section, explain on a step-by-step basis how the natural gas company will adjust for rate discounts in its methodology to reflect changes in costs under this section.

(9) If the costs passed through under a mechanism approved under this section are billed by an upstream natural gas company, explain how refunds received from upstream natural gas companies will be passed through to the natural gas company's customers, including the allocation and classification of such refunds;

(10) A step-by-step explanation of the methodology used to reflect changes in the fuel reimbursement percentage, including the allocation and classification of the fuel use and unaccounted-for natural gas. Where the adjustment modifies a fuel reimbursement percentage established under subpart D of this part, the methodology must be consistent with the methodology used in the proceeding under subpart D of this part;

(11) A statement of whether the difference between quantities actually used or lost and the quantities retained from the customers for fuel use and loss will be recovered or returned in a future surcharge. Include a step-by-step explanation of the methodology used to calculate such surcharge. Any period during which these differences accumulate must be defined.

(d) *Filing requirements*. (1) Filings under this section must include:

(i) A summary statement showing the rate component added to each rate schedule with workpapers showing all mathematical calculations.

(ii) If the filing establishes a new fuel reimbursement percentage or surcharge, include computations for each fuel reimbursement or surcharge calculated, broken out by service, classification, area, zone, or other subcategory.

(iii) Workpapers showing the allocation of costs or revenue credits by rate schedule and step-by-step computations supporting the allocation, segregated into reservation and usage amounts, where appropriate.

(iv) Where the costs, revenues, rates, quantities, indices, load factors, percentages, or other numbers used in the calculations are publicly available, include references by source.

(v) Where a rate or quantity underlying the costs or revenue credits is supported by publicly available data (such as another natural gas company's tariff or EBB), the source must be referenced to allow the Commission and interested parties to review the source. If the rate or quantity does not match the rate or quantity from the source referenced, provide step-by-step instructions to tie the rate in the referenced source to the rate in the filing.

(vi) Where a number is derived from another number by applying a load factor, percentage, or other adjusting factor not referenced in paragraph (d)(1)(i) of this section, include workpapers and a narrative to explain the calculation of the adjusting factor.

(2) If the natural gas company is adjusting its rates to reflect changes in transportation and compression costs paid to others:

(i) The changes in transportation and compression costs must be based on the rate on file with the Commission. If the rate is not on file with the Commission or a discounted rate is paid, the rate reflected in the filing must be the rate the natural gas company is contractually obligated to pay;

(ii) The filing must include appropriate credits for capacity released under § 284.243 of this chapter with workpapers showing the quantity released, the revenues received from the release, the time period of the release, and the natural gas pipeline on which the release took place; and,

(iii) The filing must include a statement of the refunds received from each upstream natural gas company which are included in the rate adjustment. The statement must conform to the requirements set forth in § 154.501.

(3) If the natural gas company is reflecting changes in its fuel reimbursement percentage, the filing must include:

(i) A summary statement of actual gas inflows and outflows for each

month used to calculate the fuel reimbursement percentage or surcharge. For purposes of establishing the surcharge, the summary statement must be included for each month of the period over which the differences defined in paragraph (c) of this section accumulate.

(ii) Where the fuel reimbursement percentage is calculated based on estimated activity over a future period, the period must be defined and the estimates used in the calculation must be justified. If any of the estimates are publicly available, include a reference to the source.

(4) The natural gas company must not recover costs and is not obligated to return revenues which are applicable to the period pre-dating the effectiveness of the tariff language setting forth the periodic rate change mechanism, unless permitted or required to do so by the Commission.

[Order 582, 60 FR 52996, Oct. 11, 1995, as amended by Order 714, 73 FR 57535, Oct. 3, 2008]

Subpart F—Refunds and Reports

§ 154.501 Refunds.

(a) *Refund Obligation.* (1) Any natural gas company that collects rates or charges pursuant to this chapter must refund that portion of any increased rates or charges either found by the Commission not to be justified, or approved for refund by the Commission as part of a settlement, together with interest as required in paragraph (d) of this section. The refund plus interest must be distributed as specified in the Commission order requiring or approving the refund, or if no date is specified, within 60 days of a final order. For purposes of this paragraph, a final order is an order no longer subject to rehearing. The pipeline is not required to make any refund until it has collected the refundable money through its rates.

(2) Any natural gas company must refund to its jurisdictional customers the jurisdictional portion of any refund it receives which is required by prior Commission order to be flowed through to its jurisdictional customers or represents the refund of an amount previously included in a filing under § 154.403 and charged and collected from jurisdictional customers within thirty days of receipt or other time period established by the Commission or as established in the pipeline's tariff.

(b) *Costs of Refunding.* Any natural gas company required to make refunds pursuant to this section must bear all costs of such refunding.

(c) *Supplier Refunds.* The jurisdictional portion of supplier refunds (including interest received), applicable to periods in which a purchased gas adjustment clause was in effect, must be flowed through to the natural gas company's jurisdictional gas sales customers during that period with interest as computed in paragraph (d) of this section.

(d) *Interest on Refunds.* Interest on the refund balance must be computed from the date of collection from the customer until the date refunds are made as follows:

(1) At an average prime rate for each calendar quarter on all excessive rates or charges held (including all interest applicable to such rates and charges) on or after October 1, 1979. The applicable average prime rate for each calendar quarter must be the arithmetic mean, to the nearest one-hundredth of one percent, of the prime rate values published in the Federal Reserve Bulletin, or in the Federal Reserve's "Selected Interest Rates" (Statistical Release G, 13), for the fourth, third, and second months preceding the first month of the calendar quarter.

(2) The interest required to be paid under paragraph (d)(1) of this section must be compounded quarterly.

(3) The refund balance must be either:

(i) The revenues resulting from the collection of the portion of any increased rates or charges found by the Commission not to be justified; or

(ii) An amount agreed upon in a settlement approved by the Commission; or

(iii) The jurisdictional portion of a refund the natural gas company receives.

(e) Unless otherwise provided by the order, settlement or tariff provision requiring the refund, the natural gas company must file a report of refunds, within 30 days of the date the refund

any type of decision as provided by 5 U.S.C. 557(b), or permit waiver of the initial decision as provided by Rule 710.

§ 385.710 Waiver of the initial decision (Rule 710).

(a) *General rule.* Any participant may file a motion requesting the Commission to issue a final decision without any initial decision. If all participants join in the motion, the motion is granted, unless the Commission denies the motion within 10 days after the date of filing of the motion or, in the case of an oral motion under paragraph (c)(2) of this section, within 10 days after the motion is transmitted to the Commission. If all participants do not join in the motion, the motion is denied unless the Commission grants the motion within 30 days of filing of the motion or, in the case of an oral motion under paragraph (c)(2) of this section, within 30 days after the motion is transmitted to the Commission.

(b) *Content.* Any motion to waive the initial decision filed with the Commission must specify:

(1) Whether any participant waives any procedural right;

(2) Whether all participants concur in the request to waive the initial decision;

(3) The reasons that waiver of the initial decision is in the interest of parties and the public interest;

(4) Whether any participant desires an opportunity for filing briefs; and

(5) Whether any participant desires an opportunity for oral argument before the presiding officer, the Commission, or an individual Commissioner.

(c) *How and when made.* (1) Any written motion under this section may be filed at any time, but not later than the fifth day following the close of the hearing conducted under subpart E of this part.

(2) An oral motion under this section may be made during a hearing session, in which case the presiding officer will transmit to the Commission the relevant portions of the transcript of the hearing in which the motion was made.

(d) *Waiver by presiding officer.* A motion for waiver of the initial decision, requested for the purpose of certification of a contested settlement pursuant to Rule 602(h)(2)(iii)(A), may be filed with, and decided by, the presiding officer. If all parties join in the motion, the presiding officer will grant the motion. If not all parties join in the motion, the motion is denied unless the presiding officer grants the motion within 30 days of filing the written motion or presenting an oral motion. The contents of any motion filed under paragraph (d) of this section must comply with the requirements in paragraph (b) of this section. A motion may be oral or written, and may be made whenever appropriate for the consideration of the presiding officer.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 376, 49 FR 21705, May 23, 1984; Order 578, 60 FR 19508, Apr. 19, 1995]

§ 385.711 Exceptions and briefs on and opposing exceptions after initial decision (Rule 711).

(a) *Exceptions.* (1)(i) Any participant may file with the Commission exceptions to the initial decision in a brief on exceptions not later than 30 days after service of the initial decision.

(ii) Not later than 20 days after the latest date for filing a brief on exceptions, any participant may file a brief opposing exceptions in response to a brief on exceptions.

(iii) A participant may file, within the time set for filing briefs opposing exceptions, a brief on exceptions solely for the purpose of incorporating by reference one or more numbered exceptions contained in the brief of another participant. A brief filed under this clause need not comply with the requirements set forth in paragraph (b) of this section.

(2) A brief on exceptions or a brief opposing exceptions may not exceed 100 pages, unless the Chief Administrative Law Judge, upon motion, changes the page limitation.

(3) The Secretary may extend, on motion or upon direction of the Commission, the time limits for any brief on or opposing exceptions. No additional briefs are permitted, unless specifically ordered by the Commission.

(4) A participant may not attach to, or incorporate by reference in, any brief on exceptions or brief opposing exceptions any portion of an initial or reply brief filed in the proceeding.

(b) *Nature of briefs on exceptions and of briefs opposing exceptions.* (1) Any brief on exceptions and any brief opposing exceptions must include:

(i) If the brief exceeds 10 pages in length, a separate summary of the brief not longer than five pages; and

(ii) A presentation of the participant's position and arguments in support of that position, including references to the pages of the record or exhibits containing evidence and arguments in support of that position.

(2) Any brief on exceptions must include, in addition to matters required by paragraph (b)(1) of this section:

(i) A short statement of the case;

(ii) A list of numbered exceptions, including a specification of each error of fact or law asserted; and

(iii) A concise discussion of the policy considerations that may warrant full Commission review and opinion.

(3) A brief opposing exceptions must include, in addition to matters required by paragraph (b)(1) of this section:

(i) A list of exceptions opposed, by number; and

(ii) A rebuttal of policy considerations claimed to warrant Commission review.

(c) *Oral argument.* (1) Any participant filing a brief on exceptions or brief opposing exceptions may request, by written motion, oral argument before the Commission or an individual Commissioner.

(2) A motion under paragraph (c)(1) of this section must be filed within the time limit for filing briefs opposing exceptions.

(3) No answer may be made to a motion under paragraph (c)(1) and, to that extent, Rule 213(a)(3) is inapplicable to a motion for oral argument.

(4) A motion under paragraph (c)(1) of this section may be granted at the discretion of the Commission. If the motion is granted, any oral argument will be limited, unless otherwise specified, to matters properly raised by the briefs.

(d) *Failure to take exceptions results in waiver*—(1) *Complete waiver.* If a participant does not file a brief on exceptions within the time permitted under this section, any objection to the initial decision by the participant is waived.

(2) *Partial waiver.* If a participant does not object to a part of an initial decision in a brief on exceptions, any objections by the participant to that part of the initial decision are waived.

(3) *Effect of waiver.* Unless otherwise ordered by the Commission for good cause shown, a participant who has waived objections under paragraph (d)(1) or (d)(2) of this section to all or part of an initial decision may not raise such objections before the Commission in oral argument or on rehearing.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 375, 49 FR 21316, May 21, 1984; Order 575, 60 FR 4860, Jan. 25, 1995]

§ 385.712 Commission review of initial decisions in the absence of exceptions (Rule 712).

(a) *General rule.* If no briefs on exceptions to an initial decision are filed within the time established by rule or order under Rule 711, the Commission may, within 10 days after the expiration of such time, issue an order staying the effectiveness of the decision pending Commission review.

(b) *Briefs and argument.* When the Commission reviews a decision under this section, the Commission may require that participants file briefs or present oral arguments on any issue.

(c) *Effect of review.* After completing review under this section, the Commission will issue a decision which is final for purposes of rehearing under Rule 713.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 375, 49 FR 21316, May 21, 1984; Order 575, 60 FR 4860, Jan. 25, 1995]

§ 385.713 Request for rehearing (Rule 713).

(a) *Applicability.* (1) This section applies to any request for rehearing of a final Commission decision or other final order, if rehearing is provided for by statute, rule, or order.

(2) For the purposes of rehearing under this section, a final decision in any proceeding set for hearing under subpart E of this part includes any Commission decision:

(i) On exceptions taken by participants to an initial decision;

(ii) When the Commission presides at the reception of the evidence;

ExxonMobil Gas & Power Marketing Company, et al. v. FERC **D.C. Cir. No. 10-1098**

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i) and D.C. Cir. R. 32(a)(2)(C), I certify that the Brief of Respondent Federal Energy Regulatory Commission is proportionally spaced, has a typeface of 14 points, and contains 6,450 words, not including the tables of contents and authorities, the glossary, the certificates of counsel, and the addendum.

/s/ Kathrine L. Henry
Kathrine L. Henry
Attorney for Federal Energy
Regulatory Commission

May 5, 2011

ExxonMobil Gas & Power Marketing Company, *et al.* v. FERC
D.C. Cir. No. 10-1098

Docket No. RP09-995

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 5th day of May 2011, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system or via U.S. Mail, as indicated below:

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