

**In The United States Court Of Appeals
For The Fifth Circuit**

No. 10-60066

**TEXAS PIPELINE ASSOCIATION, *ET AL.*,
PETITIONERS,**

v.

**FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.**

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

**BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

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STATEMENT REGARDING ORAL ARGUMENT

Respondent agrees with petitioners that oral argument would be helpful to the Court's disposition of this case, considering the importance of the Commission's rule being challenged on appeal.

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the Certificate of Interested Persons contained in the brief of petitioner Texas Pipeline Association lists the person and entities described in Fifth Circuit Rule 28.2.1 that have an interest in the outcome of this case. These representations are made in order that judges of this Court may evaluate possible disqualification or recusal.

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February 1, 2011

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GLOSSARY

Commission or FERC	Federal Energy Regulatory Commission
First Proposed Rule	<i>Transparency Provisions of Section 23 of the Natural Gas Act</i> , 72 Fed. Reg. 20,791 (April 26, 2007), FERC Stats. & Regs. ¶ 32,614 (2007), JA 155
JA	Joint Appendix
NGA	Natural Gas Act
Order No. 720	<i>Pipeline Posting Requirements Under Section 23 of the Natural Gas Act</i> , Order No. 720, 73 Fed. Reg. 73,494 (Dec. 2, 2008), FERC Stats. & Regs. ¶ 31,283 (2008), JA 38
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P	Paragraph
Second Proposed Rule	<i>Transparency Provisions of Section 23 of the Natural Gas Act</i> , 73 Fed. Reg. 1116 (Jan. 7, 2008), FERC Stats. & Regs. ¶ 32,626 (2007), JA 1

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

**BRIEF OF RESPONDENT FEDERAL ENERGY
REGULATORY COMMISSION**

STATEMENT OF THE ISSUES

Following notice and comment, the Federal Energy Regulatory Commission (Commission or FERC) issued a rule (Order No. 720), promulgating regulations which, as relevant here, require major intrastate natural gas pipelines to post particular information concerning their capacity and daily scheduled flows. (The Commission's regulations refer to such intrastate pipelines as "non-interstate pipelines," to distinguish them from interstate pipelines already subject to FERC information posting requirements.)

The issues presented in these appeals challenging that rule are:

1. Whether section 23 of the Natural Gas Act (NGA), 15 U.S.C. § 717t-2,

which provides new authority for the Commission to facilitate price transparency in the interstate natural gas market, authorizes the agency to require major intrastate pipelines to disclose information relevant to the statutory purpose; and

2. Whether the Commission’s decision to require major intrastate pipelines to supply this information was a reasonable exercise of its discretion under NGA section 23, based on substantial evidence in the administrative record.

STATEMENT OF THE CASE

The Natural Gas Act has long granted the Commission regulatory authority over the transportation and sale for resale of natural gas in interstate commerce. *See* 15 U.S.C. § 717(b). This legislative delegation gives the Commission broad power to review the rates, terms and conditions of such interstate natural gas service so as to ensure that they are just and reasonable and in the public interest. 15 U.S.C. §§ 717c (pipeline rate filings), 717d (customer complaints), 717f (FERC certificates authorizing pipeline construction and service). *See also, e.g., Texas Eastern Transmission Corp. v. Federal Power Commission*, 470 F.2d 757, 760 (5th Cir. 1972) (observing that the “primary aim of the Natural Gas Act was to occupy the area where state regulatory authorities could not act so as to protect consumers against exploitation” by monopoly pipelines) (citing *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944)).

In promulgating the Energy Policy Act of 2005, Pub. L. No. 109-58, 119

Stat. 594, Congress expanded the Commission's NGA authority in certain significant respects. As relevant here, the Energy Policy Act added section 23 to the NGA, directing the Commission "to facilitate price transparency in markets for the sale or transportation of physical natural gas in interstate commerce." 15 U.S.C. § 717t-2(a)(1).

In Order No. 720, the Commission, following two rounds of notice and comment, issued a final rule pursuant to its new section 23 authority. That rule requires "major non-interstate pipelines, defined as those natural gas pipelines that deliver more than 50 million MMBtu per year, to post scheduled flow information and to post information for each receipt and delivery point with a design capacity greater than 15,000 MMBtu per day." *Pipeline Posting Requirements Under Section 23 of the Natural Gas Act*, Order No. 720 Paragraph (P) 1, 73 Fed. Reg. 73,494 (Dec. 2, 2008), FERC Stats. & Regs. ¶ 31,283 (2008), JA 38. See 18 C.F.R. §§ 284.1(d) and 284.14 (information posting requirements for major non-interstate pipelines). The Commission required major intrastate pipelines to post this information in order to better understand the operation of the interstate market, in light of the interconnected and integrated nature of the interstate and intrastate natural gas markets, and to carry out the broad consumer protection purpose of its new NGA section 23 authority.

In Order No. 720-A, the Commission essentially affirmed the final rule, but

modified it in various respects to substantially reduce the number of intrastate pipelines that must comply with these market transparency regulations. *Pipeline Posting Requirements Under Section 23 of the Natural Gas Act*, Order No. 720-A, 75 Fed. Reg. 5178 (Feb. 1, 2010), FERC Stats. & Regs. ¶ 31,302 (2010), JA 116.¹

STATEMENT OF FACTS

I. THE COMMISSION’S JURISDICTION UNDER SECTION 23 OF THE NATURAL GAS ACT

The pertinent statutory and regulatory provisions are contained in the Appendix to this brief.

The Natural Gas Act, originally enacted in 1938, was significantly amended by the Energy Policy Act of 2005. Those amendments (as well as similar amendments to the FERC-administered Federal Power Act governing wholesale electricity transactions) followed a period of historic technological and regulatory reform of FERC-regulated markets. *See Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No. 1 of Snohomish County*, 554 U.S. 527, 128 S. Ct. 2733, 2740 (2008) (noting various efforts “to break down regulatory and economic barriers that hinder a free market”); *New York v. FERC*, 535 U.S. 1, 7-8 (2002) (explaining evolution of competitive markets); *Interstate Natural Gas Ass’n of America v.*

¹The rule was further modified by Order No. 720-B, which is not on appeal here. *Pipeline Posting Requirements Under Section 23 of the Natural Gas Act*, Order No. 720-B, 75 Fed. Reg. 44,893 (July 30, 2010), FERC Stats. & Regs. ¶ 31,314 (2010).

FERC, 285 F.3d 18 (D.C. Cir. 2002) (approving the Commission’s decision to experiment with more light-handed natural gas pipeline regulation). Those amendments also followed a period of historic tumult in energy markets regulated by the Commission, marked by the California/Western energy crisis of 2000-2001, the fall of Enron in 2001, the discovery in 2002 of market manipulation activities, and the 2003 Northeastern/Midwestern blackout.

Congress responded by enacting the Energy Policy Act of 2005, giving the Commission substantial new authority to encourage and monitor competitive markets, enforce market rules, and promote necessary energy infrastructure. *See, e.g.*, 15 U.S.C. §§ 717c-1 (broad prohibition on market manipulation by any entity in connection with FERC-regulated natural gas markets), 717t-1 (enhanced civil penalty authority), and 717b(e) (giving the FERC exclusive jurisdiction over certification of liquefied natural gas projects).

In keeping with the Energy Policy Act’s directive that the Commission should seek to increase and monitor competition in the interstate natural gas market, Congress added section 23 to the NGA. This provision gives the Commission a new, though limited, regulatory tool, separate and apart from its previous NGA authority.

Section 23 directs the Commission “to facilitate price transparency in markets for the sale or transportation of physical natural gas in interstate

commerce,” in support of the public interest, interstate market integrity, fair competition and consumer protection. 15 U.S.C. § 717t-2(a)(1). To accomplish this task, section 23 authorizes the agency to “prescribe such rules” as it “determines necessary and appropriate to carry out the purposes of this section,” providing for the dissemination, “on a timely basis, of information” to the Commission, state agencies, regulated entities and the public, “about the availability and prices of natural gas sold at wholesale and in interstate commerce.” 15 U.S.C. § 717t-2(a)(2).

Pursuant to any such rules it may choose to promulgate, section 23 specifically provides that the Commission may obtain relevant information “from any market participant.” 15 U.S.C. § 717t-2(a)(3)(A). The term “any market participant” is defined neither by section 23 nor by the section of the NGA containing general definitions for the Act. *See* 15 U.S.C. §§ 717(b) (subjecting natural gas companies engaged in wholesale sales and interstate transportation to NGA regulation) and 717a(6) (defining “Natural-gas company”).

II. THE RULEMAKING IMPLEMENTING SECTION 23 OF THE NATURAL GAS ACT

A. The Commission’s Proposed Posting Regulations

Prior to the enactment of the Energy Policy Act of 2005, the Commission already had regulations in place requiring the posting of capacity and scheduled volume information by interstate pipelines, with the intention of allowing shippers

to monitor capacity availability.² See 18 C.F.R. § 284.13 (reporting requirements for interstate pipelines).

In response to the Energy Policy Act, the Commission issued a Notice of Proposed Rulemaking (First Proposed Rule) on April 19, 2007, for regulations to implement new NGA section 23. *Transparency Provisions of Section 23 of the Natural Gas Act*, 72 Fed. Reg. 20791 (April 26, 2007), FERC Stats. & Regs. ¶ 32,614 (2007). There, the Commission proposed for the first time a daily posting requirement by non-interstate pipelines of their capacity and flow volumes. First Proposed Rule, PP 1-2, JA 155. It further proposed an annual reporting requirement for certain natural gas sellers and buyers (*id.*), and requested comments about whether existing posting requirements for interstate pipelines should be amended. *Id.* P 43, JA 162.

The First Proposed Rule first addressed the issue that is the main subject of this appeal, namely whether new NGA section 23 authorizes the Commission to require non-interstate natural gas pipelines to post information about their

² *Regulation of Short-Term Natural Gas Transportation Services and Regulation of Interstate Natural Gas Transportation Services*, Order No. 637, 65 Fed. Reg. 10,156, at 10,204-05, (Feb. 25, 2000), FERC Stats. & Regs. ¶ 31,091, at 31,320-21 (2000); *order on reh'g*, Order No. 637-A, 65 Fed. Reg. 35,706 (June 5, 2000), FERC Stats. & Regs. ¶ 31,099 (2000); *order on reh'g*, Order No. 637-B, 65 Fed. Reg. 47,284 (Aug. 2, 2000), *affirmed in relevant part*, *Interstate Natural Gas Ass'n of America v. FERC*, 285 F.3d 18 (D.C. Cir. 2002), *order on remand*, 101 FERC ¶ 61,127 (2002), *order on reh'g*, 106 FERC ¶ 61,088 (2004), *aff'd sub nom. American Gas Ass'n v. FERC*, 428 F.3d 255 (D.C. Cir. 2005). The reporting requirements for interstate pipelines are codified at 18 C.F.R. § 284.13.

operations. The Commission determined that section 23 gives it this authority: “By using the term ‘any market participant,’ Congress deliberately expanded the universe subject to the Commission’s transparency authority beyond the entities subject to the Commission’s rate and certificate jurisdiction under other parts of the [NGA].” First Proposed Rule P 13, JA 158.

After extensive comment by the natural gas industry and other interested parties, the Commission issued a further Notice of Proposed Rulemaking, *Transparency Provisions of Section 23 of the Natural Gas Act*, 73 Fed. Reg. 1116 (Jan. 7, 2008), FERC Stats. & Regs. ¶ 32,626 (2008) (Second Proposed Rule). As relevant here, the Commission specifically proposed to require both interstate and “major non-interstate pipelines” to post daily information regarding their capacity, scheduled flow volumes, and actual flow volumes at major points and mainline segments. Second Proposed Rule P 3 & n.4, JA 2. This proposal, the Commission explained, would “bring the [posting] requirements for major non-interstate pipelines into alignment with the existing and proposed posting requirements for interstate pipelines.” *Id.* P 4, JA 3.

The Commission defined a “major non-interstate pipeline” as one that is “not a ‘natural gas company’ under section 1 of the [NGA, 15 U.S.C. § 717a(6)], and that flows greater than 10 million (10,000,000) MMBtus of natural gas per year,” with certain exceptions. Second Proposed Rule P 4, JA 3. The Commission

also affirmed its legal analysis that the proposed posting requirements for non-interstate pipelines are authorized by new NGA section 23, because that provision does not limit “any market participant” to interstate entities subject to the agency’s general NGA authority. *Id.* PP 22-31, JA 15-22. The Commission rejected the view of some commenters, including the Railroad Commission of Texas (Railroad Commission) and the Texas Pipeline Association (Pipeline Association), petitioners here, that section 1(b) of the NGA, limiting FERC jurisdiction to the wholesale sale and interstate transportation of natural gas, also applied to new section 23. *Id.* PP 32-35, JA 23-25.

B. Order No. 720 – Final Rule

On November 20, 2008, following the submission of dozens of comments, the Commission issued Order No. 720, the final rule which “requires major non-interstate pipelines, defined as those natural gas pipelines that deliver more than 50 million MMBtu per year, to post scheduled flow information and to post information for each receipt and delivery point with a design capacity greater than 15,000 MMBtu per day.” Order No. 720 P 1, JA 38. These postings, the Commission concluded, would meet the goal set by Congress in section 23 of the Natural Gas Act “to facilitate price transparency in markets for the sale or transportation of physical natural gas in interstate commerce” by “providing information about the supply and demand fundamentals that underlie these

markets.” *Id.* P 2, JA 39 (quoting 15 U.S.C. § 717t-2(a)(1)) (internal quotation marks omitted).

The Commission affirmed its position that NGA section 23’s “broad authority to facilitate price transparency in the interstate natural gas market” includes the power to require information relevant to the statutory purpose to be disclosed by major intrastate natural gas pipelines. Order No. 720 P 15, JA 45. In this regard, the agency once more emphasized that section 23(a)(3)(A) allows the Commission to obtain such relevant information ““from any market participant,”” rather than solely from interstate pipelines. *Id.* P 17, JA 46 (quoting 15 U.S.C. § 717-2(a)(3)(A)).

The Commission again rejected the view that the limitation of section 1(b) of the NGA to interstate transportation and wholesale sale of natural gas applied to NGA section 23. Order No. 720 P 19, JA 48. The Commission observed that its section 23 authority is not plenary in nature like its general authority under the NGA to regulate the rates, terms and conditions of interstate transportation and sales for resale of natural gas. *Id.* P 22, JA 51. Rather, Order No. 720 concluded, “[w]here transportation or sales of natural gas are not in interstate commerce, they nonetheless fall under the Commission’s transparency mandate if they affect the availability and prices of natural gas at wholesale and in interstate commerce.” *Id.*, JA 52.

Having established its authority to require non-interstate pipelines to comply with the information posting requirements, the Commission next turned to the need for these requirements. Based on the extensive record compiled in the rulemaking proceeding provided by stakeholders in filed comments, as well as relevant studies by the U.S. Department of Energy's Energy Information Administration, the Commission concluded "that this Final Rule is needed because the information currently provided by interstate pipelines presents an incomplete picture of the supply and demand fundamentals that underlie the interstate natural gas market." Order No. 720 P 39, JA 54. Because "[i]nterstate and non-interstate pipeline infrastructure is functionally interconnected in the United States," the Commission explained, the availability and price of natural gas on large non-interstate pipelines often affects "the availability and price of natural gas nation-wide because these pipelines serve as important pricing points and gateways for flows to much of the United States." *Id.* P 40, JA 58.

Under the pre-section 23 posting requirements, the agency observed, "major gas flows between producing basins and interstate markets occur[ing] on non-interstate pipelines . . . are thus invisible to the market." *Id.* P 40, JA 57-58. The posting regulations implemented by Order No. 720, the Commission held, close that informational gap.

C. Order No. 720-A – Rehearing Order

Many requests for rehearing or clarification of Order No. 720 were filed with the Commission, including those of the Pipeline Association (JA 99) and the Railroad Commission (JA 91). Subsequently, on March 18, 2009, the Commission staff held a technical conference to gather additional information on certain issues raised on rehearing, including, as relevant here, the appropriate definition of “major non-interstate pipelines.” R 129. Following the conference, the Commission requested supplemental comments on these issues. Eight supplemental comments were filed, including one by the Pipeline Association. R 132.

On January 21, 2010, the Commission issued Order No. 720-A, granting rehearing and clarification on certain issues, significantly modifying certain elements of the posting regulations. “As a whole,” the Commission explained, “the modifications that are adopted substantially reduce the number of major non-interstate pipelines that must comply with the proposed transparency regulations.” Order No. 720-A P 9, JA 119. Order No. 720-A also denied requests for rehearing on a number of issues, including two relevant on appeal.

First, the Commission reaffirmed that “[Natural Gas Act] section 23 provides the Commission limited jurisdiction over major non-interstate pipelines

for the purpose of requiring public disclosure of information to enhance market transparency.” Order No. 720-A P 25, JA 130.

Second, the Commission held, contrary to arguments of the Pipeline Association, the Railroad Commission, and several other parties, that “the major non-interstate pipeline posting requirements are needed.” Order No. 720-A P 42, JA 136. In this regard, the agency emphasized that because of the vital role played by non-interstate pipelines in the interconnected interstate market, their information was necessary for “interstate market participants . . . to more fully understand supply and demand fundamentals and therefore price formation.” *Id.* P 44, JA 137.

The Commission particularly emphasized that the information disclosed by intrastate pipelines pursuant to these regulations would serve to enhance understanding of the supply and demand fundamentals of the interstate market (Order No. 720-A PP 47-53); be beneficial to interstate market participants during times of natural disaster (*id.* PP 59-61); and could be helpful in detecting market manipulation and discriminatory behavior (*id.* PP 62-63).

This appeal followed.

SUMMARY OF ARGUMENT

1. The Commission's decision to require major intrastate pipelines to post certain information about their operations reasonably and logically follows from the language and purpose of newly-added section 23 of the Natural Gas Act. As Congress entrusted the Commission with rulemaking responsibility to facilitate market transparency, and to advance the effective operation and monitoring of competitive natural gas markets, the familiar *Chevron* standard of review applies.

The Commission promulgated Order No. 720 pursuant to the specific authority delegated by Congress in NGA section 23, 15 U.S.C. § 717t-2, to increase the transparency of the interstate natural gas market. While framed in terms of jurisdiction, the question presented is simply whether the Commission properly interpreted its section 23 authority to require information from "any market participant" to include information from major intrastate pipelines.

2. The Commission's reasonable construction of "any market participant," a phrase left undefined by the statute, to include major non-interstate pipelines is reasonable and should be affirmed by this Court. The Commission concluded, based on the evidentiary record in the proceeding below, that, for purposes of the market transparency aims of section 23, major non-interstate pipelines are participants in the interstate natural gas market. The evidence demonstrated that the intrastate natural gas market is highly integrated with the interstate market. As

a result, scheduled flow and capacity on major non-interstate pipelines have a significant effect on the price and availability of natural gas in the interstate market, both specifically referenced in NGA section 23. Thus, the Commission determined that it was authorized by the statute to require major non-interstate pipelines to post relevant information that better enables the Commission and consumers to understand the operation of the interstate natural gas market.

Petitioners argue that the Commission’s interpretation of “any market participant” is forbidden by the limitation of NGA section 1, 15 U.S.C. § 717(b), the Commission’s general authority to regulate “natural gas companies” engaging in the interstate transportation or wholesale sale of natural gas. As the Commission explained, however, Congress chose to use a new term – “any market participant” – in new section 23, which is not incorporated in the definitional section of NGA section 1. Rather, NGA section 23 bestows upon the Commission a new limited authority to enhance market transparency, separate and apart from its broad general NGA authority to regulate the rates, terms and conditions of interstate transportation and wholesale sales of natural gas.

While petitioners offer various canons of statutory construction in support of their arguments, they fail to grapple with the pivotal fact that Congress left it to the Commission to define “any market participant,” consistent with the broad, consumer-oriented language and purpose of the 2005 amendment of the statute.

Furthermore, because the Commission already requires interstate pipelines to post market information under its general preexisting NGA authority, petitioners' interpretation would denude section 23, intended to increase the amount of market information available, of meaning.

3. The Commission fully demonstrated, based on the evidentiary record, that posting of scheduled flow and capacity information by major non-interstate pipelines is reasonably directed to meeting NGA section 23's goal of enhanced transparency for the interstate natural gas market. In this regard, the agency relied on substantial record evidence demonstrating the integrated nature of the intrastate and interstate markets and the impact of the flow of natural gas on major intrastate pipelines on the interstate natural gas market. While the Pipeline Association, in particular, disagrees with the Commission's assessment of the evidence in various respects, the Court should defer to the agency's finding within its area of specialized expertise.

ARGUMENT

I. **CHEVRON DEFERENCE PROVIDES THE APPROPRIATE STANDARD OF REVIEW ON THE ISSUE OF THE COMMISSION'S NEW NGA SECTION 23 AUTHORITY.**

The familiar two-step standard of review set forth in *Chevron U.S.A., Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837 (1984), applies to the Commission's interpretation of its statutory authority pursuant to section 23 of the Natural Gas Act in the challenged orders. *See, e.g., Pacific Gas & Elec. Co. v. FERC*, 106 F.3d 1190, 1196 (5th Cir. 1997) (applying *Chevron* deference in assessing whether "FERC imposed a reasonable construction on the description of its statutory powers" in the Natural Gas Act); *El Paso Elec. Co. v. FERC*, 201 F.3d 667, 669-70 (5th Cir. 2000) (applying *Chevron* deference to FERC's determination of its statutory authority under the analogous Federal Power Act).

Under the first step, if Congress "has spoken directly on the precise question at issue," the Court "must 'give effect to [Congress'] unambiguously expressed intent.'" *Tex. Office of Pub. Util. Counsel v. FCC*, 265 F.3d 313, 320 (5th Cir. 2001) (quoting *Chevron*, 467 U.S. at 843); *Texas Savings & Community Bankers Ass'n v. Fed. Housing Finance Bd.*, 201 F.3d 551, 554 (5th Cir. 2000) (same). In making this determination, the Court "look[s] to not only 'the particular statutory language at issue,' but also to the 'language and design of the statute as a whole.'" *United Services Auto Ass'n v. Perry*, 102 F.3d 144, 146 (5th Cir. 1996) (quoting *K*

Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988)) (citations omitted).

“A statute is ambiguous” under *Chevron* “if it is susceptible of more than one accepted meaning.” *Texas Savings & Community Bankers Ass’n*, 201 F.3d at 554 (quoting *United Services Auto Ass’n*, 102 F.3d at 146).

Once the Court determines that Congress has not spoken directly to the issue at hand, it moves to the second step of *Chevron* and assesses “whether the agency interpretation is a ‘permissible construction of the statute.’” *La. Env’tl. Action Network v. EPA*, 382 F.3d 575, 581-82 (5th Cir. 2004) (quoting *Chevron*, 467 U.S. at 843). If the agency’s interpretation is permissible, “[d]eference is warranted” so long as the agency’s construction is not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Id.* at 582.

In light of this precedent, the Commission’s interpretation of its new NGA section 23 authority to require major intrastate natural gas pipelines to post certain market information should be afforded *Chevron* deference on appeal.

The specific issue presented here is whether the statutory language authorizing the Commission to require such information from “any market participant” includes major intrastate pipelines, as well as interstate pipelines already subject to NGA information posting requirements. The Commission, charged with administering the statute, concluded that section 23 gives the agency “broad authority to facilitate price transparency in the interstate natural gas

market.” Order No. 720 P 15, JA 45. In this delegation of authority, the agency determined, Congress left to the Commission’s discretion the enactment of rules “the Commission determines necessary and appropriate” with respect to the dissemination of information concerning the availability and price of natural gas. *Id.* P 16 (quoting 15 U.S.C. § 717t-2(a)(2)). *See, e.g., Chippewa and Flambeau Improvement Co. v. FERC*, 325 F.3d 353, 358 (D.C. Cir. 2003) (“By enacting the ‘necessary or appropriate’ standard, the Congress invested the Commission with significant discretion”). Furthermore, the Commission observed, “this language does not limit the type of information the Commission could collect to implement its mandate, provided that such information is ‘about’ (*i.e.*, pertains to) the ‘availability and prices of natural gas sold at wholesale and in interstate commerce.” Order No. 720 P 22, JA 51-52.

More specifically, the Commission pointed out, Congress determined that in exercising this new transparency jurisdiction, the agency could require the dissemination of information from “any market participant.” This broad term “is not defined in the NGA and is not on its face limited to otherwise jurisdictional entities.” Order No. 720 P 17, JA 46.

The Railroad Commission suggests that *Chevron* may not apply here, as “it is unclear whether” this Court employs *Chevron* “when an agency reads a statute to confer jurisdiction.” TRC Br. at 14 (citing *New Orleans Pub. Serv., Inc. v. Council*

of *City of New Orleans*, 911 F.2d 993, 1001-02 (5th Cir. 1990) (declining to reach the issue) and *Pacific Gas & Elec. Co.*, 106 F.3d at 1196-97 (applying *Chevron* deference to the Commission’s jurisdictional determination, albeit where the agency had disclaimed jurisdiction)).

Even if the cases cited by the Railroad Commission leave any uncertainty on this point, this Court has routinely applied *Chevron* in other cases, like this one, involving the scope of particular statutory authority delegated by Congress. For example, in its recent decision in *Hardy Wilson Memorial Hospital v. Sebelius*, 616 F.3d 449 (5th Cir. 2010), the Court explained that “[a]dministrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency to make rules carrying the force of law, and the agency interpretation claiming deference was promulgated in the exercise of that authority.” 616 F.3d at 454 (quoting *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001)).

Here in new NGA section 23, Congress delegated to the Commission the authority to issue regulations requiring “any market participant” to disclose information relating to the price and availability of natural gas in those markets. The Commission promulgated the regulations at issue by means of a formal rulemaking process in the exercise of this authority. The only question before the Court is whether the Commission reasonably interpreted the statutory authority

conveyed by section 23 to include major intrastate natural gas pipelines within the scope of “any market participant” subject to information reporting.

Both the Railroad Commission and the Pipeline Association strenuously argue that *Chevron* deference is inapplicable here because the plain language of NGA sections 1 and 23 limit the Commission’s transparency authority to interstate pipelines. *See* TRC Br. at 10, 19; TPA Br. at 25, 27. This argument, of course, is tied to the merits of the Commission’s NGA interpretation here, to which we next turn.

II. THE COMMISSION’S INTERPRETATION OF ITS NEW NGA SECTION 23 AUTHORITY IS REASONABLE AND SHOULD BE AFFIRMED BY THIS COURT.

A. The Commission Reasonably Defined Section 23’s Reference To “Any Market Participant” To Include Major Intrastate Pipelines.

In construing the meaning of “any market participant,” the Commission began by emphasizing that Congress had deliberately not employed the more precise phrase “natural gas company,” found in the general definitional section of the Natural Gas Act. *See* 15 U.S.C. § 717a(6) (“‘Natural-gas company’ means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale”). In the Commission’s view, Congress “was aware that other sections of the [Natural Gas Act] limited the scope of entities subject to the Commission’s traditional regulatory authority,” but “chose not to apply” this limitation in new section 23. Order No. 720 P 17, JA 47.

Rather, the agency reasoned, “Congress clearly recognized that the Commission might not obtain sufficient price transparency from those ‘natural gas companies’ subject to our traditional regulatory authority.” Order No. 720 P 17, JA 47. This view is consistent, the Commission found, with its “findings here that a complete picture of the interstate natural gas market and the supply and demand fundamentals underlying that market require information from non-interstate natural gas pipelines.” *Id.* Thus, the Commission concluded, new section 23 was most logically construed to mean that “[w]here transportation or sales of natural gas are not in interstate commerce, they nonetheless fall under the Commission’s transparency mandate if they affect the availability and prices of natural gas at wholesale and in interstate commerce.” *Id.* P 22, JA 52.

The Commission found further support for its interpretation because “the statutory language emphasizes the broad meaning of the phrase ‘market participant’ by adding ‘any’ as a descriptor.” Order No. 720 P 18, JA 47. “Court precedent confirms,” the Commission explained, “that the word ‘any’ gives the term it modifies (in this case, ‘market participant’) an expansive meaning.” *Id.* & n.35, JA 47-48 (citing, *e.g.*, *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 31-32 (2004) (the word “any” gives the word it modifies an expansive reading); *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (same)).

Moreover, the word “participant” itself has broad meaning (especially in

conjunction with the antecedent “any”). Market participants subject to the Commission’s information posting requirements need not be buyers, sellers, transporters, shippers or some other type of entity directly engaged in the transportation or sale of natural gas in the interstate market, within the meaning of NGA section 1(b), 15 U.S.C. § 717(b). They need only “participate” in that market in some non-*de minimis* way. See new NGA section 23(d)(2), 15 U.S.C. § 717t-2(d)(2) (Commission’s market transparency jurisdiction extends broadly to all “users” with a significant market “presence”). Cf. *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1371 (D.C. Cir. 2004) (Roberts, J.) (Commission reasonably can direct utility customers to pay a share of the costs of transmission facilities they themselves do not actually use, analogizing to members of the public who benefit from, and should pay a share of the costs of, the federal court system, even if they are not themselves direct litigants).

In construing section 23, the Commission explicitly recognized that major intrastate pipelines are indeed participants in the interstate natural gas market, based on the evidence compiled in the administrative record. For example, Order No. 720 cites a Department of Energy study demonstrating that 13 of 28 “national market centers . . . are served by a combination of interstate and non-interstate pipelines.” Order No. 720 P 41 & n.87, JA 58. “Significantly,” the agency observed, “at nine of these thirteen locations, non-interstate capacity is greater than

interstate capacity.” *Id.* The Commission specifically referred to the Henry Hub market center in Louisiana as “indicative of the integration of interstate and non-interstate pipelines,” because it includes significant major non-interstate pipelines, yet is employed “in determining a variety of monthly index prices used to set natural gas prices in a large number of transactions in interstate commerce.” Order No. 720 P 42, JA 59-60.

The Commission further found that examining the flow-patterns of interstate and non-interstate pipelines “demonstrates the integration of interstate and non-interstate flows” in many natural gas markets. Order No. 720 P 43, JA 60. For example, the agency determined, “[n]on-interstate pipelines provide crucial physical links between interstate natural gas pipelines (particularly in Texas, Oklahoma, Louisiana, and California), as well as links between market hubs.” *Id.* See Figure 1, “Texas and Louisiana Market Hubs and Their Connection to Other Regions in the United States,” *id.* See also *infra* pp. 35-37 (further explaining need to consider information concerning intrastate, as well as interstate, natural gas pipelines).

In sum, the Commission reasonably construed the term “any market participant” in section 23 to include major non-interstate pipelines. Because the interstate and intrastate markets essentially operate as one large interconnected market, requiring disclosure of relevant information solely from interstate pipelines

fails to fully capture interstate market operations.

B. Petitioners Cannot Demonstrate That The Commission’s Interpretation Of NGA Section 23 Is Unreasonable.

The Pipeline Association argues that the specific language of new section 23 bars the Commission from including non-interstate pipelines within the scope of “any market participant,” because “those entities” included “must be participants in interstate markets.” TPA Br. at 29. But as explained above, the Commission specifically determined that major intrastate pipelines do indeed participate in the interstate market, in view of the fact that “[i]nterstate and non-interstate pipeline infrastructure is functionally interconnected in the United States.” Order No. 720 P 40, JA 58. Thus, the premise of the Pipeline Association’s argument is incorrect.

The Railroad Commission, for its part, acknowledges the Commission’s interpretation but denigrates it as “peculiar . . . given that the Posting Rule defines ‘major non-interstate pipeline[s]’ to include those that abstain from interstate transportation and interstate sales-for-resale.” TRC Br. at 23 (citing 18 C.F.R. § 284.1(d)). But the Commission never suggests that non-interstate pipelines conduct interstate transportation. Rather, it observes that “[w]here transportation or sales of natural gas are not in interstate commerce, they nonetheless fall under the Commission’s transparency mandate if they affect the availability and prices of natural gas at wholesale and in interstate commerce.” Order No. 720 P 22, JA 52.

Thus, the Commission found that, based on the administrative record, major intrastate pipelines are indeed “market participants” in view of the interconnected nature of the intrastate and interstate markets, and the impact major non-interstate pipelines have on interstate pipelines.

Order Nos. 720 and 720-A are filled with record references to support the Commission’s conclusion. To cite but one instance, the agency makes the point that “market prices of physical natural gas in interstate commerce result from the aggregate of interstate and non-interstate pipeline flows.” Order No. 720 P 46, JA 63. In support, the Commission cited Energy Information Agency studies indicating the interconnection between intrastate and interstate natural gas supplies in Texas and California. *Id.* P 45. Petitioners simply ignore the Commission’s finding that major intrastate pipelines participate in the highly integrated interstate natural gas market.

C. The Commission Reasonably Concluded That The Jurisdictional Limitations Of NGA Section 1 Do Not Foreclose The Agency’s Construction Of NGA Section 23.

Both the Railroad Commission and the Pipeline Association argue strenuously that jurisdictional limits in NGA section 1 forbid the Commission’s interpretation of new NGA section 23. TRC Br. at 15-20; TPA Br. at 29-30. For example, the Railroad Commission asserts that the “plain language” of NGA section 1 “establishes a blanket prohibition” against construing section 23 to apply

to non-interstate pipelines. TRC Br. at 18.

The Commission, however, specifically rejected the theory that “Congress could have expressed its intent to subject non-interstate pipelines to the Commission’s transparency authority only by revising or amending section 1 of the NGA.” Order No. 720 P 21, JA 50. There is no doubt, as the Commission readily acknowledged, that NGA section 1 limits the agency’s “traditional ratemaking and certificate authority” to interstate pipelines. *Id.* But NGA section 23 does not address or expand the general scope of FERC ratemaking and certification authority; rather, it gives to the Commission for the first time a specific and “limited grant of transparency authority.” *Id.* Thus, the agency reasoned, if Congress had expanded NGA section 1, “it would have been providing the Commission not only a limited grant of transparency authority, but the broader grant of authority that section 1 entails.” *Id.* By conferring on the Commission this new transparency authority, directed solely to information reporting, “separately from [its] authority under section 1,” Congress avoided this problem. *Id.*

Both the Railroad Commission and the Pipeline Association argue that Congress would have used more explicit language if it had contemplated that NGA section 23 would apply to intrastate pipelines. In this regard, the Pipeline Association emphasizes that when the Energy Policy Act of 2005 did amend the

NGA to add the import and export of liquefied natural gas to FERC jurisdiction, it did so by amending NGA sections 1 and 3. TPA Br. at 30-31; *see also* TRC Br. at 25.

However, a comparison of these separate amendments to the NGA demonstrates the flaw in this logic. The Energy Policy Act amended the NGA to give the Commission “the exclusive authority to approve or deny an application for the siting, construction, expansion or operation of a [liquefied natural gas] terminal,” 15 U.S.C. § 717b(e)(1). Unlike the limited information-gathering authority granted by section 23, this was indeed a significant expansion of FERC jurisdiction into an entirely new area. Because of this, the Energy Policy Act provided extensive and detailed instructions concerning the Commission’s administration of this new program. For example, the Act amended the NGA to endow the Commission with unique and detailed procedural authority to coordinate with other federal and state agencies the processing of applications to construct and operate liquefied natural gas projects and pipeline facilities. *See* 15 U.S.C § 717n.

The addition of section 23, as interpreted by the Commission, is hardly on the same scale. Far from being the “drastic” (TRC Br. at 15) or “massive expansion of jurisdiction” (TPA Br. at 30) painted by petitioners, section 23’s grant of transparency jurisdiction is, as the Commission emphasized, extremely

limited in scope. *See* Order No. 720 P 22, JA 51 (stressing that the Commission’s authority to obtain information from “any market participant” is not “plenary,” and discussing the limitations on this authority imposed by the statute); Order No. 720-A PP 31-32, JA 133 (indicating “limited” nature of section 23’s transparency jurisdiction). This is further demonstrated by the fact that the Commission’s information disclosure requirements for interstate pipelines pursuant to its general NGA jurisdiction are significantly more extensive and detailed than the posting requirements at issue here. *Compare* 18 C.F.R. § 284.13 (Reporting requirements for interstate pipelines) *with* 18 C.F.R. § 284.14 (Posting requirements of major non-interstate pipelines). It is not surprising, then, that the Pipeline Association’s brief complains about the Commission’s exercise of its authority, but not particularly about any burden that its members will incur by complying with the Commission’s information posting rule.

“Perhaps the most important limitation on our transparency authority,” the Commission emphasized, “is contained in section 23(d)(2) which mandates an exemption from any reporting for ‘natural gas producers, processors, or users who have a *de minimis* market presence.’” Order No. 720 P 23 & n.43, JA 52 (quoting 15 U.S.C. § 717t-2(d)(2)). While NGA section 1(b) “explicitly excludes these entities from the Commission’s traditional regulation,” the agency observed, Congress found it necessary to give them a *de minimis* exemption from section 23.

Id. P 23, JA 52. If Congress had not intended to give FERC section 23 authority over entities excluded by section 1(b), the Commission reasoned, “a *de minimis* exemption would have been unnecessary,” violating the presumption that Congress does not “enact surplus language.” *Id.* & n.44, JA 52 (citing, *e.g.*, *Babbitt v. Sweet Home Chapter of Cmty. for a Greater Oregon*, 515 U.S. 687, 698 (1995)).

Both petitioners take issue with the Commission’s interpretation for ignoring the fact that NGA section 1(b) “excludes ‘production’ from FERC’s jurisdiction, and not ‘producers,’ as the agency contends.” TRC Br. at 26 (citing 15 U.S.C. § 717(b)); TPA Br. at 32-33. Because “[s]ection 1(b) does give jurisdiction to regulate producers, insofar as [they] engage in interstate commerce,” the Railroad Commission maintains, section 23(d)(2)’s *de minimis* exemption is “not reduced to surplusage” when section 1(b) is read to limit FERC’s section 23 authority. TRC Br. at 26-27 (citation omitted).

Tellingly, petitioners ignore that section 23(d)(2)’s exemption also extends to “processors” and “users” – neither of which are mentioned by NGA section 1(b). Indeed, the term “users” of natural gas by any definition extends to entities well beyond the Commission’s traditional section 1 NGA jurisdiction. The Commission reasonably could conclude that Congress intended to subject major, non-*de minimis* “users” and other entities, not otherwise subject to traditional NGA jurisdiction over “natural gas companies” in interstate markets, to the

Commission's new, limited information posting jurisdiction. *See* Order No. 720-A P 31, JA 133 (emphasizing that the Commission "is requiring only the posting of essential information to ensure market transparency and is not engaging in traditional regulation of rates, terms, and conditions of service").

In any event, the jurisdictional line drawn by NGA section 1(b) is not nearly as absolute as petitioners would have it. The Commission has often been recognized to have certain limited authority over matters only indirectly related to its general regulatory jurisdiction. *See, e.g., Northern Natural Gas Co. v. FERC*, 929 F.2d 1261, 1273 (8th Cir. 1991) (Commission authorized to regulate rates charged for gathering on a pipeline's gathering facilities in connection with the pipeline's interstate transportation activities, notwithstanding NGA section 1(b)'s specific exclusion of gathering from FERC jurisdiction); *Nat'l Ass'n of Regulatory Util. Comm'n's v. FERC*, 475 F.3d 1277, 1280 (D.C. Cir. 2007) (in exercising its jurisdiction, the Commission "may, of course, impinge as a practical matter on the behavior of non-jurisdictional" entities).

This is particularly true with respect to the Commission's ability to gather information, as this Court recognized in *Superior Oil Co. v. FERC*, 563 F.2d 191 (5th Cir. 1977). There, the Court rejected the argument that the Commission had exceeded its statutory authority by requiring the affiliates of natural gas companies to file information concerning their expenditures on otherwise exempt natural gas

exploration and development. The Court upheld the Commission because the information as to affiliates was necessary to ensure that the Commission could determine the true cost of production of regulated sales of natural gas. In so holding, the Court specifically concluded that the investigatory powers of the agency, granted by NGA section 14, 15 U.S.C. § 717m, “are not limited by the constraints which Congress has placed on the regulatory and rate-setting jurisdiction of the [Commission].” *Superior Oil Co.*, 563 F.2d at 198.

New Section 23 employs the same template: Congress extended the Commission’s limited authority to seek information about the interstate natural gas market to include non-interstate pipelines not subject to the Commission’s general NGA section 1 jurisdiction over rates, terms and conditions of service. The Commission continues to refrain from “regulating” intrastate pipeline operations in the traditional sense of the word. Order No. 720 P 24, JA 53.

D. Principles Of Statutory Construction Support The Commission’s Interpretation Of NGA Section 23.

Both petitioners repeatedly cite general principles of statutory construction in support of their arguments that NGA section 1 forbids the Commission from including major non-interstate pipelines within NGA section 23’s definition of “any market participant.”

For example, the Railroad Commission maintains that the Commission’s reading of NGA section 23, to grant it new authority without a corresponding

change to existing section 1 of the Act, “founders on the ‘presum[ption] that Congress is knowledgeable about existing law pertinent to the legislation it enacts.’” TRC Br. at 20 (quoting *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185 (1988)).

At best, the Railroad Commission’s argument cuts both ways. In the Commission’s view, congressional awareness of the general jurisdictional limitations of NGA section 1 informed its use of specialized terminology in NGA section 23 to avoid these limitations: “In using the term ‘any market participant’ instead of ‘natural gas company,’ Congress signaled its intent to expand the Commission’s transparency authority beyond the universe of natural gas companies to which it would otherwise be limited.” Order No. 720 P 20, JA 49-50. Indeed, the Commission’s reading is consistent with (and the Railroad Commission’s reading runs afoul of) of another “generally accepted tenet of statutory construction . . . that the general language of a statute does not prevail over matters specifically dealt with in another part of the same enactment.” *Matter of Nobleman*, 968 F.3d 483, 488 (5th Cir. 1992) (internal citation and quotation marks omitted) (citing numerous cases).

Moreover, there is a larger canonical stumbling block to the petitioners’ view that the Commission could not reasonably include non-interstate pipelines within its section 23 transparency authority. Prior to the enactment of section 23,

the NGA authorized the collecting of market data from the companies subject to the Commission's traditional jurisdiction. In particular, the Commission's Order No. 637 already required interstate natural gas pipelines to post capacity and scheduling information. *See* 18 C.F.R. § 284.13 (reporting requirements for interstate pipelines). It follows that new section 23 in general, and section 23(a)(3)(A) in particular, would be redundant unless Congress had intended to expand the agency's transparency authority to require non-interstate pipelines to disclose information relevant to market operation. But this Court does not interpret statutes in a manner which would lead to such redundant or "futile results." *Ecee, Inc. v. FERC*, 611 F.2d 554, 563-64 (5th Cir. 1980) (quoting, *e.g.*, *Perry v. Commerce Loan Co.*, 383 U.S. 392, 400 (1966)).

Finally, the Railroad Commission invokes the D.C. Circuit's opinion in *Columbia Gas Transmission Corp. v. FERC*, 404 F.3d 459 (D.C. Cir 2005), as an allegedly "useful demonstration" of how this Court should review the Commission's transparency authority under NGA section 23. TRC Br. at 27. That case, however, is completely unlike the one at bar.

In *Columbia Gas Transmission*, the Commission had attempted to exercise its NGA section 4 and 5 jurisdiction – *i.e.*, its traditional rate-setting jurisdiction, 15 U.S.C. § 717c-717d – to regulate natural gas gathering facilities, a subject matter clearly foreclosed by NGA section 1(b), because they were included in an

otherwise NGA jurisdictional tariff filed with the agency. Not surprisingly, the court concluded that the Commission had violated the firmly established plain meaning of its statutory mandate, notwithstanding the tariff language, because “the Commission cannot acquire jurisdiction merely by agreement of the parties before it.” 404 F.3d at 463 (internal quotation marks and citations omitted).

Here, on the other hand, the Commission was implementing for the first time section 23’s specific delegation of statutory authority – limited transparency jurisdiction – which it distinguished from its general NGA section 4 and 5 regulatory authority. *See* Order No. 720 P 21, JA 50. *Columbia Gas Transmission* sheds no light on this issue.

III. THE COMMISSION REASONABLY RELIED ON SUBSTANTIAL RECORD EVIDENCE IN DETERMINING THAT IT IS NECESSARY FOR INTRASTATE PIPELINES TO POST INFORMATION PURSUANT TO ITS SECTION 23 REGULATIONS.

In the orders on review, the Commission explained in detail why it believes the information posting requirements for major intrastate pipelines are necessary. In the Commission’s view, “this Final Rule is needed because the information currently provided by interstate pipelines presents an incomplete picture of the supply and demand fundamentals that underlie the interstate natural gas market.” Order No. 720 P 39, JA 54; *see also* Order No. 720-A P 44, JA 137 (recognizing “a gap in information available to interstate market participants necessary to more fully understand supply and demand fundamentals and therefore price formation”).

The Commission explicitly identified, based on the administrative record, the nexus between the information to be posted by intrastate pipelines and the interstate natural gas market: “[M]ajor gas flows between producing basins and interstate markets occur on non-interstate pipelines and are thus invisible to the market.” Order No. 720 P 40, JA 56. Scheduled flows on intrastate pipelines, the agency elaborated, “impact supply considerations in interstate markets” as well as demand considerations “at the end of the delivery chain.” Order No. 720-A P 44, JA 137-138.

The Commission then went on to provide specific examples, present in the administrative record, of both supply and demand impacts of intrastate pipeline flows on the interstate market. For example, relying on studies by the Energy Information Agency, the Commission observed that intrastate supply flows in Texas and other western states are of significant magnitude and thus “have a significant effect on interstate price formation because new supply can reduce regional and national gas prices.” Order No. 720-A P 49, JA 139.

The Commission similarly identified the information gap with respect to interstate market demand because of the absence of data from non-interstate pipelines. For example, one Energy Information Agency study showed that “90 percent of the gas consumed” in Texas is “invisible to market participants and other market observers on a daily basis” because it flows on intrastate pipelines.

Order No. 720 P 44, JA 62. Yet, the agency pointed out, “[p]urchasers of natural gas in interstate commerce draw on the same sources of supply as users and purchasers of intrastate natural gas.” *Id.* P 45, JA 62. The Commission found similar problems in California disclosed by the record. Order No. 720-A P 56, JA 140 (citing “[i]ntrastate pipeline constraints within California” currently “unobservable to the public,” causing natural gas price differentials in the interstate market).

The Pipeline Association disputes the Commission’s finding that its information posting regulations are necessary. Many of the Pipeline Association’s arguments in support of this point are simply a repetition of its position that NGA section 23 does not give the agency authority to require posting of information by intrastate pipelines. *See* TPA Br. at 45, 47. Its remaining assertions are equally without merit.

Primarily, the Pipeline Association attacks the Commission’s finding that the information it seeks from major intrastate pipelines is relevant to interstate market operations. TPA Br. at 44. But this ignores the Commission’s specific finding, based on record evidence, that the operation of major non-interstate pipelines has a significant impact on the price and availability of natural gas in the interstate markets. *See* 15 U.S.C. § 717r(b) (under the NGA, the factual findings of the Commission, “if supported by substantial evidence,” shall be “conclusive”).

The Commission's assessment of this evidence within its area of statutory expertise is, of course, entitled to judicial deference. *See, e.g., Transwestern Pipeline Co. v. FERC*, 820 F.2d 733, 738 (5th Cir. 1989).

The Association also maintains that Order No. 720 encroaches on state regulatory jurisdiction. TPA Br. at 47-49. However, the Association does not point to any particular state regulation with which the Commission's posting requirement is in conflict. Rather, it reasserts its position that intrastate pipelines cannot have an impact on interstate market operations, a position the Commission rejected based on evidence in the rulemaking record. *See supra* pp. 23-24.

Finally, the Pipeline Association takes issue with the Commission's rationale for its exemption from the reporting requirement for major intrastate pipelines entirely upstream of a processing, treatment or dehydration plant. TPA Br. 49-53. Specifically, the Association asserts that the Commission left unexplained why it declined to employ the familiar primary function test, used to distinguish natural gas transportation from gathering for purposes of traditional NGA section 1 jurisdiction, in formulating this exemption. *See Sea Robin Pipeline Co. v. FERC*, 127 F.3d 364, 368-69 (5th Cir. 1997) (discussing the primary function test).

However, the Commission reasonably explained that it does not employ the primary function test in this context so as not to "confuse the distinction that the

Commission makes here between its traditional section 1 and its new section 23 jurisdiction.” Order No. 720 P 114, JA 80-81; *see also* Order No. 720-A P 31, JA 133 (new, “limited” information posting requirement distinguished from traditional NGA regulation of pipeline rates, terms and conditions). The Pipeline Association’s contention is thus without merit.

CONCLUSION

For the reasons stated, the petitions for review should be denied, and the Commission's orders should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE REGARDING PRIVACY REDACTIONS
AND VIRUS SCANNING

I certify that (1) any necessary privacy redactions have been made in this brief, (2) the electronic submission is an exact copy of the paper document, in compliance with 5th Cir. R. 25.2.1, and (3) the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free from viruses.

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March 22, 2011

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(c)(i) and Fifth Circuit Rule 32.3, I certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. 32(a)(7)(B) because it contains 8,412 words, excluding the cover page, statement regarding oral argument, table of contents and authorities, certificates of counsel, and the addenda.

2. This brief complies with the typeface requirements of Fed. R. App P. 32(a)(5) and the type style requirements of Fed. R. App. 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Office Word, Version 2003 in 14 points, Times New Roman style.

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March 22, 2011

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§ 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

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§ 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.

STATE LAWS AND REGULATIONS

Section 404(b) of Pub. L. 102-486 provided that: “The transportation or sale of natural gas by any person who is not otherwise a public utility, within the meaning of State law—

“(1) in closed containers; or

“(2) otherwise to any person for use by such person as a fuel in a self-propelled vehicle, shall not be considered to be a transportation or sale of natural gas within the meaning of any State law, regulation, or order in effect before January 1, 1989. This subsection shall not apply to any provision of any State law, regulation, or order to the extent that such provision has as its primary purpose the protection of public safety.”

EMERGENCY NATURAL GAS ACT OF 1977

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

EXECUTIVE ORDER No. 11969

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

PROCLAMATION No. 4485

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

PROCLAMATION No. 4495

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

§ 717a. Definitions

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

(1) “Person” includes an individual or a corporation.

(2) “Corporation” includes any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, receiver or receivers, trustee or trustees of any of the foregoing, but shall not include municipalities as hereinafter defined.

(3) “Municipality” means a city, county, or other political subdivision or agency of a State.

(4) “State” means a State admitted to the Union, the District of Columbia, and any organized Territory of the United States.

(5) “Natural gas” means either natural gas unmixed, or any mixture of natural and artificial gas.

(6) “Natural-gas company” means a person engaged in the transportation of natural gas

in interstate commerce, or the sale in interstate commerce of such gas for resale.

(7) “Interstate commerce” means commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States.

(8) “State commission” means the regulatory body of the State or municipality having jurisdiction to regulate rates and charges for the sale of natural gas to consumers within the State or municipality.

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

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

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

(A) waterborne vessels used to deliver natural gas to or from any such facility; or

(B) any pipeline or storage facility subject to the jurisdiction of the Commission under section 717f of this title.

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

AMENDMENTS

2005—Par. (11). Pub. L. 109-58 added par. (11).

1992—Par. (10). Pub. L. 102-486 added par. (10).

TERMINATION OF FEDERAL POWER COMMISSION;
TRANSFER OF FUNCTIONS

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

§ 717b. Exportation or importation of natural gas; LNG terminals**(a) Mandatory authorization order**

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

(b) Free trade agreements

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

- (1) the importation of such natural gas shall be treated as a “first sale” within the meaning of section 3301(21) of this title; and
- (2) the Commission shall not, on the basis of national origin, treat any such imported natural gas on an unjust, unreasonable, unduly discriminatory, or preferential basis.

(c) Expedited application and approval process

For purposes of subsection (a) of this section, the importation of the natural gas referred to in subsection (b) of this section, or the exportation of natural gas to a nation with which there is in effect a free trade agreement requiring national treatment for trade in natural gas, shall be deemed to be consistent with the public interest, and applications for such importation or exportation shall be granted without modification or delay.

(d) Construction with other laws

Except as specifically provided in this chapter, nothing in this chapter affects the rights of States under—

- (1) the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.);
 - (2) the Clean Air Act (42 U.S.C. 7401 et seq.);
- or
- (3) the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.).

(e) LNG terminals

(1) The Commission shall have the exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal. Except as specifically provided in this chapter, nothing in this chapter is intended to affect otherwise applicable law related to any Federal agency’s authorities or responsibilities related to LNG terminals.

(2) Upon the filing of any application to site, construct, expand, or operate an LNG terminal, the Commission shall—

- (A) set the matter for hearing;
- (B) give reasonable notice of the hearing to all interested persons, including the State commission of the State in which the LNG terminal is located and, if not the same, the Governor-appointed State agency described in section 717b-1 of this title;
- (C) decide the matter in accordance with this subsection; and
- (D) issue or deny the appropriate order accordingly.

(3)(A) Except as provided in subparagraph (B), the Commission may approve an application described in paragraph (2), in whole or part, with such modifications and upon such terms and conditions as the Commission find¹ necessary or appropriate.

(B) Before January 1, 2015, the Commission shall not—

- (i) deny an application solely on the basis that the applicant proposes to use the LNG

terminal exclusively or partially for gas that the applicant or an affiliate of the applicant will supply to the facility; or

(ii) condition an order on—

(I) a requirement that the LNG terminal offer service to customers other than the applicant, or any affiliate of the applicant, securing the order;

(II) any regulation of the rates, charges, terms, or conditions of service of the LNG terminal; or

(III) a requirement to file with the Commission schedules or contracts related to the rates, charges, terms, or conditions of service of the LNG terminal.

(C) Subparagraph (B) shall cease to have effect on January 1, 2030.

(4) An order issued for an LNG terminal that also offers service to customers on an open access basis shall not result in subsidization of expansion capacity by existing customers, degradation of service to existing customers, or undue discrimination against existing customers as to their terms or conditions of service at the facility, as all of those terms are defined by the Commission.

(f) Military installations

(1) In this subsection, the term “military installation”—

(A) means a base, camp, post, range, station, yard, center, or homeport facility for any ship or other activity under the jurisdiction of the Department of Defense, including any leased facility, that is located within a State, the District of Columbia, or any territory of the United States; and

(B) does not include any facility used primarily for civil works, rivers and harbors projects, or flood control projects, as determined by the Secretary of Defense.

(2) The Commission shall enter into a memorandum of understanding with the Secretary of Defense for the purpose of ensuring that the Commission coordinate and consult² with the Secretary of Defense on the siting, construction, expansion, or operation of liquefied natural gas facilities that may affect an active military installation.

(3) The Commission shall obtain the concurrence of the Secretary of Defense before authorizing the siting, construction, expansion, or operation of liquefied natural gas facilities affecting the training or activities of an active military installation.

(June 21, 1938, ch. 556, §3, 52 Stat. 822; Pub. L. 102-486, title II, §201, Oct. 24, 1992, 106 Stat. 2866; Pub. L. 109-58, title III, §311(c), Aug. 8, 2005, 119 Stat. 685.)

REFERENCES IN TEXT

The Coastal Zone Management Act of 1972, referred to in subsec. (d)(1), 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.

²So in original. Probably should be “coordinates and consults”.

¹So in original. Probably should be “finds”.

The Clean Air Act, referred to in subsec. (d)(2), is act July 14, 1955, ch. 360, 69 Stat. 322, as amended, which is classified generally to chapter 85 (§7401 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 7401 of Title 42 and Tables.

The Federal Water Pollution Control Act, referred to in subsec. (d)(3), is act June 30, 1948, ch. 758, as amended generally by Pub. L. 92-500, §2, Oct. 18, 1972, 86 Stat. 816, which is classified generally to chapter 26 (§1251 et seq.) of Title 33, Navigation and Navigable Waters. For complete classification of this Act to the Code, see Short Title note set out under section 1251 of Title 33 and Tables.

AMENDMENTS

2005—Pub. L. 109-58, §311(c)(1), inserted “; LNG terminals” after “natural gas” in section catchline.

Subsecs. (d) to (f). Pub. L. 109-58, §311(c)(2), added subsecs. (d) to (f).

1992—Pub. L. 102-486 designated existing provisions as subsec. (a) and added subsecs. (b) and (c).

TRANSFER OF FUNCTIONS

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

DELEGATION OF FUNCTIONS

Functions of President respecting certain facilities constructed and maintained on United States borders delegated to Secretary of State, see Ex. Ord. No. 11423, Aug. 16, 1968, 33 F.R. 11741, set out as a note under section 301 of Title 3, The President.

EX. ORD. NO. 10485. PERFORMANCE OF FUNCTIONS RESPECTING ELECTRIC POWER AND NATURAL GAS FACILITIES LOCATED ON UNITED STATES BORDERS

Ex. Ord. No. 10485. Sept. 3, 1953, 18 F.R. 5397, as amended by Ex. Ord. No. 12038, Feb. 3, 1978, 43 F.R. 4957, provided:

SECTION 1. (a) The Secretary of Energy is hereby designated and empowered to perform the following-described functions:

(1) To receive all applications for permits for the construction, operation, maintenance, or connection, at the borders of the United States, of facilities for the transmission of electric energy between the United States and a foreign country.

(2) To receive all applications for permits for the construction, operation, maintenance, or connection, at the borders of the United States, of facilities for the exportation or importation of natural gas to or from a foreign country.

(3) Upon finding the issuance of the permit to be consistent with the public interest, and, after obtaining the favorable recommendations of the Secretary of State and the Secretary of Defense thereon, to issue to

the applicant, as appropriate, a permit for such construction, operation, maintenance, or connection. The Secretary of Energy shall have the power to attach to the issuance of the permit and to the exercise of the rights granted thereunder such conditions as the public interest may in its judgment require.

(b) In any case wherein the Secretary of Energy, the Secretary of State, and the Secretary of Defense cannot agree as to whether or not a permit should be issued, the Secretary of Energy shall submit to the President for approval or disapproval the application for a permit with the respective views of the Secretary of Energy, the Secretary of State and the Secretary of Defense.

SEC. 2. [Deleted.]

SEC. 3. The Secretary of Energy is authorized to issue such rules and regulations, and to prescribe such procedures, as it may from time to time deem necessary or desirable for the exercise of the authority delegated to it by this order.

SEC. 4. All Presidential Permits heretofore issued pursuant to Executive Order No. 8202 of July 13, 1939, and in force at the time of the issuance of this order, and all permits issued hereunder, shall remain in full force and effect until modified or revoked by the President or by the Secretary of Energy.

SEC. 5. Executive Order No. 8202 of July 13, 1939, is hereby revoked.

§ 717b-1. State and local safety considerations

(a) Promulgation of regulations

The Commission shall promulgate regulations on the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) pre-filing process within 60 days after August 8, 2005. An applicant shall comply with pre-filing process required under the National Environmental Policy Act of 1969 prior to filing an application with the Commission. The regulations shall require that the pre-filing process commence at least 6 months prior to the filing of an application for authorization to construct an LNG terminal and encourage applicants to cooperate with State and local officials.

(b) State consultation

The Governor of a State in which an LNG terminal is proposed to be located shall designate the appropriate State agency for the purposes of consulting with the Commission regarding an application under section 717b of this title. The Commission shall consult with such State agency regarding State and local safety considerations prior to issuing an order pursuant to section 717b of this title. For the purposes of this section, State and local safety considerations include—

- (1) the kind and use of the facility;
- (2) the existing and projected population and demographic characteristics of the location;
- (3) the existing and proposed land use near the location;
- (4) the natural and physical aspects of the location;
- (5) the emergency response capabilities near the facility location; and
- (6) the need to encourage remote siting.

(c) Advisory report

The State agency may furnish an advisory report on State and local safety considerations to the Commission with respect to an application no later than 30 days after the application was filed with the Commission. Before issuing an

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

certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

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

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

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

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

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

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

When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the prac-

tice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided*, That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds \$3,000.

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

AMENDMENTS

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

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

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

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

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

EFFECTIVE DATE OF 1988 AMENDMENT

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

TRANSFER OF FUNCTIONS

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

§ 717g. Accounts; records; memoranda

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

Every natural-gas company shall make, keep, and preserve for such periods, such accounts, records of cost-accounting procedures, correspondence, memoranda, papers, books, and other records as the Commission may by rules and regulations prescribe as necessary or appropriate for purposes of the administration of this chapter: *Provided, however*, That nothing in this chapter shall relieve any such natural-gas company from keeping any accounts, memoranda, or records which such natural-gas company may be required to keep by or under authority of the laws of any State. The Commission may prescribe a system of accounts to be kept by such

§ 717j. State compacts for conservation, transportation, etc., of natural gas

(a) Assembly of pertinent information; report to Congress

In case two or more States propose to the Congress compacts dealing with the conservation, production, transportation, or distribution of natural gas it shall be the duty of the Commission to assemble pertinent information relative to the matters covered in any such proposed compact, to make public and to report to the Congress information so obtained, together with such recommendations for further legislation as may appear to be appropriate or necessary to carry out the purposes of such proposed compact and to aid in the conservation of natural-gas resources within the United States and in the orderly, equitable, and economic production, transportation, and distribution of natural gas.

(b) Assembly of information relative to operation of compact; report to Congress

It shall be the duty of the Commission to assemble and keep current pertinent information relative to the effect and operation of any compact between two or more States heretofore or hereafter approved by the Congress, to make such information public, and to report to the Congress, from time to time, the information so obtained, together with such recommendations as may appear to be appropriate or necessary to promote the purposes of such compact.

(c) Availability of services, etc., of other agencies

In carrying out the purposes of this chapter, the Commission shall, so far as practicable, avail itself of the services, records, reports, and information of the executive departments and other agencies of the Government, and the President may, from time to time, direct that such services and facilities be made available to the Commission.

(June 21, 1938, ch. 556, § 11, 52 Stat. 827.)

§ 717k. Officials dealing in securities

It shall be unlawful for any officer or director of any natural-gas company to receive for his own benefit, directly or indirectly, any money or thing of value in respect to the negotiation, hypothecation, or sale by such natural-gas company of any security issued, or to be issued, by such natural-gas company, or to share in any of the proceeds thereof, or to participate in the making or paying of any dividends, other than liquidating dividends, of such natural-gas company from any funds properly included in capital account.

(June 21, 1938, ch. 556, § 12, 52 Stat. 827.)

§ 717l. Complaints

Any State, municipality, or State commission complaining of anything done or omitted to be done by any natural-gas company in contravention of the provisions of this chapter may apply to the Commission by petition, which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such natural-gas company, which shall be called upon to satisfy the

complaint or to answer the same in writing within a reasonable time to be specified by the Commission.

(June 21, 1938, ch. 556, § 13, 52 Stat. 827.)

§ 717m. Investigations by Commission

(a) Power of Commission

The Commission may investigate any facts, conditions, practices, or matters which it may find necessary or proper in order to determine whether any person has violated or is about to violate any provisions of this chapter or any rule, regulation, or order thereunder, or to aid in the enforcement of the provisions of this chapter or in prescribing rules or regulations thereunder, or in obtaining information to serve as a basis for recommending further legislation to the Congress. The Commission may permit any person to file with it a statement in writing, under oath or otherwise, as it shall determine, as to any or all facts and circumstances concerning a matter which may be the subject of investigation. The Commission, in its discretion, may publish in the manner authorized by section 825k of title 16, and make available to State commissions and municipalities, information concerning any such matter.

(b) Determination of adequacy of gas reserves

The Commission may, after hearing, determine the adequacy or inadequacy of the gas reserves held or controlled by any natural-gas company, or by anyone on its behalf, including its owned or leased properties or royalty contracts; and may also, after hearing, determine the propriety and reasonableness of the inclusion in operating expenses, capital, or surplus of all delay rentals or other forms of rental or compensation for unoperated lands and leases. For the purpose of such determinations, the Commission may require any natural-gas company to file with the Commission true copies of all its lease and royalty agreements with respect to such gas reserves.

(c) Administration of oaths and affirmations; subpoena of witnesses, etc.

For the purpose of any investigation or any other proceeding under this chapter, any member of the Commission, or any officer designated by it, is empowered to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, contracts, agreements, or other records which the Commission finds relevant or material to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in the United States or at any designated place of hearing. Witnesses summoned by the Commission to appear before it shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

(d) Jurisdiction of courts of United States

In case of contumacy by, or refusal to obey a subpoena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where

such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, contracts, agreements, and other records. Such court may issue an order requiring such person to appear before the Commission or member or officer designated by the Commission, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found or may be doing business. Any person who willfully shall fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, contracts, agreements, or other records, if in his or its power so to do, in obedience to the subpoena of the Commission, shall be guilty of a misdemeanor and upon conviction shall be subject to a fine of not more than \$1,000 or to imprisonment for a term of not more than one year, or both.

(e) Testimony of witnesses

The testimony of any witness may be taken at the instance of a party, in any proceeding or investigation pending before the Commission, by deposition at any time after the proceeding is at issue. The Commission may also order testimony to be taken by deposition in any proceeding or investigation pending before it at any stage of such proceeding or investigation. Such depositions may be taken before any person authorized to administer oaths not being of counsel or attorney to either of the parties, nor interested in the proceeding or investigation. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition. Any person may be compelled to appear and depose, and to produce documentary evidence, in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the Commission, as hereinbefore provided. Such testimony shall be reduced to writing by the person taking deposition, or under his direction, and shall, after it has been reduced to writing, be subscribed by the deponent.

(f) Deposition of witnesses in a foreign country

If a witness whose testimony may be desired to be taken by deposition be in a foreign country, the deposition may be taken before an officer or person designated by the Commission, or agreed upon by the parties by stipulation in writing to be filed with the Commission. All depositions must be promptly filed with the Commission.

(g) Witness fees

Witnesses whose depositions are taken as authorized in this chapter, and the person or officer taking the same, shall be entitled to the same fees as are paid for like services in the courts of the United States.

(June 21, 1938, ch. 556, §14, 52 Stat. 828; Pub. L. 91-452, title II, §218, Oct. 15, 1970, 84 Stat. 929.)

AMENDMENTS

1970—Subsec. (h). Pub. L. 91-452 struck out subsec. (h) which related to the immunity from prosecution of any individual compelled to testify or produce evidence, documentary or otherwise, after claiming his privilege against self-incrimination.

EFFECTIVE DATE OF 1970 AMENDMENT

Amendment by Pub. L. 91-452 effective on sixtieth day following Oct. 15, 1970, and not to affect any immunity to which any individual is entitled under this section by reason of any testimony given before sixtieth day following Oct. 15, 1970, see section 260 of Pub. L. 91-452, set out as an Effective Date; Savings Provision note under section 6001 of Title 18, Crimes and Criminal Procedure.

STUDY AND REPORT ON NATURAL GAS PIPELINE AND STORAGE FACILITIES IN NEW ENGLAND

Pub. L. 107-355, §26, Dec. 17, 2002, 116 Stat. 3012, provided that:

“(a) STUDY.—The Federal Energy Regulatory Commission, in consultation with the Department of Energy, shall conduct a study on the natural gas pipeline transmission network in New England and natural gas storage facilities associated with that network.

“(b) CONSIDERATION.—In carrying out the study, the Commission shall consider the ability of natural gas pipeline and storage facilities in New England to meet current and projected demand by gas-fired power generation plants and other consumers.

“(c) REPORT.—Not later than 1 year after the date of enactment of this Act [Dec. 17, 2002], the Federal Energy Regulatory Commission shall prepare and submit to the Committee on Energy and Natural Resources of the Senate and the Committee on Energy and Commerce of the House of Representatives a report containing the results of the study conducted under subsection (a), including recommendations for addressing potential natural gas transmission and storage capacity problems in New England.”

§ 717n. Process coordination; hearings; rules of procedure

(a) Definition

In this section, the term “Federal authorization”—

(1) means any authorization required under Federal law with respect to an application for authorization under section 717b of this title or a certificate of public convenience and necessity under section 717f of this title; and

(2) includes any permits, special use authorizations, certifications, opinions, or other approvals as may be required under Federal law with respect to an application for authorization under section 717b of this title or a certificate of public convenience and necessity under section 717f of this title.

(b) Designation as lead agency

(1) In general

The Commission shall act as the lead agency for the purposes of coordinating all applicable Federal authorizations and for the purposes of complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

(2) Other agencies

Each Federal and State agency considering an aspect of an application for Federal authorization shall cooperate with the Commission

and comply with the deadlines established by the Commission.

(c) Schedule

(1) Commission authority to set schedule

The Commission shall establish a schedule for all Federal authorizations. In establishing the schedule, the Commission shall—

(A) ensure expeditious completion of all such proceedings; and

(B) comply with applicable schedules established by Federal law.

(2) Failure to meet schedule

If a Federal or State administrative agency does not complete a proceeding for an approval that is required for a Federal authorization in accordance with the schedule established by the Commission, the applicant may pursue remedies under section 717r(d) of this title.

(d) Consolidated record

The Commission shall, with the cooperation of Federal and State administrative agencies and officials, maintain a complete consolidated record of all decisions made or actions taken by the Commission or by a Federal administrative agency or officer (or State administrative agency or officer acting under delegated Federal authority) with respect to any Federal authorization. Such record shall be the record for—

(1) appeals or reviews under the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.), provided that the record may be supplemented as expressly provided pursuant to section 319 of that Act [16 U.S.C. 1465]; or

(2) judicial review under section 717r(d) of this title of decisions made or actions taken of Federal and State administrative agencies and officials, provided that, if the Court determines that the record does not contain sufficient information, the Court may remand the proceeding to the Commission for further development of the consolidated record.

(e) Hearings; parties

Hearings under this chapter may be held before the Commission, any member or members thereof, or any representative of the Commission designated by it, and appropriate records thereof shall be kept. In any proceeding before it, the Commission in accordance with such rules and regulations as it may prescribe, may admit as a party any interested State, State commission, municipality or any representative of interested consumers or security holders, or any competitor of a party to such proceeding, or any other person whose participation in the proceeding may be in the public interest.

(f) Procedure

All hearings, investigations, and proceedings under this chapter shall be governed by rules of practice and procedure to be adopted by the Commission, and in the conduct thereof the technical rules of evidence need not be applied. No informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision, rule, or regulation issued under the authority of this chapter.

(June 21, 1938, ch. 556, §15, 52 Stat. 829; Pub. L. 109-58, title III, §313(a), Aug. 8, 2005, 119 Stat. 688.)

REFERENCES IN TEXT

The National Environmental Policy Act of 1969, referred to in subsec. (b)(1), 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.

The Coastal Zone Management Act of 1972, referred to in subsec. (d)(1), 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.

AMENDMENTS

2005—Pub. L. 109-58 substituted “Process coordination; hearings; rules of procedure” for “Hearings; rules of procedure” in section catchline, added subsecs. (a) to (d), and redesignated former subsecs. (a) and (b) as (e) and (f), respectively.

§ 717o. Administrative powers of Commission; rules, regulations, and orders

The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this chapter; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

(June 21, 1938, ch. 556, §16, 52 Stat. 830.)

§ 717p. Joint boards

(a) Reference of matters to joint boards; composition and power

The Commission may refer any matter arising in the administration of this chapter to a board to be composed of a member or members, as determined by the Commission, from the State or each of the States affected or to be affected by such matter. Any such board shall be vested with the same power and be subject to the same duties and liabilities as in the case of a member of the Commission when designated by the Commission to hold any hearings. The action of such board shall have such force and effect and its

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 indi-

vidual 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.

(b) Notice

The penalty shall be assessed by the Commission after notice and opportunity for public hearing.

(c) Amount

In determining the amount of a proposed penalty, the Commission shall take into consideration the nature and seriousness of the violation and the efforts to remedy the violation.

(June 21, 1938, ch. 556, §22, as added Pub. L. 109-58, title III, §314(b)(1)(B), Aug. 8, 2005, 119 Stat. 691.)

PRIOR PROVISIONS

A prior section 22 of act June 21, 1938, was renumbered section 24 and is classified to section 717u of this title.

§ 717t-2. Natural gas market transparency rules**(a) In general**

(1) The Commission is directed to facilitate price transparency in markets for the sale or transportation of physical natural gas in interstate commerce, having due regard for the public interest, the integrity of those markets, fair competition, and the protection of consumers.

(2) The Commission may prescribe such rules as the Commission determines necessary and appropriate to carry out the purposes of this section. The rules shall provide for the dissemination, on a timely basis, of information about the availability and prices of natural gas sold at wholesale and in interstate commerce to the Commission, State commissions, buyers and sellers of wholesale natural gas, and the public.

(3) The Commission may—

(A) obtain the information described in paragraph (2) from any market participant; and

(B) rely on entities other than the Commission to receive and make public the information, subject to the disclosure rules in subsection (b) of this section.

(4) In carrying out this section, the Commission shall consider the degree of price transparency provided by existing price publishers and providers of trade processing services, and shall rely on such publishers and services to the maximum extent possible. The Commission may establish an electronic information system if it determines that existing price publications are not adequately providing price discovery or market transparency.

(b) Information exempted from disclosure

(1) Rules described in subsection (a)(2) of this section, if adopted, shall exempt from disclosure information the Commission determines would, if disclosed, be detrimental to the operation of an effective market or jeopardize system security.

(2) In determining the information to be made available under this section and the time to make the information available, the Commission shall seek to ensure that consumers and competitive markets are protected from the adverse effects of potential collusion or other anti-competitive behaviors that can be facilitated by untimely public disclosure of transaction-specific information.

(c) Information sharing

(1) Within 180 days of August 8, 2005, the Commission shall conclude a memorandum of understanding with the Commodity Futures Trading Commission relating to information sharing, which shall include, among other things, provisions ensuring that information requests to markets within the respective jurisdiction of each agency are properly coordinated to minimize duplicative information requests, and provisions regarding the treatment of proprietary trading information.

(2) Nothing in this section may be construed to limit or affect the exclusive jurisdiction of the Commodity Futures Trading Commission under the Commodity Exchange Act (7 U.S.C. 1 et seq.).

(d) Compliance with requirements

(1) The Commission shall not condition access to interstate pipeline transportation on the reporting requirements of this section.

(2) The Commission shall not require natural gas producers, processors, or users who have a de minimis market presence to comply with the reporting requirements of this section.

(e) Retroactive effect

(1) Except as provided in paragraph (2), no person shall be subject to any civil penalty under this section with respect to any violation occurring more than 3 years before the date on which the person is provided notice of the proposed penalty under section 717t-1(b) of this title.

(2) Paragraph (1) shall not apply in any case in which the Commission finds that a seller that has entered into a contract for the transportation or sale of natural gas subject to the jurisdiction of the Commission has engaged in fraudulent market manipulation activities materially affecting the contract in violation of section 717c-1 of this title.

(June 21, 1938, ch. 556, §23, as added Pub. L. 109-58, title III, §316, Aug. 8, 2005, 119 Stat. 691.)

REFERENCES IN TEXT

The Commodity Exchange Act, referred to in subsec. (c)(2), is act Sept. 21, 1922, ch. 369, 42 Stat. 998, as amended, which is classified generally to chapter 1 (§1 et seq.) of Title 7, Agriculture. For complete classification of this Act to the Code, see section 1 of Title 7 and Tables.

PRIOR PROVISIONS

A prior section 23 of act June 21, 1938, was renumbered section 25 and is classified to section 717v of this title.

§ 717u. Jurisdiction of offenses; enforcement of liabilities and duties

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 exclusive jurisdiction of violations of this chapter or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder. Any criminal proceeding shall be brought in the district wherein any act or transaction constituting the violation oc-

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- 284.262 Definitions.
- 284.263 Exemption from section 7 of Natural Gas Act and certain regulatory conditions.
- 284.264 Terms and conditions.
- 284.265 Cost recovery by interstate pipeline.
- 284.266 Rates and charges for interstate pipelines.
- 284.267 Intrastate pipeline emergency transportation rates.
- 284.268 Local distribution company emergency transportation rates.
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- 284.270 Reporting requirements.
- 284.271 Waiver.

Subpart J—Blanket Certificates Authorizing Certain Natural Gas Sales by Interstate Pipelines

- 284.281 Applicability.
- 284.282 Definitions.
- 284.283 Point of unbundling.
- 284.284 Blanket certificates for unbundled sales services.
- 284.285 Pregrant of abandonment of unbundled sales services.
- 284.286 Standards of conduct for unbundled sales service.
- 284.287 Implementation and effective date.
- 284.288 Code of conduct for unbundled sales service.

Subpart K—Transportation of Natural Gas on the Outer Continental Shelf by Interstate Natural Gas Pipelines on Behalf of Others

- 284.301 Applicability.
- 284.302 Definitions.
- 284.303 OCS blanket certificates.

Subpart L—Certain Sales for Resale by Non-interstate Pipelines

- 284.401 Definitions.
- 284.402 Blanket marketing certificates.
- 284.403 Code of conduct for persons holding blanket marketing certificates.

Subpart M—Applications for Market-Based Rates for Storage

- 284.501 Applicability.
- 284.502 Procedures for applying for market-based rates.
- 284.503 Market-power determination.
- 284.504 Standard requirements for market-power authorizations.
- 284.505 Market-based rates for storage providers without a market-power determination.

AUTHORITY: 15 U.S.C. 717-717w, 3301-3432; 42 U.S.C. 7101-7352; 43 U.S.C. 1331-1356.

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SOURCE: Order 46, 44 FR 52184, Sept. 7, 1979, unless otherwise noted.

EDITORIAL NOTE: Nomenclature changes to part 284 appear at 65 FR 10222, Feb. 25, 2000.

Subpart A—General Provisions and Conditions

§ 284.1 Definitions.

(a) *Transportation* includes storage, exchange, backhaul, displacement, or other methods of transportation.

(b) *Appropriate state regulatory agency* means a state agency which regulates intrastate pipelines and local distribution companies within such state. When used in reference to rates and charges, the term includes only those agencies which set rates and charges on a cost-of-service basis.

(c) *Market center* means an area where gas purchases and sales occur at the intersection of different pipelines.

(d) *Major non-interstate pipeline* means a pipeline that fits the following criteria:

(1) It is not a “natural gas company” under section 1 of the Natural Gas Act, or is a “natural gas company” and has obtained a service area determination under section 7(f) of the Natural Gas Act from the Commission;

(2) It delivers annually more than fifty (50) million MMBtu (million British thermal units) of natural gas measured in average deliveries for the previous three calendar years; or, if the pipeline has been operational for less than three years, its design capacity permits deliveries of more than fifty (50) million MMBtu of natural gas annually.

[44 FR 52184, Sept. 7, 1989, as amended by Order 636, 57 FR 13315, Apr. 16, 1992; Order 720, 73 FR 73517, Dec. 2, 2008; Order 720-A, 75 FR 5201, Feb. 1, 2010]

§ 284.2 Refunds and interest.

(a) *Refunds*. Any rate or charge collected for any sale, transportation, or assignment conducted pursuant to this part which exceeds the rates or charges authorized by this part shall be refunded.

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Internet web site and must notify affected parties of such notices in either of the following ways to be chosen by the affected party: Internet E-Mail or direct notification to the party’s Internet URL address.

code_of_federal_regulations/ibr_locations.html.

* * * * *

[Order 587, 61 FR 39068, July 26, 1996]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 284.12, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

EFFECTIVE DATE NOTE: At 75 FR 16344, Apr. 1, 2010, § 284.12 was amended by revising paragraphs (a)(1)(i) through (a)(1)(vii), and (a)(2), effective May 3, 2010. For the convenience of the user, the revised text is set forth as follows:

§ 284.12 Standards for pipeline business operations and communications.

- (a) * * *
(1) * * *

(i) Additional Standards (General Standards, Creditworthiness

Standards and Gas/Electric Operational Communications Standards) (Version 1.9, September 30, 2009);

(ii) Nominations Related Standards (Version 1.9, September 30, 2009);

(iii) Flowing Gas Related Standards (Version 1.9, September 30, 2009);

(iv) Invoicing Related Standards (Version 1.9, September 30, 2009);

(v) Quadrant Electronic Delivery Mechanism Related Standards (Version 1.9, September 30, 2009) with the exception of Standard 4.3.4;

(vi) Capacity Release Related Standards (Version 1.9, September 30, 2009); and

(vii) Internet Electronic Transport Related Standards (Version 1.9, September 30, 2009) with the exception of Standard 10.3.2.

(2) This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies of these standards may be obtained from the North American Energy Standards Board, 801 Travis Street, Suite 1675, Houston, TX 77002, Phone: (713) 356-0060. NAESB’s Web site is at http://www.naesb.org/. Copies may be inspected at the Federal Energy Regulatory Commission, Public Reference and Files Maintenance Branch, 888 First Street, NE., Washington, DC 20426, Phone: (202) 502-8371, http://www.ferc.gov, or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202-741-6030, or go to: http://www.archives.gov/Federal_register/

§ 284.13 Reporting requirements for interstate pipelines.

An interstate pipeline that provides transportation service under subparts B or G of this part must comply with the following reporting requirements.

(a) Cross references. The pipeline must comply with the requirements in Part 358, Part 250, and Part 260 of this chapter, where applicable.

(b) Reports on firm and interruptible services. An interstate pipeline must post the following information on its Internet web site, and provide the information in downloadable file formats, in conformity with § 284.12 of this part, and must maintain access to that information for a period not less than 90 days from the date of posting.

(1) For pipeline firm service and for release transactions under § 284.8, the pipeline must post with respect to each contract, or revision of a contract for service, the following information no later than the first nomination under a transaction:

(i) The full legal name of the shipper, and identification number, of the shipper receiving service under the contract, and the full legal name, and identification number, of the releasing shipper if a capacity release is involved or an indication that the pipeline is the seller of transportation capacity;

(ii) The contract number for the shipper receiving service under the contract, and, in addition, for released transactions, the contract number of the releasing shipper’s contract;

(iii) The rate charged under each contract;

(iv) The maximum rate, and for capacity release transactions not subject to a maximum rate, the maximum rate that would be applicable to a comparable sale of pipeline services;

(v) The duration of the contract;

(vi) The receipt and delivery points and zones or segments covered by the contract, including the industry common code for each point, zone, or segment;

(vii) The contract quantity or the volumetric quantity under a volumetric release;

(viii) Special terms and conditions applicable to a capacity release transaction, including all aspects in which the contract deviates from the pipeline's tariff, and special details pertaining to a pipeline transportation contract, including whether the contract is a negotiated rate contract, conditions applicable to a discounted transportation contract, and all aspects in which the contract deviates from the pipeline's tariff.

(ix) Whether there is an affiliate relationship between the pipeline and the shipper or between the releasing and replacement shipper.

(x) Whether a capacity release is a release to an asset manager as defined in §284.8(h)(3) and the asset manager's obligation to deliver gas to, or purchase gas from, the releasing shipper.

(xi) Whether a capacity release is a release to a marketer participating in a state-regulated retail access program as defined in §284.8(h)(4).

(2) For pipeline interruptible service, the pipeline must post on a daily basis no later than the first nomination for service under an interruptible agreement, the following information:

(i) The full legal name, and identification number, of the shipper receiving service;

(ii) The rate charged;

(iii) The maximum rate;

(iv) The receipt and delivery points covered between which the shipper is entitled to transport gas at the rate charged, including the industry common code for each point, zone, or segment;

(v) The quantity of gas the shipper is entitled to transport;

(vi) Special details pertaining to the agreement, including conditions applicable to a discounted transportation contract and all aspects in which the agreement deviates from the pipeline's tariff.

(vii) Whether the shipper is affiliated with the pipeline.

(c) *Index of customers.* (1) On the first business day of each calendar quarter, an interstate pipeline must file with the Commission an index of all its firm transportation and storage customers

under contract as of the first day of the calendar quarter that complies with the requirements set forth by the Commission. The Commission will establish the requirements and format for such filing. The index of customers must also be posted on the pipeline's Internet web, in accordance with standards adopted in §284.12 of this part, and made available from the Internet web site in a downloadable format complying with the specifications established by the Commission. The information posted on the pipeline's Internet web site must be made available until the next quarterly index is posted.

(2) For each shipper receiving firm transportation or storage service, the index must include the following information:

(i) The full legal name, and identification number, of the shipper;

(ii) The applicable rate schedule number under which the service is being provided;

(iii) The contract number;

(iv) The effective and expiration dates of the contract;

(v) For transportation service, the maximum daily contract quantity (specify unit of measurement), and for storage service, the maximum storage quantity (specify unit of measurement);

(vi) The receipt and delivery points and the zones or segments covered by the contract in which the capacity is held, including the industry common code for each point, zone, or segment;

(vii) An indication as to whether the contract includes negotiated rates;

(viii) The name of any agent or asset manager managing a shipper's transportation service; and

(ix) Any affiliate relationship between the pipeline and a shipper or between the pipeline and a shipper's asset manager or agent.

(3) The requirements of this section do not apply to contracts which relate solely to the release of capacity under §284.8, unless the release is permanent.

(4) Pipelines that are not required to comply with the index of customers posting and filing requirements of this section must comply with the index of customer requirements applicable to transportation and sales under Part 157

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as set forth under § 154.111(b) and (c) of this chapter.

(5) The requirements for the electronic index can be obtained from the Federal Energy Regulatory Commission, Division of Information Services, Public Reference and Files Maintenance Branch, Washington, DC 20426.

(d) *Capacity and flow information.* (1) An interstate pipeline must provide on its Internet web site and in downloadable file formats, in conformity with § 284.12 of this part, equal and timely access to information relevant to the availability of all transportation services whenever capacity is scheduled, including, but not limited to, the availability of capacity at receipt points, on the mainline, at delivery points, and in storage fields, whether the capacity is available directly from the pipeline or through capacity release, the total design capacity of each point or segment on the system, the amount scheduled at each point or segment whenever capacity is scheduled, and all planned and actual service outages or reductions in service capacity. An interstate pipeline must also provide information about the volumes of no-notice transportation provided pursuant to § 284.7(a)(4). This information must be posted at each receipt and delivery point before 11:30 a.m. central clock time three days after the day of gas flow.

(2) An interstate pipeline must make an annual filing by March 1 of each year showing the estimated peak day capacity of the pipeline's system, and the estimated storage capacity and maximum daily delivery capability of storage facilities under reasonably representative operating assumptions and the respective assignments of that capacity to the various firm services provided by the pipeline.

(e) *Semi-annual storage report.* Within 30 days of the end of each complete storage injection and withdrawal season, the interstate pipeline must file with the Commission a report of storage activity. The report must be signed under oath by a senior official, consist of an original and five conformed copies, and contain a summary of storage injection and withdrawal activities to include the following:

(1) The identity of each customer injecting gas into storage and/or withdrawing gas from storage, identifying any affiliation with the interstate pipeline;

(2) The rate schedule under which the storage injection or withdrawal service was performed;

(3) The maximum storage quantity and maximum daily withdrawal quantity applicable to each storage customer;

(4) For each storage customer, the volume of gas (in dekatherms) injected into and/or withdrawn from storage during the period; and (5) The unit charge and total revenues received during the injection/withdrawal period from each storage customer, noting the extent of any discounts permitted during the period.

(f) *Notice of bypass.* An interstate pipeline that provides transportation (except storage) to a customer that is located in the service area of a local distribution company and will not be delivering the customer's gas to that local distribution company, must file with the Commission, within thirty days after commencing such transportation, a statement that the interstate pipeline has notified the local distribution company and the local distribution company's appropriate regulatory agency in writing of the proposed transportation prior to commencement.

[Order 637, 65 FR 10221, Feb. 25, 2000, as amended by Order 637-A, 65 FR 35765, June 5, 2000; Order 2004, 68 FR 69157, Dec. 11, 2003; Order 712, 73 FR 37092, June 30, 2008; Order 720, 73 FR 73517, Dec. 2, 2008]

§ 284.14 Posting requirements of major non-interstate pipelines.

(a) *Daily posting requirement.* A major non-interstate pipeline must post on a daily basis on a publicly-accessible Internet Web site and in downloadable file format equal and timely access to information regarding receipt or delivery points, including non-physical scheduling points.

(1) A major non-interstate pipeline must post data for each receipt or delivery point, or for any point that operates as both a delivery and receipt point for the major non-interstate

pipeline, to which natural gas transportation is scheduled:

(i) With a physically metered design capacity equal to or greater than 15,000 MMBtu (million British thermal units)/day; or

(ii) If a physically metered design capacity is not known or does not exist for such a point, with a maximum volume scheduled to such a point equal to or greater than 15,000 MMBtu on any day within the prior three calendar years.

(2) Notwithstanding the requirements of subsection 284.14(a)(1), a receipt point is not subject to the posting requirements of this section if the maximum scheduled volume at the receipt point was less than 5,000 MMBtu on every day within the prior three calendar years. If a point has operated as both a receipt and delivery point any time within the prior three calendar years, subsection 284.14(a)(2) shall not apply to that point.

(3) A major non-interstate pipeline that must post data for a receipt or delivery point shall do so within 45 days of the date that the point becomes eligible for posting.

(4) For each delivery or receipt point that must be posted, a major non-interstate pipeline must provide the following information by 10:00 p.m. central clock time the day prior to scheduled natural gas flow: Transportation Service Provider Name, Posting Date, Posting Time, Nomination Cycle, Location Name, Additional Location Information if Needed to Distinguish Between Points, Location Purpose Description (Receipt, Delivery, Bilateral, or Non-physical Scheduling Point), Posted Capacity (physically metered design capacity or maximum flow within the last three years), Method of Determining Posted Capacity (Capacity or Maximum Volume), Scheduled Volume, Available Capacity (Calculated as Posted Capacity minus Scheduled Capacity), and Measurement Unit (Dth, MMBtu, or MCF). For receipt or delivery points with bi-directional scheduled flows, the Scheduled Volume for scheduled flow in each direction must be posted. The information in this subsection must remain posted for at least a period of one year.

(b) *Exemptions to daily posting requirement.* The following categories of major non-interstate pipelines are exempt from the posting requirement of § 284.14(a):

(1) Those that are located upstream of a processing, treatment or dehydration plant;

(2) Those that deliver more than ninety-five percent (95%) of the natural gas volumes they flow directly to end-users or on-system storage as measured in average deliveries for the previous three calendar years;

(3) Storage providers;

(4) Those that deliver the entirety of their transported natural gas directly to an end-user that owns or operates the major non-interstate pipeline.

[Order 720-A, 75 FR 5201, Feb. 1, 2010]

Subpart B—Certain Transportation by Interstate Pipelines

§ 284.101 Applicability.

This subpart implements section 311(a)(1) of the NGPA and applies to the transportation of natural gas by any interstate pipeline on behalf of:

- (a) Any intrastate pipeline; or
- (b) Any local distribution company.

§ 284.102 Transportation by interstate pipelines.

(a) Subject to paragraphs (d) and (e) of this section, other provisions of this subpart, and the conditions of subpart A of this part, any interstate pipeline is authorized without prior Commission approval, to transport natural gas on behalf of:

- (1) Any intrastate pipeline; or
- (2) Any local distribution company.

(b) Any rates charged for transportation under this subpart may not exceed the just and reasonable rates established under subpart A of this part.

(c) An interstate pipeline that engages in transportation arrangements under this subpart must file reports in accordance with § 284.13 and § 284.106 of this chapter.

(d) Transportation of natural gas is not on behalf of an intrastate pipeline or local distribution company or authorized under this section unless:

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 22nd day of March 2011, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system as indicated below:

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