ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

Nos. 12-1470, 12-1474, and 12-1475

NO GAS PIPELINE, *ET AL*.
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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October 7, 2013

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties:

Parties and intervenors appearing below and in this Court are listed in Petitioners' briefs or their initial filings with this court.

B. Rulings Under Review:

1. *Texas Eastern Transmission, LP*, 139 FERC ¶ 61,138 (May 21, 2012) ("Certificate Order"), R.1378, JA 1; and

2. *Texas Eastern Transmission, LP*, 141 FERC ¶ 61,043 (Oct. 18, 2012) ("Rehearing Order"), R.1521, JA 69.

C. Related Cases:

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

/s/ Jennifer S. Amerkhail
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Attorney

October 7, 2013

TABLE OF CONTENTS

PAGE

STATEMENT OF ISSUES 1

STATUTORY AND REGULATORY PROVISIONS 2

COUNTERSTATEMENT OF JURISDICTION 2

STATEMENT OF THE CASE.....3

I. Statutory And Regulatory Background 3

A. Natural Gas Act 3

B. National Environmental Policy Act.....5

C. Omnibus Budget Reconciliation Act Of 1968.....6

II. The Commission's Review Of The NJ-NY Project.....6

A. The Project And Environmental Review.....6

B. Radon In Natural Gas And Indoor Air Quality 8

C. Challenged FERC Orders 10

SUMMARY OF ARGUMENT 12

ARGUMENT 14

I. This Court Lacks Jurisdiction To Review The Petitions..... 14

A. This Court Lacks Original Subject Matter Jurisdiction To Review A Challenge To The Budget Act..... 14

TABLE OF CONTENTS

PAGE

B. Coalition Has Not Established Standing For Either Of Its Claims…… 18

1. Coalition's Alleged Harm From Radon Does Not Satisfy Constitutional Standing Requirements..... 20

2. Coalitions' Alleged Harm From Safety Of Pipeline Operations Satisfies Neither Constitutional Nor Prudential Standing Requirement…..... 25

C. Jersey City's Bias Claim Was Untimely And Is Now Jurisdictionally Barred..... 30

II. Standard Of Review 31

III. Neither The Commission's Financial Structure Nor Its Consideration Of Proposed Projects Demonstrates Any Potential Or Actual Unconstitutional Bias..... 33

A. The Structure Of FERC's Funding, Created By Congress, Does Not Present Even The Most Remote "Possible Temptation" To Favor Gas Pipelines..... 33

B. The Commission Does Not Actually Favor Any Pipelines..... 40

1. The Court Lacks Jurisdiction to Consider Allegations Of Actual Bias 40

2. The Commission Successfully Identifies Poor Projects And Poor Routes Through Its Initial Process..... 41

3. Other Allegations Of Actual Bias Are Unavailing..... 45

TABLE OF CONTENTS

PAGE

IV. The Commission's Analysis of Safety Risks, Including The Risk Of Remote, Deliberate Attack On Pipeline Controls, Complied With NEPA 46

V. The Commission's Analysis Of The Environmental Impact Associated With Radon Complied With NEPA Obligations 50

A. FERC Reasonably Analyzed Radon Health Risks Using Available Studies 50

B. The Commission Properly Analyzed New Studies Submitted After The Final Environmental Impact Statement 52

C. Coalition Has Not Established The Need For A Trial-Type Evidentiary Hearing 53

CONCLUSION 57

TABLE OF AUTHORITIES

COURT CASES: **PAGE**

Aetna Life Ins. Co. v. Lavoie,
475 U.S. 813 (1986)…….....34

Alpha Epsilon Phi Tau Chapter Hous. Ass'n v. City of Berkeley,
114 F.3d 840 (9th Cir. 1997)……..37

American Petroleum Inst. v. SEC,
No. 12-1398, 2013 WL 1776467 (D.C. Cir. Apr. 26, 2013)……..16

ANR Pipeline Co. v. FERC,
205 F.3d 403 (D.C. Cir. 2000)……26

Ark Las Vegas Rest. Corp. v. NLRB,
334 F.3d 99 (D.C. Cir. 2003)…….16

ASARKO Inc. v. Kadish,
490 U.S. 605 (1989)……...29

Association of Flight Attendants v. U.S. Dep't of Transp.,
564 F.3d 462 (D.C. Cir. 2009)……24

**Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*,
462 U.S. 87 (1983).....5, 32, 46, 52

B&J Oil & Gas v. FERC,
353 F.3d 71 (D.C. Cir. 2004)..... 32, 56

Blue Ridge Envtl. Def. League v. NRC,
No. 12-1106, 2013 WL 1954200 (D.C. Cir. May 14, 2013)……..46

---

* Cases chiefly relied upon are marked with an asterisk.

TABLE OF AUTHORITIES

COURT CASES: **PAGE**

Blumenthal v. FERC,
613 F.3d 1142 (D.C. Cir. 2010)..... 54, 56

Boston Gas Co. v. FERC,
575 F.2d 975 (1st Cir. 1978)……..31

C & W Fish Co. v. Fox,
931 F.2d 1556 (D.C. Cir. 1991)…….32

Canadian Ass'n of Petroleum Producers v. FERC,
308 F.3d 11 (D.C. Cir. 2002)…….41

Caperton v. A.T. Massey Coal Co.,
556 U.S. 868 (2009)……..34

Center for Biological Diversity v. BLM,
698 F.3d 1101 (9th Cir. 2012)……50

Cerro Wire & Cable Co. v. FERC,
677 F.2d 124 (D.C. Cir. 1982)……56

Chlorine Inst., Inc. v. Federal R.R. Admin.,
No. 12-1298, 2013 WL 2477012 (D.C. Cir. June 11, 2013).....19

Citizens' Comm. to Save Our Canyons v. Krueger,
513 F.3d 1169 (10th Cir. 2008)……..52

Citizens to Preserve Overton Park, Inc. v. Volpe,
401 U.S. 402 (1971)……...32

City of Orrville v. FERC,
147 F.3d 979 (D.C. Cir. 1998)……18

TABLE OF AUTHORITIES

COURT CASES: **PAGE**

City of Rochester v. Bond,
603 F.2d 927 (D.C. Cir. 1979)……17

**Clapper v. Amnesty Int'l USA*,
1333 S. Ct. 1138 (2013)……18-19, 21, 22, 23, 27

Clarke v. Security Indus. Ass'n,
479 U.S. 388 (1987)..... 25, 27

Communities Against Runway Expansion, Inc. v. FAA,
355 F.3d 678 (D.C. Cir. 2004)…….5

Competitive Enter. Inst. v. National Highway Traffic Safety Admin.,
901 F.2d 107 (D.C. Cir. 1990).....…….26, 27

Davis v. Mineta,
302 F.3d 1104 (10th Cir. 2002)……..32

**Dugan v. Ohio*,
277 U.S. 61 (1928)..... 34, 35

Eastern Niagara Pub. Power Alliance v. FERC,
558 F.3d 564 (D.C. Cir. 2009)……32

El Paso Natural Gas Co. v. FERC,
50 F.3d 23 (D.C. Cir. 1995)……21

Evans v. Sebelius,
No. 11-5120, 2103 WL 2122072, *2 (D.C. Cir. May 17, 2013)……15

ExxonMobil Gas Mktg. Co. v. FERC,
297 F.3d 1071 (D.C. Cir. 2002)……..32

**Five Flags Pipeline Co. v. Department of Transp.*,
854 F.2d 1438 (D.C. Cir. 1988)..... 16, 18

TABLE OF AUTHORITIES

COURT CASES: **PAGE**

Forest Guardians v. U.S. Fish & Wildlife Serv.,
611 F.3d 692 (10th Cir. 2010).....33

Friends of Keeseville v. FERC,
859 F.2d 230 (D.C. Cir. 1988)……19

Gibson v. Berryhill,
411 U.S. 564 (1973)……...34

Grocery Mfrs. Ass'n v. EPA,
693 F.3d 169 (D.C. Cir. 2012).....23, 25, 26

Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n,
426 U.S. 482 (1976)……...37

Hunt v. Washington State Apple Adver. Comm'n,
432 U.S. 333 (1977)……...18

Illinois Commerce Comm'n v. FERC,
Nos. 11-3421, 2013 WL 2451766 (7th Cir. June 7, 2013)..... 55, 56

Jackson Cnty. v. FERC,
589 F.3d 1284 (D.C. Cir. 2009)…….50

Kleppe v. Sierra Club,
427 U.S. 390 (1976)……...31

Lead Indus. Ass'n v. EPA,
647 F.2d 1130 (D.C. Cir. 1980)..... 30, 32

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992)……...…18

Marsh v. Oregon Natural Res. Council,
490 U.S. 360 (1989)……..31

TABLE OF AUTHORITIES

COURT CASES: **PAGE**

Marshall v. Jerrico, Inc.,
446 U.S. 238 (1980) 35, 38

Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak,
132 S. Ct. 2199 (2012) 19

Midwest Indep. Transmission Sys. Operator, Inc. v. FERC,
388 F.3d 903 (D.C. Cir. 2004) 6, 16, 17

Moreau v. FERC,
982 F.3d 556 (D.C. Cir. 1993) 25, 27, 28, 30, 55

Mountain States Legal Found. v. Glickman,
92 F.3d 1228 (D.C. Cir. 1996) 18

Murray Energy Corp. v. FERC,
629 F.3d 231 (D.C. Cir. 2011) 47

National Comm. for New River v. FERC,
373 F.3d 1323 (D.C. Cir. 2004) 32, 53

National Comm. for New River, Inc. v. FERC,
433 F.3d 830 (D.C. Cir. 2005) 25, 28

Neighbors of Cuddy Mountain v. U.S. Forest Serv.,
137 F.3d 1372 (9th Cir. 1998) 51

Nevada v. Department of Energy,
457 F.3d 78 (D.C. Cir. 2006) 31

New Mexico Attorney Gen. v. FERC,
466 F.3d 120 (D.C. Cir. 2006) 22

Nevada Land Action Ass'n v. U.S. Forest Serv.,
8 F.3d 713 (9th Cir. 1993) 27

TABLE OF AUTHORITIES

COURT CASES: **PAGE**

New York Reg'l Interconnect v. FERC,
634 F.3d 581 (D.C. Cir. 2011) 21, 23

Northern Mariana Islands v. Kaipat,
94 F.3d 574 (7th Cir. 1996)……37

**Occidental Permian Ltd. v. FERC*,
673 F.3d 1024 (D.C. Cir. 2012) 20, 21, 22, 28

Paramasamy v. Ashcroft,
295 F.3d 1047 (9th Cir. 2002)……...45

Public Utils. Comm'n of Cal. v. FERC,
900 F.2d 269 (D.C. Cir. 1990)……31

Robertson v. Methow Valley Citizens Council,
490 U.S. 332 (1989).....5, 31, 50

South Coast Air Quality Mgmt. Dist. v. FERC,
621 F.3d 1085 (9th Cir. 2010)……24

Summers v. Earth Island Inst.,
555 U.S. 488 (2009).....22, 23, 24

Theodore Roosevelt Conservation P'ship v. Salazar,
616 F.3d 497 (D.C. Cir. 2010)……52

TOMAC, Taxpayers Of Mich. Against Casinos v. Norton,
433 F.3d 852 (D.C. Cir. 2006) 52, 53

Tumey v. Ohio,
273 U.S. 510 (1927).....34, 35, 46

Union Pac. Fuels, Inc. v. FERC,
129 F.3d 157 (D.C. Cir. 1997)……54

TABLE OF AUTHORITIES

COURT CASES: **PAGE**

U.S. Dep't of Transp. v. Public Citizen,
541 U.S. 752 (2004)……5

US Ecology, Inc. v. U.S. Dep't of Interior,
231 F.3d 20 (D.C. Cir. 2000)……..29

Van Harken v. City of Chicago,
103 F.3d 1346 (7th Cir. 1997)……39

Village of Bensenville v. FAA,
457 F.3d 52 (D.C. Cir. 2006)..... 30, 35

Ward v. Village of Monroeville,
409 U.S. 57 (1972).....33, 35, 37, 39

Watts v. SEC,
482 F.3d 501 (D.C. Cir. 2007)……16

ADMINISTRATIVE CASES:

Annual Charges Under the Omnibus Budget Reconciliation Act of 1986,
Order No. 472, FERC Stats. & Regs. ¶ 30,746, *clarified*, Order No. 472-A, FERC Stats. & Regs. ¶ 30,750, 52 Fed. Reg. 23,650, *on reh'g*, Order No. 472-B, FERC Stats. & Regs. ¶ 30,767, 52 Fed. Reg. 36,013 (1987), *on reh'g*, Order No. 472-C, 42 FERC ¶ 61,013 (1988).....6, 36, 40

Central N.Y. Oil & Gas Co.,
134 FERC ¶ 61,035 (2011)…….45

Dominion Transmission, Inc.,
136 FERC ¶ 61,126 (2011)……45

Dominion Transmission, Inc.,
141 FERC ¶ 61,240 (2012)……43

TABLE OF AUTHORITIES

ADMINISTRATIVE CASES: **PAGE**

Golden Pass LNG Terminal LP,
112 FERC ¶ 61,041 (2005)…….46

Golden Pass Pipeline LP,
117 FERC ¶ 61,015 (2006)…….46

**Texas Eastern Transmission, LP*,
139 FERC ¶ 61,138 (2012)..... 3, 7, 8, 10, 22, 23, 24, 27, 28, 44, 47, 51, 54

**Texas Eastern Transmission, LP*,
141 FERC ¶ 61,043 (2012)..... 3, 8, 11, 22, 23, 27, 30, 35, 36, 38, 39, 41, 42, 44, 45, 47, 48, 49, 52, 54, 55

Turtle Bayou Gas Storage Co.,
135 FERC ¶ 61,233 (2011)…….43

STATUTES:

Administrative Procedure Act

5 U.S.C. § 706(2)(A)……..31

Natural Gas Act

Section 1(b)-(c), 15 U.S.C. § 717(b)-(c)……..3

Section 7(c), 15 U.S.C. § 717f(c)……...4, 41

Section 7(e), 15 U.S.C. § 717f(e).....4, 15, 43

Section 19(a), 15 U.S.C. § 717r(a)……40

Section 19(b), 15 U.S.C. § 717r(b).....3, 12, 13, 15, 16, 30

TABLE OF AUTHORITIES

STATUTES: **PAGE**

National Environmental Policy Act

42 U.S.C. § 4321……..5

Omnibus Budget Reconciliation Act of 1986

42 U.S.C. § 7178.....2, 16, 36

42 U.S.C. § 7178(a)-(b)……6

42 U.S.C. § 7178(e)……38

Federal Question Jurisdiction

28 U.S.C. § 1331……12

REGULATIONS:

18 C.F.R. § 157.14(a)(9)(vi)……..47

18 C.F.R. § 157.21.....4, 7, 42

18 C.F.R. § 381.207……38

18 C.F.R. § 381.401-03……..39

18 C.F.R. § 382.201-03……..38

18 C.F.R. § 382.202……6, 17

18 C.F.R. § 385.713(c)(3)……..30

GLOSSARY

APA	Administrative Procedure Act
Budget Act	Omnibus Budget Reconciliation Act of 1986, codified at 42 U.S.C. § 7178
Commission or FERC	Federal Energy Regulatory Commission
Certificate Order	*Texas Eastern Transmission, LP*, 139 FERC ¶ 61,138 (May 21, 2012), R.1378, JA 1
DEIS	Draft Environmental Impact Statement
FEIS	Final Environmental Impact Statement
JA	Joint Appendix
NEPA	National Environmental Policy Act
NGA	Natural Gas Act
NJ-NY Project or Project	A natural gas pipeline connecting New Jersey and New York proposed by Spectra
P	Paragraph number in a FERC order or affidavit
PHMSA	Pipeline and Hazardous Materials Safety Administration
R.	Record citation
Rehearing Order	*Texas Eastern Transmission, LP*, 141 FERC ¶ 61,043 (Oct. 18, 2012), R.1521, JA 69
Spectra	Spectra Energy Company, including subsidiaries Texas Eastern Transmission, LP and Algonquin Gas Transmission, LLC
TSA	Transportation Security Administration

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

Nos. 12-1470, 12-1474, and 12-1475

NO GAS PIPELINE, *ET AL.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF ISSUES

The Federal Energy Regulatory Commission ("FERC" or "Commission") approved the proposal of two subsidiaries of Spectra Energy Corporation, Texas Eastern Transmission, LP and Algonquin Gas Transmission, LLC (collectively "Spectra"), to build a natural gas pipeline connecting New Jersey and New York ("NJ-NY Project" or "Project") that would deliver new gas supplies to lower Manhattan. The following issues are raised, as noted, in separate briefs:

1. Assuming this Court has subject matter jurisdiction, whether the funding structure of the Commission created by Congress in the Omnibus Budget

Reconciliation Act of 1986 ("Budget Act"), codified at 42 U.S.C. § 7178, is too remote an influence on the Commission's decisions on proposed pipeline projects to present a disqualifying interest under constitutional due process standards. [Jersey City brief]

2. Assuming jurisdiction, whether the Commission satisfied its procedural responsibilities under the National Environmental Policy Act ("NEPA") and otherwise reasonably addressed objections regarding safety of the NJ-NY Project and residential radon exposure. [Sierra Club, Food & Water Watch, and NO Gas Pipeline (collectively "Coalition") brief]

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutes and regulations are contained in the Addendum.

COUNTERSTATEMENT OF JURISDICTION

The Court does not have original subject matter jurisdiction over Jersey City's bias claim, which contests the constitutionality of a structure established by Congress in the Budget Act, not by the Commission in the challenged orders. *See* Part I.A of the Argument. Further, as explained in Part I.B of the Argument, the Court does not have jurisdiction over either of Coalition's NEPA claims as Coalition did not demonstrate constitutional or prudential standing. Finally, Jersey City waived its bias claim by failing to raise it in a timely manner, *see* Part I.C, and, on the merits, waived its actual bias arguments by failing to raise them to the

Commission as required by Natural Gas Act ("NGA") section 19(b), 15 U.S.C. §717r(b), *see infra* pp. 40-41.

STATEMENT OF THE CASE

In the orders on review, the Commission granted Spectra a certificate of public convenience and necessity to expand its existing natural gas transportation pipeline in Connecticut and New Jersey, and to extend a new pipeline from New Jersey into lower Manhattan in New York. *See Texas Eastern Transmission, LP*, 139 FERC ¶ 61,138, P 7 (2012) ("Certificate Order"), R.1378, JA 1; *order on reh'g*, 141 FERC ¶ 61,043, P 1 (2012) ("Rehearing Order"), R.1521, JA 69. The purpose of the pipeline is to eliminate constraints that cause disruptions of natural gas service, provide new sources of gas supply for greater fuel security and competitive choice, meet ever-increasing demands for energy in the New York metropolitan area, and improve air quality in New York City.

STATEMENT OF FACTS

I. Statutory And Regulatory Background

A. Natural Gas Act

NGA sections 1(b) and (c) grant the Commission jurisdiction over the transportation and wholesale sale of natural gas in interstate commerce, with jurisdiction over the production, gathering, and local distribution of natural gas reserved to the states. 15 U.S.C. § 717(b) and (c). Under NGA section 7(c), any

person seeking to construct, extend, acquire, or operate a facility for the transportation or sale of natural gas in interstate commerce must secure a certificate of public convenience and necessity from the Commission. 15 U.S.C. § 717f(c)(1)(A). Under NGA section 7(e), the Commission shall issue a certificate to any qualified applicant upon finding that the proposed construction and operation of a pipeline facility is required by the public convenience and necessity. 15 U.S.C. § 717f(e).

Applicants seeking certification from FERC must comply with extensive application requirements, including public notice and comment and environmental review proceedings. *See generally* 18 C.F.R. §§ 157.1-157.22. In 2002, the Commission developed and implemented, through a FERC staff guidance document, a new pre-filing process for builders of interstate natural gas pipelines. *Guidance: FERC Staff NEPA Pre-Filing Involvement In Natural Gas Projects* (Oct. 23, 2002) ("Pre-Filing Guidance") (included in Addendum). The Pre-Filing Guidance encouraged pipeline project sponsors "to engage in early project-development involvement with the public and agencies, as contemplated by the National Environmental Policy Act (NEPA)." *Id*. at 1 (stating that information should be filed seven to eight months prior to filing an application). In 2005, pursuant to the Energy Policy Act of 2005, the Commission developed rules for those that choose to use the pre-filing process. *See* 18 C.F.R. § 157.21(b). The

rules codified the process set forth in the Pre-Filing Guidance and are designed such that a prospective applicant will engage FERC staff, federal and state agencies, tribal authorities, and the public in identifying potential issues and developing additional information before the prospective applicant submits an application.

B. National Environmental Policy Act

NEPA, 42 U.S.C. §§ 4321, *et seq.*, sets out procedures to be followed by federal agencies to ensure that the environmental effects of proposed actions are "adequately identified and evaluated." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); *U.S. Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 768 (2004). "NEPA itself does not mandate particular results in order to accomplish these ends." *Public Citizen*, 541 U.S. at 756 (quoting *Robertson*, 490 U.S. at 350). "Rather, NEPA imposes only procedural requirements on federal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions." *Id*. at 756-57 (citations omitted). Under NEPA, an agency must "take a 'hard look' at the environmental consequences before taking a major action." *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983) (citation omitted); *see also Communities Against Runway Expansion, Inc. v. FAA*, 355 F.3d 678, 685 (D.C. Cir. 2004) (same).

C. Omnibus Budget Reconciliation Act Of 1986

The Omnibus Budget Reconciliation Act of 1986 (the "Budget Act") requires that "the Federal Energy Regulatory Commission shall, using the provisions of this section and authority provided by other laws, assess and collect fees and annual charges in any fiscal year in amounts equal to all of the costs incurred by the Commission in that fiscal year." 42 U.S.C. § 7178(a)(1). "The fees or annual charges assessed shall be computed on the basis of methods that the Commission determines, by rule, to be fair and equitable." *Id*. § 7178(b).

The Commission's Order No. 472, adopted in 1987 and implementing section 7178 for all the industries it regulates, is still applicable to natural gas pipelines.[1] *See* 18 C.F.R. § 382.202; *see also Midwest Indep. Transmission Sys. Operator, Inc. v. FERC*, 388 F.3d 903, 906-07 (D.C. Cir. 2004) (explaining that Order No. 472 no longer controls for electricity program annual charges).

II. The Commission's Review Of The NJ-NY Project

A. The Project And Environmental Review

After months of gathering input on the proposed route from landowners and public officials, Spectra filed, on April 15, 2010, to begin its environmental review

[1] *See Annual Charges Under the Omnibus Budget Reconciliation Act of 1986*, Order No. 472, FERC Stats. & Regs. ¶ 30,746, *clarified*, Order No. 472-A, FERC Stats. & Regs. ¶ 30,750, 52 Fed. Reg. 23,650, *on reh'g*, Order No. 472-B, FERC Stats. & Regs. ¶ 30,767, 52 Fed. Reg. 36,013 (1987), *on reh'g*, Order No. 472-C, 42 FERC ¶ 61,013 (1988).

through FERC's pre-filing process. *See* Final Environmental Impact Statement ("FEIS"), ES-2, R.1310 (Mar. 16, 2012), JA 413; 18 C.F.R § 157.21(b). In addition to seven formal landowner information sessions that the company conducted prior to pre-filing, Spectra, in conjunction with the Commission, held five open houses at various locations along the proposed project route to provide information about the Project and the Commission's environmental review process, as well as to hear concerns about the Project from the general public and affected agencies and landowners. FEIS at ES-2, JA 413.

On December 20, 2010, Spectra filed with the Commission an NGA section 7(c) application for a certificate of public convenience and necessity, authorizing the construction and operation of the Project. Application, R.3, JA 149. The Commission issued a draft Environmental Impact Statement on September 7, 2011. Draft Environmental Impact Statement ("DEIS"), R.801, JA 238. The Commission issued a final Environmental Impact Statement on March 16, 2012, after an extensive public outreach that included numerous scoping and public comment meetings. *See, e.g.*, FEIS at 1-5 to 1-12 (discussing consultation process), JA 427-34. Hundreds of comments were filed in support of and in opposition to the Project. *See* Certificate Order, App. A (listing intervenors and commentors), JA 45-58.

B. Radon In Natural Gas And Indoor Air Quality

Natural gas contains varying amounts of radon, which disperses in homes when gas is burned in unvented appliances. *See* FEIS 4-216, JA 875. This may, depending on several factors, introduce radiation into the home that, when inhaled, can contribute to lung cancer, especially with long-term exposure. *See* Certificate Order P 82, JA 29. Studies show that gas extracted from shale formations can contain higher levels of radon than the gas extracted from other areas. Rehearing Order P 51, JA 94.

In the draft Environmental Impact Statement, because the development of shale gas was uncertain and the Commission did not evaluate shale gas development as a cumulative environmental impact, it also found that the health impacts from releasing radon through burning natural gas in the home was beyond the scope of the required analysis. DEIS at 1-8, JA 272. Even though it was beyond the scope of the analysis, the Commission, in the Final Environmental Impact Statement, responded to concerns and evaluated studies on radon exposure. FEIS at 4-216 to 4-217, JA 875-76. Determining that several factors reduce radon in natural gas, the Commission concluded, consistent with the available studies, that radon from home use of natural gas is unlikely to pose a hazard. *Id*. These limiting factors include: removal through gas processing; radioactive decay due to

the time it takes to process, gather, store, and deliver gas; and building codes that require venting of appliances. *Id*.

On May 10, 2012, in a motion to supplement the record, Coalition submitted a study of the radon threat from natural gas originating in the Marcellus Shale region of the mid-Atlantic, authored by Dr. Marvin Resnikoff, that was originally completed and filed in another agency proceeding on January 10, 2012. Motion, R.1366, Attach. A, *Radon in Natural Gas from Marcellus Shale* ("Resnikoff Study"), JA 2607. In an answer to the motion, Spectra requested, notwithstanding that the Commission had at that point approved the Project, that the Commission allow it to submit a substantive response to the Resnikoff Study in a future filing. Preliminary Response of Spectra to Motion to Supplement the Record, 2-3, R.1383 (May 25, 2012), JA 2623-24.

Spectra submitted that substantive response in its answer to Coalition's request for rehearing. Answer of Spectra, 44, R.1432 (July 5, 2012), JA 2763. Spectra also submitted two recent reports on radon risk: *Scientific Issues Concerning Radon in Natural Gas* by Dr. Lynn Anspaugh on July 5, 2012; and *An Assessment of the Lung Cancer Risk Associated with the Presence of Radon in Natural Gas Used for Cooking in Homes in New York* prepared by Risk Sciences International on July 4, 2012. *Id*., Exs. A & B, JA 2785, 2874.

C. Challenged FERC Orders

On May 21, 2012, two months after completion of its environmental analysis, the Commission issued an order approving the Project and imposing thirty environmental conditions. Certificate Order P 1 & App. B, JA 1, 59.

The Certificate Order concludes that the Project would serve the public interest by enhancing the market-access options available to pipelines and their customers in the New York metropolitan area. *See id*. P 26, JA 10. This increased access to cleaner natural gas will allow New York City to displace dirtier heavy heating oil that is used in residential and commercial boilers. *Id*. P 23 (explaining City's ban of new oil boilers and limits on existing uses of heavy heating oil), JA 9. There also is significant demand for the Project's capacity, as evidenced by the Pipeline's execution of transportation contracts, signed almost three years in advance, with three shippers for 100 percent of the design capacity of the Project. *Id*. P 20, JA 8.

In the Certificate Order, the Commission conducted an environmental review of the Project, taking into account the Environmental Impact Statement and all substantive comments on that document. *See id*. P 62, JA 21. Specifically, the Commission addressed Coalition's comments regarding the adequacy of the cumulative impacts analysis in the Environmental Impact Statement, including whether the future development of natural gas from the Marcellus Shale formation

should be part of the Environmental Impact Statement analysis, *id*. PP 70-73, JA 24-25, the short-term and long-term air quality impact of the project, *id*. PP 80-82, JA 28-29, and the adequacy of the safety measures adopted by Spectra, *id*. PP 85-87, JA 30-31. Addressing the risk that radon in natural gas posed to indoor air quality, the Commission determined that that processing and storage of gas, venting of appliances, and other factors would reduce any risk and, in any event, the Commission had no authority to "set, monitor, or respond to indoor radon levels." *Id*. P 82, JA 29. The Commission, upon balancing the evidence of public benefits against the identified potential adverse effects of the Project, coupled with the environmental analysis and the imposition of the mitigation measures recommended in the Environmental Impact Statement and other conditions, *id*. P 123, JA 42, determined that the Project is required by the public convenience and necessity. *Id*. P 26, JA 10.

On rehearing, the Commission reaffirmed its approval of the Project in an order issued on October 18, 2012. Rehearing Order P 1, JA 69. As relevant to this appeal, the Commission addressed air quality issues, including the newly-submitted studies on whether radon entrained in natural gas poses a health risk for residential users of the gas, *id*. PP 49-56, JA 93-96, the risks of and mitigation for a remote attack on Spectra's control system through a computer virus, *id*. PP 60-65, JA 98-100, and constitutional due process claims alleging favoritism toward

pipeline projects, *id*. PP 18, 20-28, JA 77, 79-82. The Commission also rejected the constitutional claims as untimely raised. *Id*. P 19, JA 78.

This appeal followed.

SUMMARY OF ARGUMENT

This Court lacks original appellate jurisdiction over the sole claim Jersey City preserved for appeal. Jersey City does not "complain of" any reasoning or action by the Commission in the orders under review as is required for the Court's jurisdiction under the Natural Gas Act, 15 U.S.C. § 717r(b). Instead, it claims that the financial structure created for the Commission by Congress violates due process by giving the Commission an unconstitutional "possible temptation" to favor pipeline companies in its adjudications. Thus this court of limited appellate jurisdiction cannot hear Jersey City's claim, which is only properly brought as a federal question under 28 U.S.C. § 1331 in the appropriate federal district court.

The sole merits challenge to FERC's approval of this particular Project is that brought by Sierra Club, Food & Water Watch, and NO Gas Pipeline (collectively, "Coalition").[2] None of these organizations has standing to appeal the orders at issue, as neither Coalition nor any of its members has suffered, or is in imminent peril of suffering, any justiciable injury caused by the Commission's

[2] Capitalization of the lead petitioner's name in this set of appeals differs between Coalition's brief and the affidavit submitted by that group's founder. In this brief we use the name as it appears in the affidavit and the original petition for review, i.e., "NO Gas Pipeline."

approval of the Project. Because it has failed to demonstrate constitutional or prudential standing, Coalition's petitions should be dismissed for lack of jurisdiction.

If this Court finds original jurisdiction over Jersey City's claims, then it must apply the requirements of section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b). That section provides a jurisdictional bar to review of objections not raised with specificity on rehearing before the Commission. On appeal, Jersey City asserts evidence of actual bias that it either failed to raise at all or failed to raise with specificity to the Commission. Further, all of Jersey City's bias claims are waived because they were raised too late to the Commission.

On the assertion of bias, Jersey City has failed to show that the Commission, as an institution, faces a "possible temptation," as the courts have applied that test, to favor pipeline companies over those that oppose new projects. Congress not only established the funding structure for the Commission through the Budget Act, it also sets, each year, the level of expenses for the Commission. Both of these facts fully undermine the argument that the Commission holds a conflicting partisan position, the duties of which would create a disqualifying interest in its pipeline project adjudications. Furthermore, each of Jersey City's allegations of actual bias is completely without basis.

As to the merits of the Commission's actions on this Project, its environmental review, which began more than two years prior to its approval of the Project, properly balanced the need for the project, including the need for cleaner air in the long term in the New York metropolitan area, with the protection of environmental resources and the mitigation of any harms from the Project. In conducting its NEPA review, the Commission properly determined that the Project would meet or exceed safety requirements set by other agencies. NEPA does not require the Commission to adopt the enforceable certificate conditions requested by Coalition here, or to take any particular action as a result of its analysis of pipeline cybersecurity issues.

Finally, the Commission conducted a thorough review of available studies of the effect of radon on indoor air quality and related health risks. It renewed those efforts when newer studies containing actual radon measurements in the Project near the communities were presented to it late in the proceeding. This careful review of the radon issue fully satisfied the Commission's statutory obligations.

ARGUMENT

I. This Court Lacks Jurisdiction To Review The Petitions

A. This Court Lacks Original Subject Matter Jurisdiction To Review A Challenge To The Budget Act

This Court has no original appellate jurisdiction over Jersey City's petition, under section 19(b) of the Natural Gas Act. *See* Br. 1 (citing 15 U.S.C. § 717r(b)).

Section 19(b) provides that any party "aggrieved by an order issued by the Commission ["in a proceeding under this chapter"] may obtain a review of such order" in this Court. 15 U.S.C. § 717r(b). While the orders on appeal undeniably were issued by the Commission in a proceeding under section 7(e) of the Natural Gas Act, 15 U.S.C. § 717f(e), Jersey City, in its brief, does not seek review of *those orders*.

Nowhere in its brief does it question the Commission's reasoning for approving the Project. Nor does it disagree with any Commission findings or decisions that are part of the adjudication below. *See, e.g.*, Br. 2 (asserting "unconstitutional 'possible temptation' to be biased toward pipeline companies in its adjudications," but not the adjudication on appeal here). Indeed, Jersey City in asserting its "actual bias" claims relies almost exclusively on analysis of Commission orders and records in other proceedings not on review here. Br. 8-9, 35, 37-39; *see id*. at 36 (citing, only once, an order on appeal; in that instance, analyzing FERC's consideration of expert agency opinion). Jersey City does not assert that the Commission violated any provision of the NGA or NEPA and it does not join Coalition's brief that makes such claims. *See Evans v. Sebelius*, No. 11-5120, 2013 WL 2122072, at *2 (D.C. Cir. May 17, 2013) (because "briefs make no effort to advance [certain claims asserted below], they are waived") (citing *Ark*

Las Vegas Rest. Corp. v. NLRB, 334 F.3d 99, 108 n.4 (D.C. Cir. 2003) (noting that arguments not raised in briefs are waived)).

Jersey City is not drawing in question the constitutionality of the Natural Gas Act under which the Commission acted in these orders; rather the thrust of Jersey City's challenge regards the Budget Act, 42 U.S.C § 7178, and the financial structure it created in 1986. Because the financial structure established by the Budget Act is not an order issued by the Commission in a proceeding under the Natural Gas Act, this court cannot review it in the first instance. *See American Petroleum Inst. v. SEC*, No. 12–1398, 2013 WL 1776467, at *1-*3 (D.C. Cir. Apr. 26, 2013) (dismissing constitutional and statutory claims for lack of jurisdiction where agency, in acting, relied on provisions of its statute that do not provide for "direct review" by appellate court); *Five Flags Pipeline Co. v. Department of Transp.*, 854 F.2d 1438, 1439-1442 (D.C. Cir. 1988) (no original jurisdiction to review agency's determination of fees pursuant to the Budget Act of 1986); *see also Watts v. SEC*, 482 F.3d 501, 505 (D.C. Cir. 2007) ("Initial review occurs at the appellate level only when a direct-review statute specifically gives the court of appeals subject-matter jurisdiction to directly review agency action.").

In another case on the Commission's annual charges distinguishable from the case here, this Court found jurisdiction under an provision analogous to section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b). *See Midwest Indep.*

Transmission, 388 F.3d at 908 (questioning *sua sponte* whether annual charges rules are "proceedings under" the Federal Power Act ("FPA")). There, petitioners sought changes to rules that had been promulgated under the substantive authority of the Budget Act, but also, as the Court held, "implemented" under the broad rulemaking authority provided to the Commission in "'proceedings under' the FPA . . . ." *Id*. at 909. Additionally, the Commission and the Court agreed that the fact-finding capacity of the district court was unwarranted there because the record necessary for appellate review already had been generated in FERC's proceeding below. *Id*. at 910. Here, there is no similar basis for finding jurisdiction because Jersey City is not requesting a change to FERC's annual charge regulations, is not challenging any "implementation" of the Budget Act, and does not rely on the record developed in the FERC proceeding below. In fact, the remedy that it argued for below – that the agency "withhold any further consideration of the [Project] until constitutionally adequate statutory and regulatory schemes replace the presently deficient ones," Rehearing Request at 3, R.1404, JA 2645 – requires, at a minimum, a change to the financial structure created by the Budget Act.

While Congress may freely choose the court in which judicial review may occur, *City of Rochester v. Bond*, 603 F.2d 927, 931 (D.C. Cir. 1979), if it makes no specific choice, then an aggrieved person may pursue constitutional claims in federal district court pursuant to federal question jurisdiction, 28 U.S.C. § 1331.

Five Flags, 854 F.2d at 1439. This Court has already determined that the Budget Act does not specify "the court in which judicial review . . . initially may be had." *Id*. at 1440. There is, therefore, no statute that gives this court jurisdiction to hear Jersey City's petition on direct review.

B. Coalition Has Not Established Standing For Either Of Its Claims

While not every member of the Coalition needs standing, at least one of its members must demonstrate constitutional and prudential standing for each claim. *See City of Orrville v. FERC*, 147 F.3d 979, 990 n.12 (D.C. Cir. 1998) (because petitioners' merits claims are "entirely separate," one petitioner "cannot piggyback on [another petitioner's] standing"); *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1232 (D.C. Cir. 1996) ("For each claim, if constitutional and prudential standing can be shown for at least one plaintiff, we need not consider the standing of the other plaintiffs to raise that claim.").

To establish Article III standing, an association's member must present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the agency's challenged action; and redressable by a favorable ruling. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *see Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977) (explaining associational standing). Any future "threatened injury must be *certainly impending* to constitute injury in fact[;] allegations of *possible* future injury are not sufficient." *Clapper v.*

Amnesty Int'l USA, 133 S. Ct. 1138, 1147 (2013) (quotations omitted); *cf*. Br. 13 (citing *Friends of Keeseville v. FERC*, 859 F.2d 230, 234 (D.C. Cir. 1988), for standard of "future threatened injuries" used in ripeness inquiry); *but see Chlorine Inst., Inc. v. Federal R.R. Admin.*, No. 12-1298, 2013 WL 2477012 at *4 (D.C. Cir. June 11, 2013) (ripeness requires an injury that is "imminent or certainly impending").

NO Gas Pipeline does not allege personal injury to any particular member and, thereby, fails by design to meet these injury requirements. *See* Coalition Br., Addendum, Aff. of Dale Hardman for NO Gas Pipeline P 6 (alleging only that "the majority of its members" will be threatened). As discussed below, Sierra Club and Food & Water Watch have not shown a concrete, particularized injury related to either the radon or cybersecurity claim that is sufficiently traceable to the challenged orders and redressible by this Court.

Moreover, as pertains to the cybersecurity claim and the Coalition's effort to turn it into a NEPA objection, none of the petitioner associations has met the "not especially demanding" requirements of prudential standing. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012) ("The test forecloses suit only when a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.")

1. Coalition's Alleged Harm From Radon Does Not Satisfy Constitutional Standing Requirements

Sierra Club and Food & Water Watch (but not NO Gas Pipeline) submit declarations attesting that their members are "injured by the certainty that radon levels in the residences will increase *once* gas from sources that have higher radon levels than currently supplied gas *begins to flow* through [the Spectra and intrastate] pipelines into their homes." Br. 13 (emphases added); *see also* Addendum, Aff. of Leslie Bailey PP 9-10; Aff. of Clare Donohue PP 8-9; Aff. of Mavoline Moorhead PP 7-10. These individuals' concerns are "far too speculative to represent a 'concrete' injury" required for standing. *See Occidental Permian Ltd. v. FERC*, 673 F.3d 1024, 1026 (D.C. Cir. 2012). Here, many intervening acts of independent third parties are required before any cancer risk to these members could flow from the Project.[3] *See*, *e.g.*, Bailey Aff. P 10 ("Once gas with higher levels of radon, such as Marcellus gas, starts flowing through the Spectra Pipeline and into the distribution system . . . I will be injured"); Donohue Aff. P 8 (expressing concern about "potential cancer risks . . . from *more* Marcellus gas . . . being introduced into the gas being delivered through the [Project]") (emphasis added); Moorhead Aff. P 9 ("new gas [from Marcellus shale] will be distributed to

[3] Ms. Moorhead expresses concern about the effects of radon on her asthma. Moorhead Aff. P 9. Although the Environmental Protection Agency lists exposure to a gas stove as a potential asthma "trigger," it is the nitrogen dioxide produced by the stove and not radon that exacerbates asthma. *See* http://www.epa.gov/asthma/no2.html.

us"); *see also Clapper*, 133 S. Ct. at 1150 (declining to "endorse standing theories that rest on speculation about the decisions of independent actors").

Under Coalition's theory, if now-undeveloped natural gas from the Marcellus shale formations in Pennsylvania and New York is produced, extracted, and delivered by the Project without prior storage or processing, and if this shale gas is the sole or predominant source of gas delivered through the Project without significant dilution from other gas sources, then these declarants could be exposed to more radon through their gas stoves, which in turn could potentially cause lung cancer. *See* Bailey Aff. P 10 (expressing complete uncertainty as to when these things will occur). This "theory of injury 'stacks speculation upon hypothetical upon speculation, which does not establish an actual or imminent injury.'" *Occidental*, 673 F.3d at 1027 (citing *New York Reg'l Interconnect v. FERC*, 634 F.3d 581, 587 (D.C. Cir. 2011)); *see also Clapper*, 133 S. Ct. at 1147 (finding "argument rests on [plantiffs'] highly speculative fear that . . . a highly attenuated chain of possibilities" will occur); *El Paso Natural Gas Co. v. FERC*, 50 F.3d 23, 24 (D.C. Cir. 1995) (petitioner's scenario, which "flows from the hypothetical premise" that agencies will take particular steps, does not supply the requisite injury to confer standing).

Coalition's alleged injury rest solely on the possibility that gas reserves from the Marcellus Shale formation in the mid-Atlantic states may in the future be

developed and introduced through the Project into their homes. *See*, *e.g.*, Bailey Aff. P 9 & nn.3-4. But as the Commission found, and Coalition does not dispute here, the development of Marcellus gas is "not predictable because the scope and timing of Marcellus drilling and production (which encompasses the acquisition of mineral rights, well permits, and approvals for associated processing, gathering, and NGA-exempt transportation facilities) is dependent on state authorizations." Rehearing Order P 38, JA 86; FEIS at 1-11 (same), JA 433; *see also New Mexico Attorney Gen. v. FERC*, 466 F.3d 120, 121-22 (D.C. Cir. 2006) (petitioners do not have standing when their alleged injury is conditional upon further agency action). Moreover, the alleged harm from shale gas is too speculative and remote because the "development of natural gas reserves in the [Marcellus Shale] formation is expected to take 20 to 40 years." Certificate Order P 73 n.57, JA 26; *see Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009) (finding no imminent injury from declarant's wish to visit subject forest tracts at some unspecified future time). Because Coalition "cannot demonstrate that the future injury [it] purportedly fear[s] is certainly impending," it cannot establish Article III standing. *Clapper*, 133 S. Ct. at 1155.

Added to the uncertainty of whether the Marcellus gas will ever be developed is the uncertainty of how that new gas will be processed, stored, and mixed with gases from other regions. *See Occidental*, 673 F.3d at 1026 ("[e]ven if

we knew with certainty that [the first link in chain would occur], the remaining links in [petitioner's] chain of injury remain uncertain"). Coalition faults the Commission for not specifying these matters in the challenged orders. Br. 25-26. But the petitioner has the burden to prove standing by pointing to specific facts; it cannot rely on the government to fill those factual gaps. *Clapper*, 133 S. Ct. at 1149 n.4. Indeed, the need for guesswork about the treatment of these undeveloped reserves demonstrates that the asserted radon risk is a generalized, remote, and conjectural threat that cannot be transformed into a cognizable injury for purposes of constitutional standing. *See Summers*, 555 U.S. at 495 (finding alleged injury "presents a weaker likelihood of concrete harm" than one that was described as "no more than conjecture"); *New York Reg'l Interconnect*, 634 F.3d at 587-88 (holding that petitioner lacked standing based on conjectural injury).

Further, any harm from the radon in now-undeveloped Marcellus gas is not directly traceable to the challenged orders, as numerous independent parties will be responsible for developing, processing, gathering, and storing any gas and, most important, granting the necessary approvals for any new production. *See Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 176 (D.C. Cir. 2012) (petitioners must establish "probability that the third parties will [act]" as petitioners posit). New Marcellus gas may (or may not) be developed and produced whether the Project moves forward or not. Certificate Order P 73 (finding "no causal relation" between the

project and shale gas development), JA 25; Rehearing Order P 49 n.77 ("applicants could operate the NJ-NY Project at full capacity without a molecule of Marcellus gas"), JA 93; *see Association of Flight Attendants v. U.S. Dep't of Transp.*, 564 F.3d 462, 466 (D.C. Cir. 2009) ("Missing is the crucial causal connection tying the actions to [agency's approval of competitor] rather than to some other factor.").

Finally, the alleged injury is not redressible because "FERC is without power to regulate" the end-use burning of gas in New York metropolitan area homes. *South Coast Air Quality Mgmt. Dist. v. FERC*, 621 F.3d 1085, 1092 (9th Cir. 2010) ("the history and judicial construction of the Natural Gas Act suggest that all aspects related to the direct consumption of gas – such as passing tariffs that set the quality of gas to be burned by direct end-users – remain within the exclusive purview of the states"); *see also* Certificate Order P 82 (same), JA 29.

While Coalition's alleged procedural injury – that is, the Commission's failure to hold a trial-type hearing on radon risks – might be able to overcome the redressibility and immediacy requirements, it cannot make up here for lack of a concrete injury traceable to the challenged orders. *See Summers*, 555 U.S. at 496 ("deprivation of a procedural right without some concrete interest that is affected by the deprivation – a procedural right *in vacuo* – is insufficient to create Article III standing"). Moreover, the Commission is not required to conduct a trial-type

hearing in every case. *See Moreau v. FERC*, 982 F.2d 556, 568 (D.C. Cir. 1993) ("FERC need not conduct an evidentiary hearing when there are no disputed issues of material fact," and "even where there are such disputed issues, FERC need not conduct such a hearing if they may be adequately resolved on the written record"). Thus, Coalition has been afforded "no such procedural right" that would lessen its burden to demonstrate imminent injury, traceability, and redress for constitutional standing. *National Comm. for New River, Inc. v. FERC*, 433 F.3d 830, 833 (D.C. Cir. 2005) ("[l]acking a valid procedural right . . . [petitioner] has no standing to bring this challenge" to a FERC natural gas pipeline decision).

2. Coalition's Alleged Harm From Safety Of Pipeline Operations Satisfies Neither Constitutional Nor Prudential Standing Requirement

In order to challenge the Commission's actions related to cybersecurity under NEPA as it does here, Br. 11, 38-39, 40, Coalition must meet prudential standing requirements. *See Clarke v. Security Indus. Ass'n*, 479 U.S. 388, 399 (1987) (describing zone of interest test). Coalition must show that its asserted interest is "arguably within the zone of interests to be protected or regulated by the statute in question or by any provisions integrally related to it." *Grocery Mfrs.*, 693 F.3d at 179 (punctuation and quotation omitted). This it has not done.

Coalition relies on NEPA as the statute that is protecting its interests before the Commission, asserting repeatedly that the Commission failed to take the

requisite "hard look" at the remote access safety issue in its Environmental Impact Statement. Br. 22, 29, 34, 37. But "NEPA's concern is to inform other governmental agencies and the public about the environmental consequences of its proposed activities, not to inform them about *all* possible consequences of an agency's action." *Competitive Enter. Inst. v. National Highway Traffic Safety Admin.*, 901 F.2d 107 123-24 (D.C. Cir. 1990); *see ANR Pipeline Co. v. FERC*, 205 F.3d 403, 408 (D.C. Cir. 2000) ("NEPA, of course, is a statute aimed at the protection of the environment."). Coalition's interest is in protecting against cyber intrusions in pipeline controls so that explosions do not occur. Br. 38-40. This safety concern is analogous to the safety risk from smaller, more fuel-efficient automobiles that the petitioners complained of in *Competitive Enterprise*, which the Court found was a "nonenvironmental issue" that "falls outside the sphere of any definition of injury adopted in NEPA cases." 901 F.2d at 123 (dismissing, for lack of prudential and constitutional standing, claim that agency failed to assess safety effect of new corporate fuel economy standards in an Environmental Impact Statement). Similarly, Coalition has "failed to surmount prudential barriers" because its interest in improved cybersecurity is far removed from the environmental and informational interests protected by NEPA. *Id*. at 123-24; *see also Grocery Mfrs.*, 693 F.3d at 179 (finding food group's interest in low corn prices is not within the zone of interest of statutory provision about cars and fuel).

As to the Natural Gas Act, none of the declarants here seeks to protect the "property interests of neighboring landowners [that] arguably fall within the zone of interests the NGA protects . . . ." *Moreau*, 982 F.2d at 564 n.3; *see also* Br. 13 (citing *Moreau* as support for prudential standing).

Further, Coalition seeks a delay in the operation of the Project until stronger cybersecurity can be implemented. Br. 14, 40. Given that any such delay of the Project in turn will delay significant expected air quality improvements in the New York metropolitan area, Certificate Order P 80, JA 28; Rehearing Order P 46, JA 92, its claim "runs the risk of frustrating rather than furthering statutory objectives" of NEPA. *Competitive Enterprise*, 901 F.2d at 124; *see Clarke*, 479 U.S. at 397 n.12 (1987) ("the 'zone of interest' inquiry . . . seeks to exclude those plaintiffs whose suits are more likely to frustrate than to further statutory objectives"); *see also Nevada Land Action Ass'n v. U.S. Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993) (finding no standing where interest is likely to frustrate NEPA's environmental objectives).

Nor has Coalition met constitutional standing requirements with regard to its cybersecurity claim. Here the threatened harm is highly speculative as, like the radon claim, it also rests on a hypothetical chain of events with third party agents responsible for links in the chain. *See Clapper*, 133 S. Ct. at 1148. Hackers must develop and deploy a computer virus that can penetrate Spectra's control system, a

system that has "improved markedly" its security since the 1982 attack on a Russian pipeline. Rehearing Order P 63, JA 99. Then, the virus would have to overcome safeguards on the pipeline (such as overpressure devices) that are not connected to the control system, *id*., to cause overpressure on the pipeline that might eventually lead to a leak or, in the worst case, an explosion. *See Occidental*, 673 F.3d at 1028 (finding it is "sheer speculation" that "safeguards will 'ultimately' prove too weak"). The damage from any resulting incident would be limited by the extra depth and thickness of the pipe, Certificate Order P 86, JA 30, and thus may never cause personal injuries. "Even if all these additional events transpired, [petitioners'] injury would be caused by some action other than FERC's approval of the orders" before the Court. *Occidental*, 673 F.3d at 1026; *see also Association of Flight Attendants*, 564 F.3d at 465 (finding declarants' "averments are insufficient to establish the requisite causation").

Moreover, a "continuing safety risk" from a pipeline located nearby is not enough alone to establish cognizable injury. Br. 13 (citing *Moreau*, 982 F.2d at 564-67). In *Moreau*, this Court found standing based on injury from a "permanent aesthetic eyesore *and* a continuing safety hazard" on, or adjacent to, petitioners' property due to the pipeline's location. 982 F.2d at 565 (emphasis added). It, however, focused its entire discussion of injury on aesthetic harms. *Id*. at 565-66; *see also National Comm. for New River*, 433 F.3d at 832 ("To have standing to

challenge [pipeline] route realignments, [petitioner] must demonstrate that its members have suffered, or will suffer, specific environmental and aesthetic harms as a result of the route realignments themselves.").

Finally, to redress its injury, Coalition suggests, without authority, that this Court can direct FERC to develop measures to mitigate the risks of pipeline explosion. Br. 14. The Department of Transportation has "exclusive authority to promulgate Federal safety standards used for facilities used in the transportation of natural gas." Rehearing Order P 87 n.125, JA 209. And the "[Transportation Security Administration] already has statutory authority to issue cybersecurity regulations for pipelines if the agency chooses to do so." Br. 35 (citation omitted). Even if the Commission shared authority with these other agencies, which Coalition has not demonstrated, "redress depends largely on policy decisions yet to be made by government officials" about enforceable rules to address safety concerns raised by potential access to pipeline control systems. *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989) (Court is "loath to find standing" when redress depends on future policy decisions); *see also US Ecology, Inc. v. U.S. Dep't of Interior*, 231 F.3d 20, 24 (D.C. Cir. 2000) (citing same and dismissing petitions where redress depends on "choices made by independent actors not before the courts"). Therefore, Coalition has no Article III standing in this appeal.

C. Jersey City's Bias Claim Was Untimely And Is Now Jurisdictionally Barred

The Commission rejected, as untimely, the only part of Jersey City's request for rehearing that is relevant in this appeal – its bias claim. Rehearing Order P 19, JA 78. The Commission regularly rejects requests for rehearing that raise issues not previously presented unless parties show that the request is "based on matters not available for consideration . . . at the time of the . . . final decision." 18 C.F.R. § 385.713(c)(3); *see also* Rehearing Order P 19 & nn.29-30 (explaining that rejection of such novel issues prevents disruption of the administrative process and respects FERC's general prohibition on answers to rehearing requests), JA 78. Because Jersey City is deemed to have not met the timeliness requirement of section 19(b) of the Natural Gas Act by failing to bring its bias objection at the first opportunity, this Court is without jurisdiction over any of its arguments on appeal. *See Moreau*, 982 F.2d at 562-63 (untimely motion for rehearing deprived Court of jurisdiction under NGA § 19(b)); *accord Village of Bensenville v. FAA*, 457 F.3d 52, 73 (D.C. Cir. 2006) (petitioner waived claims because "claims of bias must be raised as soon as practicable after a party has reasonable cause to believe that grounds for disqualification exist" (citation omitted)); *Lead Indus. Ass'n v. EPA*, 647 F.2d 1130, 1173 (D.C. Cir. 1980) (disqualification request in petition for reconsideration to the agency came too late; "litigant who neglect[s] to present his constitutional claim to . . . agency in a timely fashion [may be] precluded from

raising it before the reviewing court"); *Boston Gas Co. v. FERC*, 575 F.2d 975, 980 (1st Cir. 1978) (finding jurisdictional bar where FERC denied an untimely rehearing on the merits).

II. Standard Of Review

Agency action taken pursuant to NEPA is entitled to a high degree of deference. *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 377-78 (1989). The Court's role is to ensure that NEPA's procedural requirements have been satisfied. *Public Utils. Comm'n of Cal. v. FERC*, 900 F.2d 269, 282 (D.C. Cir. 1990) (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976) (judicial role is to ensure agency took a hard look at environmental consequences)); *see also Robertson*, 490 U.S. at 350-51 (NEPA merely prohibits uninformed – rather than unwise – agency action); *Nevada v. Department of Energy*, 457 F.3d 78, 93 (D.C. Cir. 2006) ("[a]lthough the contours of the 'hard look' doctrine may be imprecise, a court must at a minimum ensure that the agency has adequately considered and disclosed the environmental impact of its actions") (quotation omitted).

As relevant to Coalition's NEPA claims, the Court also must ensure that agency decisions are not arbitrary and capricious under the Administrative Procedure Act ("APA"). 5 U.S.C. § 706(2)(A). Under that deferential standard, a "court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment . . . ."

ExxonMobil Gas Mktg. Co. v. FERC, 297 F.3d 1071, 1083 (D.C. Cir. 2002) (quotation omitted); *see Eastern Niagara Pub. Power Alliance v. FERC*, 558 F.3d 564, 567 (D.C. Cir. 2009) (the Court's "role is 'quite limited' and 'narrowly circumscribed'") (citation omitted).

The Commission's findings of fact, if supported by substantial evidence, are conclusive. *National Comm. for New River v. FERC*, 373 F.3d 1323, 1327 (D.C. Cir. 2004) (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)). When reviewing factual determinations by an agency under NEPA, a court "must generally be at its most deferential." *Baltimore Gas*, 462 U.S. at 103. And when an agency "is evaluating scientific data within its technical expertise," an "extreme degree of deference to the agency" is warranted. *B&J Oil & Gas v. FERC*, 353 F.3d 71, 76 (D.C. Cir. 2004).

Although "a reviewing court owes no deference to the agency's pronouncement on a constitutional question," *Lead Indus.*, 647 F.2d at 1173-74, an allegation of actual bias does not "strip" deference from the agency in a properly asserted APA prejudgment claim. Br. 32 (citing *Davis v. Mineta*, 302 F.3d 1104, 1112 (10th Cir. 2002) (prejudgment "diminishes the deference owed" to agency)); *C & W Fish Co. v. Fox*, 931 F.2d 1556, 1565 (D.C. Cir. 1991) (petitioner has burden to show by "clear and convincing" evidence that individual in agency had "an unalterably closed mind" on critical matters); *see also Forest Guardians v.*

U.S. Fish & Wildlife Serv., 611 F.3d 692, 713 n.17 (10th Cir. 2010) (cautioning that *Davis* "should not be taken to mean that the arbitrary and capricious standard does not apply" where the court finds prejudgment; rather, if agency prejudges a result, court is more likely to conclude it acted unreasonably). In any event, Jersey City has not properly asserted an APA claim on appeal as it references no provision of that Act in its brief. *See* Br. 10, 13, 32, 39.

III. Neither The Commission's Financial Structure Nor Its Consideration Of Proposed Projects Demonstrates Any Potential Or Actual Unconstitutional Bias

If this Court proceeds to the merits of Jersey City's Fifth Amendment due process claim, it should find that Jersey City has not shown a structural or actual bias that would disqualify the Commission from its duty under section 7(c) of the Natural Gas Act to approve projects that it finds "will be required by the present or future public convenience and necessity." 15 U.S.C. § 717f(c).

A. The Structure Of FERC's Funding, Created By Congress, Does Not Present Even The Most Remote "Possible Temptation" To Favor Gas Pipelines

With a claim of institutional structural bias, according to the cases cited by Jersey City, the constitutional inquiry is whether "the situation . . . offer[s] a possible temptation to the average . . . [adjudicator] to . . . lead [it] not to hold the balance nice, clear and true." *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972) (holding mayor had disqualifying interest because the fines he assessed in

traffic court paid his salary and supported him in carrying out his executive duties); *see Gibson v. Berryhill*, 411 U.S. 564 (1973) ("the law concerning disqualification . . . applies with equal force to . . . administrative adjudicators").

As relevant here, a court examines whether the adjudicator also holds an inconsistent partisan position, the duties of which would create a disqualifying interest. *See Tumey v. Ohio*, 273 U.S. 510, 532-34 (1927) (finding mayor, who also served as a judge in the liquor court, "occupies two practically and seriously inconsistent positions, one partisan and the other judicial" so that it creates a lack of due process); *Dugan v. Ohio*, 277 U.S. 61, 65 (1928) (finding no impermissible partisan conflict of individual that was both mayor and judge on liquor court because he has "no executive but only judicial duties" as the city was run by a city manager). The other reason, not applicable here, for disqualifying an adjudicator – that the judge has "a direct, personal, substantial, pecuniary interest" that upsets the fair balance – applies in cases in which individuals, instead of institutions, hold such an interest. *Tumey*, 273 U.S. at 523 (fines assessed in liquor court determined mayor's salary and created biasing influence); *see also Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 884 (2009) (contributor to judge's campaign "has a significant and disproportionate influence," thereby creating an impermissible "possible temptation"); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821-22 (1986) (upholding challenge to judge's participation in a decision on insurance law that

had the effect of enhancing the settlement value of a pending class action lawsuit filed by that same judge).

The original "possible temptation" cases all involved fines that, as a result of the adjudication, increased, in some way, monies available to the mayor-adjudicators. *Tumey*, 273 U.S. at 520 (no fees are paid to mayor unless defendant is convicted); *Dugan*, 277 U.S. at 62-63 ("all the fees taxed and collected under his convictions were paid into the city treasury, and were contributions to a general fund out of which his salary as mayor was payable"); *Ward*, 409 U.S. at 58 ("major part of village income is derived from the fines" imposed in mayor's court); *see also Marshall v. Jerrico, Inc*., 446 U.S. 238, 240 (1980) (agency administering child labor laws set fines that reimbursed, at administrator's discretion, the enforcement expenses of its regional offices). That common factual scenario is completely absent here. When FERC approves a gas project it does not receive increased fees for doing so or any extra revenue to offset its expenses. *See* Rehearing Order P 22 ("there is no financial incentive for the Commission to grant or deny an application for a gas project"), JA 80. Here, there is no link between the adjudicator's duty and an ability to favor the institution by taking one action over another. *Accord Dugan*, 277 U.S. at 65 (finding remote relationship between mayor and the fund he contributes to by his duties as a judge); *Village of Bensenville*, 457 F.3d at 426-27 (denying claim that pay bonuses create

unconstitutional financial incentives for agency employees to approve runway projects).

In asserting its bias claim, Jersey City wrongly assumes that because the funding for FERC does not come from the general fund, Br. 4, Congress makes no decision as to the level of funding for the agency. *See* Br. 6; *see also* Rehearing Order P 21 (explaining appropriations), JA 79. To the contrary, "Congress will continue to approve the Commission's budget through annual and supplemental appropriations. The annual charges thus do not constitute a 'blank check' to the Commission but merely serve . . . to reimburse the [Treasury] for the Commission's expenses approved by Congress." Order No. 472 at 30,620 (FERC rulemaking implementing 1986 Budget Act). Congress can and does set expense limits for FERC that are less than the agency requests. *See* http://www.ferc.gov/about/strat-docs/budget.asp (showing ten years of requests and corresponding appropriations); Br. 6 (citing same); *see, e.g.*, Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, Div. D, Title III, 117 Stat. 11 (2003) (setting lower budget than requested).

In order to reimburse the Treasury for the same amount as its appropriation, the Commission sets a per-unit annual charge for pipeline companies based on each company's share of total transported gas. Rehearing Order P 21 (explaining proportional volumetric charge and citing 42 U.S.C. § 7178 and 18 C.F.R.

§ 382.202), JA 79. This is one step removed from an agency that sets its own budget and then also establishes a per-unit fee on those it regulates to recover those expenses. *See Alpha Epsilon Phi Tau Chapter Hous. Ass'n v. City of Berkeley*, 114 F.3d 840, 842 (9th Cir. 1997) (White, J., sitting by designation). And yet the Ninth Circuit found, nevertheless, that such situation "does not offend the applicable due process standard." *Id*. at 847 (holding that "no person could reasonably fear partisan influence in the judgment" of industry-funded board) (citation omitted).

To be sure, FERC's appropriations have grown in the last decade, *see* Br. 20; this growth, however, is due, in large part, to the substantial new duties and powers it was given by Congress after enactment of the Energy Policy Act of 2005, Pub. L. No. 109-58. Because the Commission does not have any responsibilities, such as those of the mayor in *Ward*, 409 U.S. at 60, for securing the institution's funding, it cannot have the kind of "financial stake in [a pipeline certificate] decision that might create a conflict of interest . . . ." *Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 492 (1976) (school board that served statutory role as negotiator in teachers' strike was not disqualified, on due process grounds, from acting in a policy-making role to decide on dismissal of striking teachers); *see also Northern Mariana Islands v. Kaipat*, 94 F.3d 574, 580-81 (7th Cir. 1996) (finding no strong, official motive of administrative head of the

judiciary – who "submits budget requests" and consults with governor on expenditures – that would present a "possible temptation" to assess greater fines).

Likewise, the Commission's approval of a new pipeline project – even if it led to an increase in the amount of natural gas sold and thus an increase in the annual charges collected – would not have any impact on its revenues. Rehearing Order P 21, JA 79. "At the end of each year the Commission trues up its collection by making 'such adjustments in the assessments for such fiscal year as may be necessary to eliminate any overrecovery or underrecovery of its total costs, and any overcharging or undercharging of any person.'" *Id*. (citing 42 U.S.C. § 7178(e)); *see id*. P 22 (explaining that FERC will "reimburse the Treasury no more and no less than what it actually expends to meet its statutory mandates"), JA 80; *accord Marshall*, 446 U.S. at 246 (finding challenged statutory provisions did not result in "any increase in the funds available to the [agency] over the amount appropriated by Congress"); *id*. at 250 (pressures relied on in such cases as *Tumey* and *Gibson* to show a biasing influence are "entirely absent").

Nor does the Commission rely exclusively on annual charges from natural gas pipelines, as Jersey City asserts. Br. 21. It recovers annual charges from three different sectors of the energy industry, as well as fees for specific services provided. *See* 18 C.F.R. § 382.201-03 (annual charges assessed against electric utilities, and oil and gas pipeline companies); *id*. § 381.207 (fees under the Natural

Gas Act); *id*. § 381.401-03 (fees under the Natural Gas Policy Act). FERC also is hardly unique among federal agencies in receiving funding from the industry that it oversees. *See* Rehearing Order P 20 n.32 (citing Government Accountability Office report finding that twenty-seven agencies rely on user fees for a significant portion of their budget), JA 79. Jersey City has not shown that annual charges for gas pipeline companies (that are not paid to the Commission and do not increase its appropriation from Congress) are as substantial or as influential as those monies found to produce a "possible temptation" toward bias in *Ward*, 409 U.S. 58-59. *See also Van Harken v. City of Chicago,* 103 F.3d 1346, 1353 (7th Cir. 1997) ("the mere fact that an administrative or adjudicative body derives a financial benefit from fines or penalties that it imposes is not in general a violation of due process").

To support its challenge, Jersey City provides numerical examples allegedly showing how FERC is compelled to be a "business partner" with the gas pipelines. Br. 21-26. Its examples are not only "overly simplistic," Br. 22, but also premised on a faulty understanding of the funding structure. As explained above, the Commission's annual expenditures are limited by Congress. It neither receives revenue directly from gas pipelines nor does it keep any of the revenues that are overcollected. And, pipeline companies pass through the annual charges to their customers in pipeline transportation rates; the charges are not paid from profits that

companies receive from operating their pipelines, Br. 21. *See* Order No. 472 at 30,629 ("because the annual charges will reduce the net income . . . of the gas pipeline industry by 2.5 percent," FERC established an "annual charges adjustment clause" to permit pipelines "to pass through the charges directly to their customers"). For these reasons, Jersey City's examples are of no value in evaluating its claim of structural bias.

B. The Commission Does Not Actually Favor Any Pipelines

1. The Court Lacks Jurisdiction To Consider Allegations Of Actual Bias

Jersey City contends that FERC's actual bias is demonstrated by: (1) the historical record of its pipeline and pipeline route approvals; (2) use of boilerplate language in its orders to reject opposition to pipeline proposals; (3) heeding or ignoring other expert agencies as it suits its pipeline approval purposes; and (4) ceding control over its approval authority when pipelines demand it. Br. 12-13, 32-39. Jersey City did not make any actual bias claim to the Commission and, except for a reference to the Commission's history of pipeline route approvals in a different context, Rehearing Request at 14-18, JA 3656-60, none of these alleged examples of actual bias was presented at all. It did list about thirty orders in which FERC approved pipelines since 2010. *Id*. at 13 n.41, JA 2655. In so doing, it simply made the general assertion that the Commission rarely directed pipeline route changes in those thirty orders. Such a general claim is insufficient to

preserve the specific arguments Jersey City now seeks to press on appeal. *See* 15 U.S.C. § 717r(a) ("The application for rehearing shall set forth specifically the ground or grounds upon which such application is based."); *Canadian Ass'n of Petroleum Producers v. FERC*, 308 F.3d 11, 15 (D.C. Cir. 2002) (court "cannot countenance" denial of the opportunity for FERC to consider the "precise challenge" that petitioner raises on appeal). In any event, as explained below, Jersey City's arguments fail to show any bias on the part of the Commission.

2. The Commission Successfully Identifies Poor Projects And Poor Routes Through Its Initial Process

The Commission evaluates under section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c), several types of natural gas facilities in addition to pipelines, including storage facilities and liquefied natural gas facilities, as well as abandonment of existing facilities. Contrary to Jersey City's simplistic assumption, Br. 3 n.3, 7-8, 12, the Commission does not approve every gas infrastructure project that is presented to it. *See infra* p. 43. Moreover, the high approval rate indicates merely that the Commission's process is functioning well to ensure that projects in the application stage are financially and environmentally viable projects. Rehearing Order P 24, JA 81.

Given that development of pipeline infrastructure requires huge expenditures, Br. 28, most of the developers that come before the Commission already own gas transportation infrastructure. Those parties are already well aware

of the certification process, with its many steps, requirements, and pitfalls. *See* Rehearing Order P 24 (criteria for evaluating projects are explicit and well understood), JA 81. Usually, they consult with Commission staff early on, before they begin the pre-filing process. Developers decide not to go forward with some of these plans, based on informal feedback from agency staff or for other reasons. The Commission does not track which (or how many) of these projects fail to reach the pre-filing stage.

Many of the major pipeline expansion projects have employed the voluntary pre-filing process since the Commission instituted those regulations in 2005, *see* 18 C.F.R. § 157.21; others began using it when FERC first created the process in 2002, *see supra* p. 4. "Prefiling is designed to identify issues and highlight possible difficulties with a contemplated project as far in advance as is feasible." Rehearing Order P 23, JA 80. Input from landowners, the public, local, state, and federal authorities, and FERC staff frequently leads to significant modifications to a sponsor's original plan. *Id*.; *see*, *e.g.*, *id*. P 25 n.42 (in this proceeding, applicant considered 85 route variations and adopted 45 of them, modifying almost half of the project), JA 81. That applications present projects that are complete, viable, and sufficiently vetted shows prudence on the part of project sponsors and efficient use of administrative resources. *Id*. P 24, JA 81.

Of those projects that move forward to the voluntary pre-filing stage, some, however, never mature into formal applications for certificates. *See*, *e.g.*, *Dominion Transmission, Inc.*, 141 FERC ¶ 61,240, PP 10 n.8, 54 (2012) (developer withdrew project from pre-filing process). Further, some applications are made and then withdrawn. The Commission does not track either of these occurrences. A few applications remain pending for years, sometimes with little appreciable progress toward completion of the process. *See* Major Pending Pipeline Projects, http://www.ferc.gov/industries/gas/indus-act/pipelines/pending-projects.asp (showing, as of June 2013, one project pending since 2006 and another since 2008). Finally, given the Commission's statutory ability to impose "such reasonable terms and conditions as the public convenience and necessity may require," 15 U.S.C. § 717f(e), very few projects are rejected outright. *See*, *e.g.*, *Turtle Bayou Gas Storage Co.*, 135 FERC ¶ 61,233, PP 1-2, 33 (2011) (denying certificate for "a new company that does not own any existing storage facilities and is not currently engaged in natural gas operations" because it failed to show project need outweighed adverse impacts).

The Commission does track approvals of major pipeline projects that survive the layers of public and government input, rigorous environmental reviews, and the final balancing of need against any adverse impacts. *See* Approved Major Pipeline Projects, http://www.ferc.gov/industries/gas/indus-act/pipelines/approved-

projects.asp. It is no surprise that each of the projects on this approved projects list was approved. It also is no support for Jersey City's incorrect assertion that "over the past decade, FERC has approved . . . *every one* of the 160 pipelines . . . that companies have proposed." Br. 33 (emphasis original). Nor is it evidence that the Commission has succumbed to a "possible temptation" to favor pipeline companies. Br. 13. Instead, it is evidence only that some gas projects successfully navigate the expensive and time-consuming certificate application process, usually by modifying their original plans along the way in order to present, in the end, a financially and environmentally viable project. Moreover, pre-filing is not pre-approval. The Commission regularly, through its orders and the recommendations in its environmental analysis, requires mitigation and places conditions on pipelines such as those in the challenged orders. *See* Certificate Order, App. B, JA 59-68.

Although, in Jersey City's view, "the list of the Commission's selective justifications and omissions vis-à-vis this pipeline could extend virtually endlessly," Rehearing Request at 21, JA 2663, it neglected to raise in its brief even one example of a biased route decision in the orders on appeal. *Cf.* Rehearing Order P 76 (addressing Jersey City's request to route the project through Brooklyn), JA 105. Jersey City ignores that routes are frequently changed through the pre-filing process. Rehearing Order P 24, JA 81. As support for its incorrect

claim that the Commission has approved 99.375 percent of all pipeline routes in the last decade, Br. 33-34, Jersey City includes many projects that have no real route associated with them. *See, e.g.*, *Dominion Transmission, Inc.*, 136 FERC ¶ 61,126 (2011) (adding only compression at three existing facilities); *Central N.Y. Oil & Gas Co.*, 134 FERC ¶ 61,035 (2011) (adding only single motor for more compression). For these reasons, Jersey City's bald assertions of bias in favor of pipeline routes is without basis.

3. Other Allegations Of Actual Bias Are Unavailing

Jersey City's other three examples do not show actual bias by the Commission. The Commission's use of similar language to respond to similar (or even identical) concerns in separate cases – what Jersey City disparages as boiler-plate language, Br. 34 – is unlike the judge's identical descriptions of the demeanor of three different witnesses in *Paramasamy v. Ashcroft*, 295 F.3d 1047 (9th Cir. 2002). *See id*. at 1051 (asylum cases require "individualized findings").

Additionally, whether the Commission properly responded to the input of other agencies is a fact-rich inquiry properly considered on appeal of specific orders. Each project review involves input from many local, state, and federal agencies in their areas of expertise. Without more, a single passing reference to two orders addressing environmental justice concerns for which another agency's

guidance is not binding on the Commission, Rehearing Order P 44, JA 91, is not evidence of actual bias.

Last, Jersey City, in what it calls "smoking-gun evidence of bias," Br. 36, argues that "FERC rubber-stamped a project's final [Environmental Impact Statement]" and later "acquiesced" when the project developer sought to amend its certificate to make the pipeline shorter. Br. 37-39. Its claim that this shows Commission bias, because it made these decisions over objections about the pipeline route, is without basis. "No protests were filed" in either proceeding. *Golden Pass LNG Terminal LP*, 112 FERC ¶ 61,041, P 14 (2005); *Golden Pass Pipeline LP*, 117 FERC ¶ 61,015, P 6 (2006). No comments were filed on the final environmental analysis performed for the original or amended certificate. *See* 112 FERC ¶ 61,041, P 25; 117 FERC ¶ 61,015, P 19. When the question is whether the Commission held "the balance nice, clear, and true" between adversaries, *Tumey*, 273 U.S. at 532, it cannot be answered by examining Commission proceedings in which, if there were any opposing parties, they did not express opposing views.

IV. The Commission's Analysis Of Safety Risks, Including The Risk Of Remote, Deliberate Attack On Pipeline Controls, Complied With NEPA

The purpose of NEPA is to ensure that "the agency has adequately considered and disclosed the environmental impacts" of the actions that it is considering. *Baltimore Gas*, 462 U.S. at 97; *see also Blue Ridge Envtl. Def. League v. NRC*, No. 12-1106, 2013 WL 1954200, at *4 (D.C. Cir. May 14, 2013)

(discussing same with regard to safety impacts of licensing nuclear power reactors). Here, the Commission properly considered and disclosed all safety issues through its environmental impact statements and its additional consideration of issues in the challenged orders.

The Department of Transportation, through the Pipeline and Hazardous Materials Safety Administration ("PHMSA"), has exclusive authority to promulgate federal safety standards used in the transportation of natural gas. FEIS at 4-235, JA 894; Rehearing Order P 87 n.125, JA 109. The Commission's rules require that applicants certify that they will meet these standards; if they so certify, the Commission does not impose additional safety standards. FEIS at 4-235 (citing 18 C.F.R. § 157.14(a)(9)(vi)), JA 894; *see Murray Energy Corp. v. FERC*, 629 F.3d 231, 240-41 (D.C. Cir. 2011) (showing how PHMSA requirements are incorporated into FERC-issued pipeline certificate).

Notwithstanding that Spectra certified that it would meet or exceed the PHMSA standards, the Commission thoroughly analyzed the environmental consequences of possible safety incidents and properly addressed related security concerns raised in comments. *See* FEIS at 4-235 to 4-249 (weighing the probability and consequences of adverse events), JA 894-908; Certificate Order P 86 (noting proposal to exceed safety standards as to pipe depth and thickness), JA 30; Rehearing Order P 61 (noting applicant's activities to enhance security

against deliberate attacks), JA 98. The Commission concluded that, although the risk is low for any incident at any given location, the operation of the Project would represent a slight increase in risk to the nearby public. FEIS at 4-249, JA 908; *see also* Rehearing Order P 116 (finding project risks acceptable as modified and mitigated), JA 118. In conjunction with PMHSA, the Commission imposes safety requirements that ensure the physical and operational integrity of the facilities so that projects can withstand any harm, whether it is caused by deliberate action or not. *See* Rehearing Order PP 61 n.96, 87, JA 98, 109.

In the same section, the Environmental Impact Statement also thoroughly reviewed and appropriately responded to related concerns about terrorism and remote, deliberate attacks on the automated control capabilities of pipeline operations. FEIS at 4-249 to 4-250 (terrorism), JA 908-09; *id*. at 4-242 (supervisory control and data acquisition systems, the so-called "SCADA"), JA 901. The Commission outlined actions which mitigate the risks of remote unauthorized control of the Project's control center. *Id*. at 4-242, JA 901; Rehearing Order PP 61, 63, 65, JA 98, 99, 100. These include appropriate Spectra staff collaborating with the Department of Homeland Security's Transportation Security Administration ("TSA") in certification, training, and the development of cybersecurity safeguards. FEIS at 4-242, JA 901; Rehearing Order PP 61, 65, JA 98, 100. Further, Spectra must operate the Project to meet minimum safety

standards as they are continually updated by PMHSA. *See* Rehearing Order PP 65, 87, JA 100, 109. Finally, the Commission recognized that Spectra had already built some cybersecurity protections into its system by not linking its overpressure protection devices to computer systems. *See* Rehearing Order P 63, JA 99. Concluding its review, the Commission found that it need not "impose additional Commission-specific directives" because the appropriate PMHSA and TSA protections are in place. *Id*. P 65, JA 100.

Coalition asserts that the Commission never took a hard look at the cybersecurity evidence which it resubmits for this Court's review. *See* Br. 30-32. But, in the Rehearing Order, the Commission examined all the reports cited in Coalition's brief. Rehearing Order PP 62-64 & nn.98-99, JA 99. Coalition's real dispute is not with the environmental analysis, but that the Commission reached the same conclusion in the Rehearing Order that it did in the Environmental Impact Statement, *see* Rehearing Order P 65, JA 100, declining to impose "enforceable certificate conditions" against cyber control of pipeline operations. Br. 39 (noting that where "NEPA assessment disclosed an environmental impact," FERC cannot "delegate such enforcement to another agency"); *see id*. at 29 (faulting orders that "contain no condition that assures Petitioners or the Commission that [Spectra has] adequately protected . . . against a . . . cyber-attack").

NEPA, however, does not require that the Commission take any particular action as a result of the outcome of a particular analysis. *Robertson*, 490 U.S. at 350 ("NEPA itself does not mandate particular results, but simply prescribes the necessary process"); *Jackson Cnty. v. FERC*, 589 F.3d 1284, 1291 (D.C. Cir. 2009) ("as the petitioners acknowledge, [FERC] did indeed address the . . . effects of the . . . projects, if not with the result the petitioners desired"). And Coalition's reliance on other regulatory programs to show otherwise is not persuasive. *See* Br. 36 (citing to FERC's implementation of 2005 amendment to the Federal Power Act, 16 U.S.C. § 824o, where the agency now has explicit authority to protect the reliability of electric infrastructure); Br. 39-40 (citing *Center for Biological Diversity v. BLM*, 698 F.3d 1101, 1107 (9th Cir. 2012) (describing Endangered Species Act's provisions including mandated "substantial civil and criminal penalties" for harassing any member of an endangered species)).

V. The Commission's Analysis Of The Environmental Impact Associated With Radon Complied With NEPA Obligations

A. FERC Reasonably Analyzed Radon Health Risks Using Available Studies

Coalition asserts that the Commission failed to properly evaluate the environmental impacts of radon in natural gas that may flow through the Project and that it impermissibly relied on conclusory statements and unsupported

assumptions instead of the requisite quantified and qualitative assessment of potential radon exposure. Br. 22, 24-27. These arguments are without merit.

In fact, the Commission in the final Environmental Impact Statement took the requisite "hard look" at potential radon exposure, analyzing relevant, available research and extrapolating from it to qualitatively assess the health risks from national data. FEIS at 4-216 to 4-217, JA 875-76 (agreeing with conclusions of available studies that this source of radon is "unlikely to pose a radiological hazard to domestic users"); *see Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1379-80 (9th Cir. 1998) (while statements about "possible" effects and "some risk" do not meet the standard, "NEPA does not require the government to do the impractical").

The Commission also described factors that it predicted could reduce any radon hazard, including newer building codes for appliance ventilation, appliance efficiency improvements, removal of radon through gas processing and storage, and a mix of gas from different locations with different radon levels. FEIS at 4-217, JA 876; Certificate Order P 82, JA 29. In so doing, the Commission relied on observable trends rather than, for example, citing a particular building code or appliance efficiency improvement. *See* Rehearing Order P 49 n.77, JA 93. Given that data was not readily available, the Commission was unable to quantify the reductions that each of these factors might yield. *Id*. Contrary to Coalition's

assertions, Br. 25-26, the Commission is not required, in meeting the mandates of NEPA, to generate this missing data or to hypothesize about the future sources of gas for the Project. *See TOMAC, Taxpayers Of Mich. Against Casinos v. Norton*, 433 F.3d 852, 863-64 (D.C. Cir. 2006) ("[agency] was under no obligation to hypothesize about future regulations"); *Citizens' Comm. to Save Our Canyons v. Krueger*, 513 F.3d 1169, 1179 (10th Cir. 2008) ("hard look" standard under NEPA "does not necessarily require the agency to develop 'hard data'"). Nor did it violate NEPA when the Commission made predictions about radon risks based on assumptions which involved substantial uncertainties. *See Baltimore Gas*, 462 U.S. at 98 (in explaining assumptions behind its predictions, agency made the "careful consideration and disclosure" required by NEPA); *accord Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 511 (D.C. Cir. 2010) (finding agency's reliance on "outdated data" reasonable especially when analysis of new data would take months).

B. The Commission Properly Analyzed New Studies Submitted After The Final Environmental Impact Statement

When new radon studies with new data were submitted after completion of the final Environmental Impact Statement, the Commission was able to quantify a range of potential lifetime cancer risks from radon in natural gas, Rehearing Order PP 52 n.85, 53, JA 95, concluding that "the project's potential transportation of Marcellus-sourced gas will not pose a health hazard to end users." *Id*. P 56, JA 96.

Any defects in the Commission's assumptions about radon reduction were cured by its examination and analysis of current measurements of radon in the Project pipeline and the use of a common set of assumptions to derive health risks. *Id.* P 52 & n.83 (accounting for gas samples taken 50 to 70 miles away from New York City and common assumptions about home volume and air exchanges), JA 94; s*ee also National Comm. for New River*, 373 F.3d at 1331 ("any defects there may have been in the [draft Environmental Impact Statement] were cured by the Commission's consideration of comments on the [final Environmental Impact Statement] from [petitioners]").

In sum, the Commission undertook extensive analyses of the radon impacts likely to occur based, first, on older, available studies and extrapolating assumptions and, then, on newly-presented studies of relevant radon measurements, "which is all that can reasonably be expected." *TOMAC*, 433 F.3d at 864 ("[agency's] thorough analysis of the conditions existing at the time of its examinations demonstrates clearly that it took a 'hard look' at the project's potential . . . impacts").

C. Coalition Has Not Established The Need For A Trial-Type Evidentiary Hearing

Coalition next argues that these studies are not properly part of the record and that, in any event, only an administrative law judge can resolve, through an

evidentiary hearing, the conflicting expert opinions on radon exposure in the home. Br. 27-28. Coalition fails to justify either argument.

All of the three new studies that are the focus of Coalition's appeal are properly part of the record. Coalition's Resnikoff Study – lodged four months after its completion – is evidence that the Commission "received and made part of the record in this proceeding." Certificate Order P 126, JA 42; *see also* Rehearing Order P 49 (noting study was "entered into the record" a few days before issuance of the Certificate Order), JA 93. The two responsive studies attached to Spectra's answer to the rehearing requests were made part of the record when the Commission waived its general prohibition on such answers. *See* Rehearing Order P 6 n.4, JA 71; *see also id*. PP 52-53 (discussing answer and attached studies), JA 94-95.

Those seeking an evidentiary hearing from the Commission must allege disputed issues of material facts, proffer evidence to support their claim, and explain why the agency cannot adequately resolve the dispute on the written record. *See Blumenthal v. FERC*, 613 F.3d 1142, 1145 (D.C. Cir. 2010) (FERC can resolve disputed facts based on the written record "'unless motive, intent or credibility are at issue or there is a dispute over a past event'") (quoting *Union Pac. Fuels, Inc. v. FERC*, 129 F.3d 157, 164 (D.C. Cir. 1997)).

In its request for rehearing below, Coalition argued for an evidentiary hearing because its sponsored studies contradicted the ones that the Commission relied on. Coalition Rehearing Request at 15-16, R.1406, JA 2701-02. In response the Commission explained that: (1) it found the measurements in the study referenced in the final Environmental Impact Statement more reliable than the Resnikoff Study as that study relied on measurements from 1300 rather than three gas wells, Rehearing Order P 51, JA 94; (2) Resnikoff relied on the same studies that the final Environmental Impact Statement relied upon, *id*. at P 50, JA 93; and (3) the other Coalition-sponsored study was inapplicable as it measured radon in water not natural gas, FEIS at 4-217, JA 876. Because the Commission was able to resolve contradictory data provided by competing experts on the written record, Rehearing Order P 17, JA 77, it appropriately found no need for another hearing on that issue. *See Moreau*, 982 F.2d at 568 (court reviews decision not to hold a hearing under deferential standard); *see also Illinois Commerce Comm'n v. FERC*, Nos. 11-3421, *et al*., 2013 WL 2451766, at *7 (7th Cir. June 7, 2013) ("[c]onsidering the highly technical character of the data, . . . the technical knowledge and experience of FERC's members and staff, and the petitioners' access to [applicable] studies, we would be creating gratuitous delay to insist at this late date on the Commission's resorting" to an evidentiary hearing).

On appeal, Coalition neither identifies nor proffers any evidence of material factual disputes that were not resolved in the Rehearing Order. *See* Br. 27-28; *Cerro Wire & Cable Co. v. FERC*, 677 F.2d 124, 129 (D.C. Cir. 1982) ("mere allegations of disputed facts are insufficient"); *see also Illinois*, 2013 WL 2451766 at *7 (petitioner has "failed to indicate what evidence that it might present in an evidentiary hearing would contribute to the data and analysis in the record already before the Commission"). Moreover, the issues presented in the new radon studies involve highly technical matters of scientific measurement; their evaluation by the Commission is entitled to "an extreme degree of deference." *B&J Oil & Gas*, 353 F.3d at 76. Nor has Coalition shown that there are matters of "motive, intent, or credibility" that require a trial-type hearing. *Blumenthal*, 613 F.3d at 1145 (finding "unsubstantiated general claim").

CONCLUSION

For the foregoing reasons, Jersey City's petition should be dismissed for lack of initial subject matter jurisdiction, and Coalition's petitions should be dismissed for lack of standing. If not, and the Court proceeds to the merits, the petitions should be denied and the Commission's orders should be upheld in all respects.

Respectfully submitted,

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June 24, 2013
Final Brief: October 7, 2013

NO Gas Pipeline, et al. v. FERC **Docket No. CP11-56**
D.C. Cir. Nos. 12-1470, *et al*.

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I certify that the brief of Respondent Federal Energy Regulatory Commission contains 13,217 words, not including the table of contents and authorities, the certificates of counsel and the addendums.

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October 7, 2013

ADDENDUM

STATUTES
AND
REGULATIONS

TABLE OF CONTENTS

STATUTES: **PAGE**

Administrative Procedure Act

5 U.S.C. § 706(2)…….A1

Natural Gas Act

15 U.S.C. § 717f (c)-(e)……A3

15 U.S.C. § 717r(a)-(b)……A5

National Environmental Policy Act

42 U.S.C. § 4322……..A6

Omnibus Budget Reconciliation Act

42 U.S.C. § 7178……..……A7

REGULATIONS:

18 C.F.R. § 157.21(b)…….A10

18 C.F.R. § 382.201-203……A12

GUIDANCE: FERC STAFF NEPA PRE-FILING INVOLVEMENT IN NATURAL GAS PROJECTS……..A14

denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

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

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(a).	June 11, 1946, ch. 324, §10(a), 60 Stat. 243.

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

AMENDMENTS

1976—Pub. L. 94–574 removed the defense of sovereign immunity as a bar to judicial review of Federal administrative action otherwise subject to judicial review.

§ 703. Form and venue of proceeding

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

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

HISTORICAL AND REVISION NOTES

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

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

AMENDMENTS

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

§ 704. Actions reviewable

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

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

HISTORICAL AND REVISION NOTES

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

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

§ 705. Relief pending review

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

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

HISTORICAL AND REVISION NOTES

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

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

§ 706. Scope of review

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

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

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

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

HISTORICAL AND REVISION NOTES

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

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

ABBREVIATION OF RECORD

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

CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

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

§ 801. Congressional review

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

(i) a copy of the rule;

(ii) a concise general statement relating to the rule, including whether it is a major rule; and

(iii) the proposed effective date of the rule.

(B) On the date of the submission of the report under subparagraph (A), the Federal agency promulgating the rule shall submit to the Comptroller General and make available to each House of Congress—

(i) a complete copy of the cost-benefit analysis of the rule, if any;

(ii) the agency's actions relevant to sections 603, 604, 605, 607, and 609;

(iii) the agency's actions relevant to sections 202, 203, 204, and 205 of the Unfunded Mandates Reform Act of 1995; and

(iv) any other relevant information or requirements under any other Act and any relevant Executive orders.

(C) Upon receipt of a report submitted under subparagraph (A), each House shall provide copies of the report to the chairman and ranking member of each standing committee with jurisdiction under the rules of the House of Representatives or the Senate to report a bill to amend the provision of law under which the rule is issued.

(2)(A) The Comptroller General shall provide a report on each major rule to the committees of jurisdiction in each House of the Congress by the end of 15 calendar days after the submission or publication date as provided in section 802(b)(2). The report of the Comptroller General shall include an assessment of the agency's compliance with procedural steps required by paragraph (1)(B).

(B) Federal agencies shall cooperate with the Comptroller General by providing information relevant to the Comptroller General's report under subparagraph (A).

(3) A major rule relating to a report submitted under paragraph (1) shall take effect on the latest of—

(A) the later of the date occurring 60 days after the date on which—

(i) the Congress receives the report submitted under paragraph (1); or

(ii) the rule is published in the Federal Register, if so published;

(B) if the Congress passes a joint resolution of disapproval described in section 802 relating to the rule, and the President signs a veto of such resolution, the earlier date—

(i) on which either House of Congress votes and fails to override the veto of the President; or

(ii) occurring 30 session days after the date on which the Congress received the veto and objections of the President; or

(C) the date the rule would have otherwise taken effect, if not for this section (unless a joint resolution of disapproval under section 802 is enacted).

(4) Except for a major rule, a rule shall take effect as otherwise provided by law after submission to Congress under paragraph (1).

(5) Notwithstanding paragraph (3), the effective date of a rule shall not be delayed by operation of this chapter beyond the date on which either House of Congress votes to reject a joint resolution of disapproval under section 802.

(b)(1) A rule shall not take effect (or continue), if the Congress enacts a joint resolution of disapproval, described under section 802, of the rule.

(2) A rule that does not take effect (or does not continue) under paragraph (1) may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule.

(c)(1) Notwithstanding any other provision of this section (except subject to paragraph (3)), a

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-

neys, 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

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.[1]

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by subchapter II of this chapter.

(Pub. L. 91–190, title I, §102, Jan. 1, 1970, 83 Stat. 853; Pub. L. 94–83, Aug. 9, 1975, 89 Stat. 424.)

AMENDMENTS

1975—Subpars. (D) to (I). Pub. L. 94–83 added subpar. (D) and redesignated former subpars. (D) to (H) as (E) to (I), respectively.

CERTAIN COMMERCIAL SPACE LAUNCH ACTIVITIES

Pub. L. 104–88, title IV, §401, Dec. 29, 1995, 109 Stat. 955, provided that: ''The licensing of a launch vehicle or launch site operator (including any amendment, extension, or renewal of the license) under [former] chapter 701 of title 49, United States Code [now chapter 509 (§50901 et seq.) of Title 51, National and Commercial Space Programs], shall not be considered a major Federal action for purposes of section 102(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(C)) if—

''(1) the Department of the Army has issued a permit for the activity; and

''(2) the Army Corps of Engineers has found that the activity has no significant impact.''

[1] So in original. The period probably should be a semicolon.

which is classified generally to chapter 12 (§ 791a et seq.) of Title 16, Conservation. For complete classification of this Act to the Code, see section 791a of Title 16 and Tables.

The Natural Gas Act, referred to in subsecs. (c) and (d), is act June 21, 1938, ch. 556, 52 Stat. 821, as amended, which is classified generally to chapter 15B (§ 717 et seq.) of Title 15, Commerce and Trade. For complete classification of this Act to the Code, see section 717w of Title 15 and Tables.

§ 7174. Referral of other rulemaking proceedings to Commission

(a) Notification of Commission of proposed action; public comment

Except as provided in section 7173 of this title, whenever the Secretary proposes to prescribe rules, regulations, and statements of policy of general applicability in the exercise of any function which is transferred to the Secretary under section 7151 of this title or section 60501 of title 49, he shall notify the Commission of the proposed action. If the Commission, in its discretion, determines within such period as the Secretary may prescribe, that the proposed action may significantly affect any function within the jurisdiction of the Commission pursuant to section 7172(a)(1) and (c)(1) of this title and section 60502 of title 49, the Secretary shall immediately refer the matter to the Commission, which shall provide an opportunity for public comment.

(b) Recommendations of Commission; publication

Following such opportunity for public comment the Commission, after consultation with the Secretary, shall either—

(1) concur in adoption of the rule or statement as proposed by the Secretary;

(2) concur in adoption of the rule or statement only with such changes as it may recommend; or

(3) recommend that the rule or statement not be adopted.

The Commission shall promptly publish its recommendations, adopted under this subsection, along with an explanation of the reason for its actions and an analysis of the major comments, criticisms, and alternatives offered during the comment period.

(c) Options of Secretary; final agency action

Following publication of the Commission's recommendations the Secretary shall have the option of—

(1) issuing a final rule or statement in the form initially proposed by the Secretary if the Commission has concurred in such rule pursuant to subsection (b)(1) of this section;

(2) issuing a final rule or statement in amended form so that the rule conforms in all respects with the changes proposed by the Commission if the Commission has concurred in such rule or statement pursuant to subsection (b)(2) of this section; or

(3) ordering that the rule shall not be issued.

The action taken by the Secretary pursuant to this subsection shall constitute a final agency action for purposes of section 704 of title 5.

(Pub. L. 95–91, title IV, § 404, Aug. 4, 1977, 91 Stat. 586.)

CODIFICATION

In subsec. (a), ''section 60501 of title 49'' substituted for reference to section 306 of this Act, meaning section 306 of Pub. L. 95–91 [42 U.S.C. 7155], and ''section 60502 of title 49'' substituted for reference to section 402(b), meaning section 402(b) of Pub. L. 95–91 [42 U.S.C. 7172(b)] on authority of Pub. L. 103–272, § 6(b), July 5, 1994, 108 Stat. 1378, the first section of which enacted subtitles II, III, and V to X of Title 49, Transportation.

§ 7175. Right of Secretary to intervene in Commission proceedings

The Secretary may as a matter of right intervene or otherwise participate in any proceeding before the Commission. The Secretary shall comply with rules of procedure of general applicability governing the timing of intervention or participation in such proceeding or activity and, upon intervening or participating therein, shall comply with rules of procedure of general applicability governing the conduct thereof. The intervention or participation of the Secretary in any proceeding or activity shall not affect the obligation of the Commission to assure procedure fairness to all participants.

(Pub. L. 95–91, title IV, § 405, Aug. 4, 1977, 91 Stat. 586.)

§ 7176. Reorganization

For the purposes of chapter 9 of title 5 the Commission shall be deemed to be an independent regulatory agency.

(Pub. L. 95–91, title IV, § 406, Aug. 4, 1977, 91 Stat. 586.)

§ 7177. Access to information

(a) The Secretary, each officer of the Department, and each Federal agency shall provide to the Commission, upon request, such existing information in the possession of the Department or other Federal agency as the Commission determines is necessary to carry out its responsibilities under this chapter.

(b) The Secretary, in formulating the information to be requested in the reports or investigations under section 825c and section 825j of title 16 and section 717i and section 717j of title 15 shall include in such reports and investigations such specific information as requested by the Federal Energy Regulatory Commission and copies of all reports, information, results of investigations and data under said sections shall be furnished by the Secretary to the Federal Energy Regulatory Commission.

(Pub. L. 95–91, title IV, § 407, Aug. 4, 1977, 91 Stat. 587.)

REFERENCES IN TEXT

This chapter, referred to in subsec. (a), was in the original ''this Act'', meaning Pub. L. 95–91, Aug. 4, 1977, 91 Stat. 565, as amended, known as the Department of Energy Organization Act, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 7101 of this title and Tables.

§ 7178. Federal Energy Regulatory Commission fees and annual charges

(a) In general

(1) Except as provided in paragraph (2) and beginning in fiscal year 1987 and in each fiscal year

thereafter, the Federal Energy Regulatory Commission shall, using the provisions of this section and authority provided by other laws, assess and collect fees and annual charges in any fiscal year in amounts equal to all of the costs incurred by the Commission in that fiscal year.

(2) The provisions of this section shall not affect the authority, requirements, exceptions, or limitations in sections 803(e) and 823a(e) of title 16.

(b) Basis for assessments

The fees or annual charges assessed shall be computed on the basis of methods that the Commission determines, by rule, to be fair and equitable.

(c) Estimates

The Commission may assess fees and charges under this section by making estimates based on data available to the Commission at the time of assessment.

(d) Time of payment

The Commission shall provide that the fees and charges assessed under this section shall be paid by the end of the fiscal year for which they were assessed.

(e) Adjustments

The Commission shall, after the completion of a fiscal year, make such adjustments in the assessments for such fiscal year as may be necessary to eliminate any overrecovery or underrecovery of its total costs, and any overcharging or undercharging of any person.

(f) Use of funds

All moneys received under this section shall be credited to the general fund of the Treasury.

(g) Waiver

The Commission may waive all or part of any fee or annual charge assessed under this section for good cause shown.

(Pub. L. 99–509, title III, § 3401, Oct. 21, 1986, 100 Stat. 1890.)

CODIFICATION

Section was enacted as part of the Omnibus Budget Reconciliation Act of 1986, and not as part of the Department of Energy Organization Act which comprises this chapter.

SUBCHAPTER V—ADMINISTRATIVE PROCEDURES AND JUDICIAL REVIEW

§ 7191. Procedures for issuance of rules, regulations, or orders

(a) Applicability of subchapter II of chapter 5 of title 5

(1) Subject to the other requirements of this subchapter, the provisions of subchapter II of chapter 5 of title 5 shall apply in accordance with its terms to any rule or regulation, or any order having the applicability and effect of a rule (as defined in section 551(4) of title 5), issued pursuant to authority vested by law in, or transferred or delegated to, the Secretary, or required by this chapter or any other Act to be carried out by any other officer, employee, or component of the Department, other than the Commission, including any such rule, regulation, or order of a State, or local government agency or officer thereof, issued pursuant to authority delegated by the Secretary in accordance with this subchapter. If any provision of any Act, the functions of which are transferred, vested, or delegated pursuant to this chapter, provides administrative procedure requirements in addition to the requirements provided in this subchapter, such additional requirements shall also apply to actions under that provision.

(2) Notwithstanding paragraph (1), this subchapter shall apply to the Commission to the same extent this subchapter applies to the Secretary in the exercise of any of the Commission's functions under section 7172(c)(1) of this title or which the Secretary has assigned under section 7172(e) of this title.

(b) Substantial issue of fact or law or likelihood of substantial impact on Nation's economy, etc.; oral presentation

(1) If the Secretary determines, on his own initiative or in response to any showing made pursuant to paragraph (2) (with respect to a proposed rule, regulation, or order described in subsection (a) of this section) that no substantial issue of fact or law exists and that such rule, regulation, or order is unlikely to have a substantial impact on the Nation's economy or large numbers of individuals or businesses, such proposed rule, regulation, or order may be promulgated in accordance with section 553 of title 5. If the Secretary determines that a substantial issue of fact or law exists or that such rule, regulation, or order is likely to have a substantial impact on the Nation's economy or large numbers of individuals or businesses, an opportunity for oral presentation of views, data, and arguments shall be provided.

(2) Any person, who would be adversely affected by the implementation of any proposed rule, regulation, or order who desires an opportunity for oral presentation of views, data, and arguments, may submit material supporting the existence of such substantial issues or such impact.

(3) A transcript shall be kept of any oral presentation with respect to a rule, regulation, or order described in subsection (a) of this section.

(c) Waiver of requirements

The requirements of subsection (b) of this section may be waived where strict compliance is found by the Secretary to be likely to cause serious harm or injury to the public health, safety, or welfare, and such finding is set out in detail in such rule, regulation, or order. In the event the requirements of this section are waived, the requirements shall be satisfied within a reasonable period of time subsequent to the promulgation of such rule, regulation, or order.

(d) Effects confined to single unit of local government, geographic area within State, or State; hearing or oral presentation

(1) With respect to any rule, regulation, or order described in subsection (a) of this section, the effects of which, except for indirect effects of an inconsequential nature, are confined to—

(A) a single unit of local government or the residents thereof;

(B) a single geographic area within a State or the residents thereof; or

CODE OF FEDERAL REGULATIONS

Title 18

Conservation of Power and Water Resources

Parts 1 to 399

Revised as of April 1, 2012

Containing a codification of documents
of general applicability and future effect

As of April 1, 2012

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statement showing, on the basis of all costs incurred to that date and estimated to be incurred for final completion of the project, the cost of constructing authorized facilities, such total costs to be classified according to the estimates submitted in the certificate proceeding and compared therewith and any significant differences explained.

(d) With respect to an acquisition authorized by the certificate, applicant must file with the Commission, in writing and under oath, an original and four conformed copies as prescribed in §385.2011 of this chapter the following:

(1) Within 10 days after acquisition and the beginning of authorized operations, notice of the dates of acquisition and the beginning of operations; and

(2) Within 10 days after authorized facilities have been constructed and within 10 days after such facilities have been placed in service or any authorized operation, sale, or service has commenced, notice of the date of such completion, placement, and commencement, and

(e) The certificate issued to applicant is not transferable in any manner and shall be effective only so long as applicant continues the operations authorized by the order issuing such certificate and in accordance with the provisions of the Natural Gas Act, as well as applicable rules, regulations, and orders of the Commission.

(f) In the interest of safety and reliability of service, facilities authorized by the certificate shall not be operated at pressures exceeding the maximum operating pressure set forth in Exhibit G-II to the application as it may be amended prior to issuance of the certificate. In the event the applicant thereafter wishes to change such maximum operating pressure it shall file an appropriate petition for amendment of the certificate. Such petition shall include the reasons for the proposed change. Nothing contained herein authorizes a natural gas company to operate any facility at a pressure above the maximum prescribed by state law, if such law requires a lower pressure than authorized hereby.

(Sec. 20, 52 Stat. 832; 15 U.S.C. 717s)

[17 FR 7389, Aug. 14, 1952, as amended by Order 280, 29 FR 4879, Apr. 7, 1964; Order 317, 31 FR 432, Jan. 13, 1966; Order 324, 31 FR 9348, July 8, 1966; Order 493, 53 FR 15030, Apr. 27, 1988; Order 493–B, 53 FR 49653, Dec. 9, 1988; Order 603, 64 FR 26606, May 14, 1999]

§157.21 Pre-filing procedures and review process for LNG terminal facilities and other natural gas facilities prior to filing of applications.

(a) *LNG terminal facilities and related jurisdictional natural gas facilities.* A prospective applicant for authorization to site, construct and operate facilities included within the definition of ''LNG terminal,'' as defined in §153.2(d), and any prospective applicant for related jurisdictional natural gas facilities must comply with this section's pre-filing procedures and review process. These mandatory pre-filing procedures also shall apply when the Director finds in accordance with paragraph (e)(2) of this section that prospective modifications to an existing LNG terminal are modifications that involve significant state and local safety considerations that have not been previously addressed. Examples of such modifications include, but are not limited to, the addition of LNG storage tanks; increasing throughput requiring additional tanker arrivals or the use of larger vessels; or changing the purpose of the facility from peaking to base load. When a prospective applicant is required by this paragraph to comply with this section's pre-filing procedures:

(1) The prospective applicant must make a filing containing the material identified in paragraph (d) of this section and concurrently file a Letter of Intent pursuant to 33 CFR 127.007, and a Preliminary Waterway Suitability Assessment (WSA) with the U.S. Coast Guard (Captain of the Port/Federal Maritime Security Coordinator). The latest information concerning the documents to be filed with the Coast Guard should be requested from the U.S. Coast Guard. For modifications to an existing or approved LNG terminal, this requirement can be satisfied by the prospective applicant's certifying

that the U.S. Coast Guard did not require such information.

(2) An application:

(i) Shall not be filed until at least 180 days after the date that the Director issues notice pursuant to paragraph (e) of this section of the commencement of the prospective applicant's pre-filing process; and

(ii) Shall contain all the information specified by the Commission staff after reviewing the draft materials filed by the prospective applicant during the pre-filing process, including required environmental material in accordance with the provisions of part 380 of this chapter, ''Regulations Implementing the National Environmental Policy Act.''

(3) The prospective applicant must provide sufficient information for the pre-filing review of any pipeline or other natural gas facilities, including facilities not subject to the Commission's Natural Gas Act jurisdiction, which are necessary to transport regassified LNG from the subject LNG terminal facilities to the existing natural gas pipeline infrastructure.

(b) *Other natural gas facilities.* When a prospective applicant for authorization for natural gas facilities is not required by paragraph (a) of this section to comply with this section's pre-filing procedures, the prospective applicant may file a request seeking approval to use the pre-filing procedures.

(1) A request to use the pre-filing procedures must contain the material identified in paragraph (d) of this section unless otherwise specified by the Director as a result of the Initial Consultation required pursuant to paragraph (c) of this subsection; and

(2) If a prospective applicant for non-LNG terminal facilities is approved to use this section's pre-filing procedures:

(i) The application will normally not be filed until at least 180 days after the date that the Director issues notice pursuant to paragraph (e)(3) of this section approving the prospective applicant's request to use the pre-filing procedures under this section and commencing the prospective applicant's pre-filing process. However, a prospective applicant approved by the Director pursuant to paragraph (e)(3) of this section to undertake the pre-filing process is not prohibited from filing an application at an earlier date, if necessary; and

(ii) The application shall contain all the information specified by the Commission staff after reviewing the draft materials filed by the prospective applicant during the pre-filing process, including required environmental material in accordance with the provisions of part 380 of this chapter, ''Regulations Implementing the National Environmental Policy Act.''

(c) *Initial consultation.* A prospective applicant required or potentially required or requesting to use the pre-filing process must first consult with the Director on the nature of the project, the content of the pre-filing request, and the status of the prospective applicant's progress toward obtaining the information required for the pre-filing request described in paragraph (d) of this section. This consultation will also include discussion of the specifications for the applicant's solicitation for prospective third-party contractors to prepare the environmental documentation for the project, and whether a third-party contractor is likely to be needed for the project.

(d) *Contents of the initial filing.* A prospective applicant's initial filing pursuant to paragraph (a)(1) of the section for LNG terminal facilities and related jurisdictional natural gas facilities or paragraph (b)(1) of this section for other natural gas facilities shall include the following information:

(1) A description of the schedule desired for the project including the expected application filing date and the desired date for Commission approval.

(2) For LNG terminal facilities, a description of the zoning and availability of the proposed site and marine facility location.

(3) For natural gas facilities other than LNG terminal facilities and related jurisdictional natural gas facilities, an explanation of why the prospective applicant is requesting to use the pre-filing process under this section.

(4) A detailed description of the project, including location maps and plot plans to scale showing all major plant components, that will serve as

clearly showing either that the petitioner does not have the money to pay all or part of the annual charge, or, if the petitioner does pay the annual charge, that the petitioner will be placed in financial distress or emergency. Petitions for waiver must be filed with the Office of the Secretary of the Commission within 15 days of issuance of the bill.

(b) *Decision on petition.* The Commission or its designee will review the petition for waiver and then will notify the applicant of its grant or denial, in whole or in part. If the petition is denied in whole or in part, the annual charge becomes due 30 days from the date of notification of the denial.

§ 382.106 Accounting for annual charges paid under part 382.

(a) Any natural gas pipeline company subject to the provisions of this part must account for annual charges paid by charging the account to Account No. 928, Regulatory Commission Expenses, of the Commission's Uniform System of Accounts.

(b) Any public utility subject to the provisions of this part must account for annual charges paid by charging the amount to Account No. 928, Regulatory Commission Expenses, of the Commission's Uniform System Accounts.

(c) Any oil pipeline company subject to the provisions of this part must account for annual charges paid by charging the amount to Account No. 510, Supplies and Expenses, of the Commission's Uniform System of Accounts.

[Order 472, 52 FR 21292, June 5, 1987, as amended by Order 472–B, 52 FR 36022, Sept. 25, 1987]

Subpart B—Annual Charges

§ 382.201 Annual charges under Parts II and III of the Federal Power Act and related statutes.

(a) *Determination of costs to be assessed to public utilities.* The adjusted costs of administration of the electric regulatory program, excluding the costs of regulating the Power Marketing Agencies, will be assessed to public utilities that provide transmission service (measured, as discussed in paragraph (c) of this section, by the sum of the megawatt-hours of all unbundled transmission and the megawatt-hours of all bundled wholesale power sales (to the extent these latter megawatt-hours were not separately reported as unbundled transmission)).

(b) *Determination of annual charges to be assessed to public utilities.* The costs determined under paragraph (a) of this section will be assessed as annual charges to each public utility providing transmission service based on the proportion of the megawatt-hours of transmission of electric energy in interstate commerce of each such public utility in the immediately preceding reporting year (either a calendar year or fiscal year, depending on which accounting convention is used by the public utility to be charged) to the sum of the megawatt-hours of transmission of electric energy in interstate commerce in the immediately preceding reporting year of all such public utilities.

(c) *Reporting requirement.* (1) For purposes of computing annual charges, as of January 1, 2002, a public utility, as defined in §382.102(b), that provides transmission service must submit under oath to the Office of the Secretary by April 30 of each year an original and conformed copies of the following information (designated as FERC Reporting Requirement No. 582 (FERC–582)): The total megawatt-hours of transmission of electric energy in interstate commerce, which for purposes of computing the annual charges and for purposes of this reporting requirement, will be measured by the sum of the megawatt-hours of all unbundled transmission (including MWh delivered in wheeling transactions and MWh delivered in exchange transactions) and the megawatt-hours of all bundled wholesale power sales (to the extent these latter megawatt-hours were not separately reported as unbundled transmission). This information must be reported to 3 decimal places; *e.g.*, 3,105 KWh will be reported as 3.105 MWh.

(2) Corrections to the information reported on FERC–582, as of January 1, 2002, must be submitted under oath to the Office of the Secretary on or before the end of each calendar year in which

the information was originally reported (i.e., on or before the last day of the year that the Commission is open to accept such filings).

(d) *Determination of annual charges to be assessed to power marketing agencies.* The adjusted costs of administration of the electric regulatory program as it applies to Power Marketing Agencies will be assessed against each power marketing agency based on the proportion of the megawatt-hours of sales of each power marketing agency in the immediately preceding reporting year (either a calendar year or fiscal year, depending on which accounting convention is used by the power marketing agency to be charged) to the sum of the megawatt-hours of sales in the immediately preceding reporting year of all power marketing agencies being assessed annual charges.

[Order 641, 65 FR 65768, Nov. 2, 2000]

§ 382.202 Annual charges under the Natural Gas Act and Natural Gas Policy Act of 1978 and related statutes.

The adjusted costs of administration of the natural gas regulatory program will be assessed against each natural gas pipeline company based on the proportion of the total gas subject to Commission regulation which was sold and transported by each company in the immediately preceding calendar year to the sum of the gas subject to the Commission regulation which was sold and transported in the immediately preceding calendar year by all natural gas pipeline companies being assessed annual charges.

[Order 472–B, 52 FR 36022, Sept. 25, 1987]

§ 382.203 Annual charges under the Interstate Commerce Act.

(a) The adjusted costs of administration of the oil regulatory program will be assessed against each oil pipeline company based on the proportion of the total operation revenues of each oil pipeline company for the immediately preceding calendar year to the sum of the operating revenues for the immediately preceding calendar year of all oil pipeline companies being assessed annual charges.

(b) No oil pipeline company's annual charge may exceed a maximum charge established each year by the Commission to equal 6.339 percent of the adjusted costs of administration of the oil regulatory program. The maximum charge will be rounded to the nearest $1000. For every company with an annual charge determined to be above the maximum charge, that company's annual charge will be set at the maximum charge, and any amount above the maximum charge will be reapportioned to the remaining companies. The reapportionment will be computed using the method outlined in paragraph (a) of this section (but excluding any company whose annual charge is already set at the maximum amount). This procedure will be repeated until no company's annual charge exceeds the maximum charge.

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

Office of Energy Projects

GUIDANCE:
FERC STAFF NEPA PRE-FILING INVOLVEMENT
IN NATURAL GAS PROJECTS

To encourage the pipeline industry to engage in early project-development involvement with the public and agencies, as contemplated by the National Environmental Policy Act (NEPA) and the Council on Environmental Quality regulations, the staff is offering the option of NEPA pre-filing work on interstate natural gas projects. The NEPA pre-filing process should be raised by a prospective applicant during early discussions with the Office of Energy Projects (OEP) about the project planning and status.

To begin the NEPA pre-filing review of a project, including starting the preparation of an environmental assessment (EA) or draft environmental impact statement (DEIS), a prospective applicant must submit a written request to the Director of OEP, 7 to 8 months prior to filing an application, that:

1. Explains why the project sponsor needs/wants to do NEPA pre-filing, including timing considerations;
2. Identifies other Federal and state agencies in the project area with relevant permitting requirements, and verifies that they are aware of and agree to participate in a pre-filing process;
3. Identifies other interested persons and organizations who have been contacted about the project;
4. Details what work has been done already, i.e., landowner contacts, agency consultations, engineering, and route planning;
5. States that the project sponsor will provide third-party contractor options for staff selection;
6. Acknowledges that a complete Environmental Report and complete application are still required at the time of filing; and
7. Details a plan which identifies specific tools and actions to facilitate stakeholder communications and public information, including establishing a single point of contact.

We strongly encourage a prospective applicant to establish a project web-site where interested persons can go for information such as copies of applications to other agencies. (See page 20 the final report of the Keystone Dialogue on Natural Gas Infrastructure—*Expanding Natural Gas Infrastructure To Meet The Growing Demand*

For Cleaner Power, issued in March, 2002, for further guidance. Contact: www.keystone.org or call 202-452-1590 for information.) Preliminary corridor or route maps are highly desirable.

If successful pre-filing cooperation is likely, the request for staff assistance will be granted. If approved, a written acceptance will be issued by OEP, and a PF docket number will be assigned. (Note that staff will not be a **project** advocate, but a **process** advocate and will stress the benefits of working together.)

Staff and third-party contractor involvement will be designed to fit each project and will include some or all of the following:

1. Assisting the applicant in developing initial information about the proposal and identifying affected parties (including landowners and agencies);
2. Issuing a Scoping Notice and conduct scoping for the proposal;
3. Facilitating issue identification, study needs and issue resolution.
4. Conducting site visits, examining alternatives, meeting with agencies and stakeholders, and participating in the applicant's public information meetings;
5. Initiating the preparation of a preliminary EA or preliminary DEIS, which may include cooperating agency review; and
6. Reviewing draft Resource Reports for the FERC application.

For further information, contact Richard R. Hoffmann, Director, Division of Environmental and Engineering Review, Office of Energy Projects at (202) 208-0066.

10/23/02

NO Gas Pipeline, et al. v. FERC **Docket No. CP11-56**
D.C. Cir. Nos. 12-1470, 12-1474 and 12-1475

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 7th day of October 2013, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system or via U.S. Mail, as indicated below:

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