

REPORT OF THE NATURAL GAS COMMITTEE

This report summarizes policy developments and legal decisions that occurred at the Federal Energy Regulatory Commission (FERC or the Commission), the Pipeline and Hazardous Materials Safety Administration (PHMSA), and the United States Courts of Appeals in the area of natural gas regulation between July 1, 2018, and June 30, 2019.*

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I. RULEMAKING ACTIONS

A. *FERC Order No. 849: Final Rule on Interstate and Intrastate Natural Gas Pipelines; Rate Changes Relating to the Federal Income Tax Rate*

On July 18, 2018, the Commission issued Order No. 849, finalizing its procedures and regulations regarding the effect of reduced corporate income taxes under the 2018 Tax Cuts and Jobs Act (TCJA) on certain natural gas pipelines and their effective rates at the Commission.¹ Order No. 849 requires interstate natural gas pipelines to submit Form No. 501-G, an abbreviated cost and revenue study designed to illustrate the effect of reduced corporate tax rates, which the FERC may then use to determine whether the pipeline's rates may be unjust and unreasonable under the Natural Gas Act (NGA).² Exemptions to make the requisite Form 501-G filings are provided for pipelines in NGA section 4 or section 5 proceedings as of the Form 501-G filing deadline, and pipelines that file uncontested

1. Order No. 849, *Interstate & Intrastate Natural Gas Pipelines; Rate Changes Relating to Fed. Income Tax Rate*, 83 Fed. Reg. 36,672 (July 30, 2018), 164 F.E.R.C. ¶ 61,031, *reh'g denied*, Order No. 849-A, 167 F.E.R.C. ¶ 61,051 (2019) [hereinafter Order No. 849].

2. *Id.* at P 2.

rate settlements between March 26, 2018, and their respective Form 501-G filing deadline.³

Previously, on March 15, 2018, the Commission issued a Notice of Proposed Rulemaking (NOPR) proposing to require interstate natural gas pipelines to file the new Form No. 501-G.⁴ In addition, the Commission proposed four options to natural gas pipelines to account for reduced corporate income taxes:

- 1) Simultaneous with the Form 501-G filing, make a limited NGA section 4 filing to reduce rates that reflect the pipeline's Form No. 501-G;
- 2) Commit to file either an uncontested rate settlement or a general NGA section 4 rate case before December 31, 2018 (if such a commitment is made, the Commission will not initiate an NGA section 5 investigation of its rates prior to that date);
- 3) File a statement explaining why no adjustment to rates is needed; or
- 4) Take no further action.⁵

In Order No. 849, the Commission made four adjustments to its original proposals in the NOPR. First, regarding the limited NGA section 4 filing, the Commission clarified that Form No. 501-G will “automatically enter a federal and state income tax of zero” for all tax pass-through entities, consistent with its revised policy statement on allowed income taxes.⁶ However, the Commission noted that a pipeline claiming a tax allowance may submit an addendum to the FERC Form No. 501-G justifying why an income tax allowance should be included.⁷ Second, a Master Limited Partnership (MLP) pipeline choosing to make a limited section 4 rate filing (under option 1 above) is permitted to reflect only the income tax reductions from the TCJA (*i.e.* may, but is not required, to eliminate its tax allowance in compliance).⁸ Third, for pipelines choosing to make the limited section 4 rate filing, the Commission guarantees a three-year moratorium from NGA section 5 rate investigations if the pipeline's FERC Form 501-G shows the pipeline's estimated return on equity is 12% or less.⁹ Fourth, a natural gas company that is organized as a pass-through entity whose entire income or losses are consolidated on the federal income tax return of its corporate parent is subject to the federal corporate income tax and is eligible for a tax allowance.¹⁰

The Commission explained in Order No. 849 that each Form 501-G filing will be docketed separately, allowing interested parties to intervene, protest, and comment within twelve days of the filing.¹¹ Under Order No. 849, the Commission would then either choose to institute an NGA section 5 rate investigation or

3. *Id.* at P 159.

4. *Interstate and Intrastate Natural Gas Pipelines; Rate Changes Relating to Federal Income Tax Rate*, 164 F.E.R.C. ¶ 61,031 (2019) (to be codified at 18 C.F.R. Parts 154, 260, & 284) [hereinafter Order No. 849].

5. *Id.* at P 2.

6. *Id.* at P 3.

7. *Id.* at P 135.

8. *Id.* at P 3.

9. Order No. 849, *supra* note 4, at P 4.

10. *Id.* at P 3.

11. *Id.* at P 96.

issue a notice accepting the filing.¹² Order No. 849 became effective September 13, 2018, forty-five days after date of publication in the *Federal Register*.¹³ Order No. 849 established a staggered filing schedule and therefore, pipelines will have between twenty-eight and eighty-four days to make their FERC Form No. 501-G filing, depending on which one of three groups that pipeline has been placed into under Order No. 849.¹⁴

B. Notice of Inquiry Regarding the Commission's Policy for Determining Return on Equity

On March 21, 2019, the FERC initiated an Inquiry Regarding the Commission's Policy for Determining Return on Equity.¹⁵ The notice of inquiry (NOI) sought comments in eight general areas, including the role its base return on equity (ROE) plays in investment decision-making, whether FERC should reevaluate how it uses the discounted cash flow (DCF) methodology to set ROEs for jurisdictional rates, and whether it should rely on alternative models such as the risk premium analysis (Risk Premium), capital-asset pricing model analysis (CAPM), and an expected earnings analysis (Expected Earnings).¹⁶ FERC initiated the NOI to reevaluate its ROE policy following the decision of the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) in *Emera Maine v. FERC*.¹⁷ While *Emera Maine* concerned the application of FERC ROE policy under the Federal Power Act, the FERC extended its general inquiry to seek comment on whether ROE policy changes “should be applied to interstate natural gas and oil pipelines.”¹⁸ Comments on the NOI were due on June 25, 2019, with reply comments due on July 25, 2019.¹⁹ FERC has not taken further action.

II. RATES, TERMS, AND CONDITIONS OF SERVICE

A. Abandonment

1. Columbia Gas Transmission, LLC

The FERC granted the request of Columbia Gas Transmission, LLC (Columbia) to abandon in place approximately fourteen miles of existing pipeline and associated facilities along its Line 8000 system located in Mineral County, West

12. *Id.* at PP 97-98.

13. *Id.* at P 153.

14. Order No. 849, *supra* note 4, PP 148, 261.

15. FERC Docket No. PL19-4-000 (March 21, 2019) [hereinafter NOI].

16. *Id.* at P 29.

17. Meghan Mandel and Miles Kiger, *FERC Issues Notice of Inquiry on Roe Policy*, WASH. ENERGY REPORT (Mar. 27, 2019), <https://www.troutmansandersenergyreport.com/2019/03/ferc-issues-notice-of-inquiry-on-roe-policy/>.

18. NOI, *supra* note 15, at 1.

19. FEDERALREGISTER.GOV, INQUIRY REGARDING THE COMMISSION'S ELECTRIC INCENTIVES POLICY, (Mar. 28, 2019), <https://www.federalregister.gov/documents/2019/03/28/2019-05895/inquiry-regarding-the-commissions-electric-transmission-incentives-policy>.

Virginia and Allegany County, Maryland.²⁰ Columbia filed the application in November 2017 to abandon these facilities as part of its multi-year, comprehensive modernization program to address aging infrastructure.²¹ Direct Energy Business Marketing, LLC (Direct Energy) and Columbia Gas of Maryland, Inc. (CMD) filed comments on the application.²² Direct Energy challenged the cost of Columbia's Line 8000 modernization program, while CMD requested that the FERC

condition certificate authority on Columbia's payment for all costs of converting the residential tap customers served by CMD to the use of an alternative energy source, and require that natural gas service to the affected residential tap customers be continued until CMD has obtained any necessary abandonment authority from the Maryland Public Service Commission.²³

The FERC rejected the comments and approved the abandonment.²⁴ The FERC found that because the pipeline segments Columbia proposed to abandon "will be replaced by the proposed segments discussed below, the proposed abandonment will not detrimentally impact Columbia's ability to meet its existing service obligations" or "jeopardize the continuity of existing service because Columbia states that the existing pipeline will remain in service during installation of the replacement pipeline and the replaced pipeline will retain the current [maximum allowable operating pressure] of 273 [pounds per square in gauge]."²⁵ The FERC also rejected CMD's request to condition certificate authority until CMD obtains abandonment authority from the Maryland Public Service Commission, stating that "CMD did not specify the regulatory approvals it may need or the amount of time that it may take to secure such regulatory approvals," so it was not "appropriate to condition the abandonment authorization issued herein upon the receipt of any state regulatory approvals."²⁶

2. Alliance Pipeline L.P.

The FERC granted the request of Alliance Pipeline L.P. (Alliance) to reduce the certificated capacity and firm service obligation on its Tioga Lateral.²⁷ Alliance filed an application in November 2018 to restate its current certificated capacity on the Tioga Lateral as 96 MMcf/d, which was a reduction from the capacity of 126.4 MMcf/d specified in Alliance certificate because, according to Alliance, the lower certificated capacity would more accurately reflect the existing firm capacity of the Tioga Lateral's installed facilities.²⁸ Given that Alliance's application sought to reduce its certificated capacity, the FERC treated Alliance's application as a request to partially abandon service.²⁹ A group of shippers, in-

20. *Columbia Gas Transmission, LLC*, 166 F.E.R.C. ¶ 61,037 at P 1 (2019).

21. *Id.* at PP 1, 4.

22. *Id.* at P 12.

23. *Id.*

24. *Id.* at PP 17-18.

25. 166 F.E.R.C. ¶ 61,037 at P 16.

26. *Id.* at P 17.

27. *Alliance Pipeline L.P.*, 167 F.E.R.C. ¶ 61,145, at PP 1-2 (2019).

28. *Id.* at P 16.

29. *Id.* at P 1.

cluding BP Canada Energy Marketing Corporation and Hess Corporation (Indicated Shippers) “filed comments questioning Alliance’s justification of its proposal.”³⁰ Indicated Shippers argued that Alliance failed to file any information supporting its contention that the firm service capacity of the Tioga Lateral was actually 96 MMcf/d and requested the Commission require Alliance to explain and justify the reduction in the pipeline’s firm service capacity.³¹ Alliance responded with information showing that earlier upgrades of the Tioga Lateral were optimized to serve the pipeline’s current firm service subscribed capacity of 61.5 MMcf/d and hydraulic flow models supporting its position.³² Based on Alliance’s filings, the FERC approved Alliance’s application, stating that because “Alliance only has firm contracts for 61.5 MMcf/d on the Tioga Lateral, we find that reducing the Tioga Lateral’s certificated capacity . . . will not adversely impact Alliance’s ability to maintain its existing contractual obligations to serve its existing customers.”³³ Therefore, Alliance’s abandonment of service was supported by the public convenience and necessity.³⁴

3. Transcontinental Gas Pipe Line Co., LLC

The FERC granted the request of Transcontinental Gas Pipe Line Co., LLC (Transco) to partially abandon the storage capacity of its Eminence Salt Dome Storage Field (Eminence Storage Field).³⁵ Transco requested that the FERC reduce the certificated maximum pressures of Caverns 5 and 6 of the Eminence Storage Field due to concerns about operational integrity.³⁶ Transco did not seek to alter the maximum pressure of Cavern 7 in its filing.³⁷ The North Carolina Utilities Commission (NCUC) filed a protest to the application alleging that Transco’s application did not contain sufficient data and supporting information to justify the requested revisions to the pressures of Caverns 5 and 7.³⁸ In response, Transco clarified that it was not seeking to reduce pressures in Cavern 7 and that the reduction in the pressure to Cavern 5 was supported by previous studies Transco submitted as part of required semi-annual reports to the FERC.³⁹ Based on these representations, the FERC approved Transco’s application, stating the reduction in certificated maximum pressures would not affect any currently-subscribed storage customers, and “the abandonment and amendment are necessary to ensure the integrity of the caverns and safe operation of the facility.”⁴⁰ However, the FERC conditioned its approval on Transco continuing to monitor Caverns 5, 6, and 7 of

30. *Id.* at P 8.

31. *Id.*

32. 167 F.E.R.C. ¶ 61,145 at PP 9-11.

33. *Id.* at P 16.

34. *Id.*

35. *Transcontinental Gas Pipe Line Co., LLC*, 166 F.E.R.C. ¶ 61,044 at PP 1-2 (2019).

36. *Id.* at P 14.

37. *Id.*

38. *Id.* at P 24.

39. *Id.* at P 25.

40. 166 F.E.R.C. ¶ 61,044 at PP 31, 33.

the Eminence Storage Field and to file semi-annual reports for five years following completion of any repairs.⁴¹

B. Acquisition Premium

1. RH energytrans, LLC

The Commission denied RH energytrans, LLC's (RH energytrans) proposal, as part of its NGA Section 7(c)⁴² application to acquire and convert 31.6 miles of existing natural gas pipeline facilities and existing compression facilities to include the "fair market value" for such facilities in its rate base instead of the original cost less accumulated depreciation.⁴³ As part of its proposal, RH energytrans concluded that the fair market value of those natural gas facilities was \$12,900,000, compared to an estimated original cost less accumulated depreciation of \$2,544,751, resulting in a proposed acquisition adjustment of \$10,355,249 in its rate base.⁴⁴ The Commission denied the request, finding that RH energytrans did not satisfy the *Longhorn* substantial benefits test.⁴⁵ The Commission held that the relevant assets were not being put to a different public use or placed in FERC-jurisdictional service for the first time.⁴⁶ In addition, the Commission found that because there was an affiliate relationship between the buyer and seller, the amount paid to acquire the facilities should be based on net book value.⁴⁷

C. Capacity Release

1. Transwestern Pipeline Co., L.L.C.

In its order addressing a reserved issue resulting from an uncontested stipulation and agreement in Transwestern's latest NGA Section 4 rate case, the FERC found that Transwestern Pipeline Co., L.L.C. (Transwestern) neither interpreted nor implemented its tariffs consistent with the FERC's capacity release policies.⁴⁸ Customers of Transwestern opposed paying additional charges for using secondary points outside the primary path of released capacity and argued that the pipeline must offer the same discounted rates to a replacement shipper as it agreed to charge the releasing shipper.⁴⁹ Transwestern argued that the replacement shipper must negotiate its own secondary point rate, regardless of the rate paid by the releasing shipper or the release agreement rate between the releasing and replacement shippers.⁵⁰

The FERC disagreed with both contentions and stated that, in general, the rate a replacement shipper pays for service is established by an agreement between

41. *Id.* at P 34.

42. 15 U.S.C. § 717f(c) (2012).

43. *RH energytrans, LLC*, 165 F.E.R.C. ¶ 61,218 at P 36 (2018).

44. *Id.* at P 36.

45. *Id.* at P 40 (citing *Longhorn Partners Pipeline*, 73 F.E.R.C. ¶ 61,355 (1995)).

46. *Id.* at PP 40-41.

47. *Id.* at P 42.

48. *Transwestern Pipeline Co., L.L.C.*, 167 F.E.R.C. ¶ 61,040 at P 1 (2019).

49. *Id.* at P 2.

50. *Id.*

the releasing shipper and the replacement shipper.⁵¹ However, if a replacement shipper uses a secondary point that is not covered by the releasing shipper's discount agreement, the releasing shipper may be charged additional reservation charges not exceeding the maximum rate.⁵² Further, a releasing shipper may include a condition in the release agreement stating that the replacement shipper cannot use secondary points where the releasing shipper does not have a discount agreement, or they must compensate the releasing shipper if additional charges are incurred.⁵³

2. MarkWest Pioneer, L.L.C.

The FERC rejected tariff records filed by MarkWest Pioneer, L.L.C. to permit capacity release under its Rate Schedule FT-2.⁵⁴ FERC concluded that the tariff records were contrary to its policy prohibiting shippers receiving service under rate schedules that have one-part volumetric rates from releasing their capacity using capacity release tariff provisions.⁵⁵ The FERC cited Order No. 636-B, in which it explained that customers who pay a one-part volumetric rate do not have a reservation charge against which to credit revenues from the replacement shipper.⁵⁶

3. Southern Star Central Gas Pipeline, Inc.

In a letter order, the FERC accepted, subject to condition, filings by Southern Star Central Gas Pipeline, Inc. (Southern Star) including revised tariff records for a non-conforming discount agreement and an amended Rate Schedule FTS-M transportation service agreement with Empire District Electric Co. (Empire).⁵⁷ The discount agreement with Empire included a provision allowing Southern Star to market Empire's released capacity at the maximum rate or a rate greater than the maximum rate for releases longer than one year.⁵⁸ However, the FERC's capacity release regulations prohibit releases for greater than one year to exceed the applicable maximum rate.⁵⁹ The FERC found this deviation impermissible and ordered Southern Star to file revised tariff records.⁶⁰ The FERC accepted the filings on condition that when Southern Star acts as a shipper's agent when marketing capacity that it complies with section 284.8(b)(2).⁶¹

51. *Id.* at P 3.

52. *Id.*

53. 167 F.E.R.C. ¶ 61,040 at P 62.

54. *MarkWest Pioneer, L.L.C.*, 166 F.E.R.C. ¶ 61,167 at P 1 (2019).

55. *Id.* at P 8.

56. *Pipeline Service. Obligations, and Revisions to Regulations Governing Self-Implementing Transportation Under Part 284 of the Commission's Regulations Regulation of Natural Gas Pipelines After Partial Well-head Decontro*, 61 F.E.R.C. ¶ 61,272, at p. 61,998 (1992).

57. *Southern Star Central Gas Pipeline, Inc.*, 165 F.E.R.C. ¶ 61,270 at PP 1-2 (2018).

58. *Id.* at P 4.

59. 18 C.F.R. § 284.8(b)(2) (2008).

60. 165 F.E.R.C. ¶ 61,270 at P 8.

61. *Id.*

4. ARP Mountaineer Production, L.L.C.

The FERC granted temporary waivers to ARP Mountaineer Production, L.L.C. (ARP Mountaineer) and Summit Natural Resources, L.L.C. (Summit) to facilitate the permanent release and assignment of capacity from ARP Mountaineer to Summit, and to lift the prohibition on capacity release transactions above the maximum rate.⁶² The capacity was assigned to ARP Mountaineer from East Tennessee Natural Gas, L.L.C. (East Tennessee) at a negotiated rate greater than East Tennessee's applicable maximum rate to facilitate a purchase and sale agreement between ARP and Summit under which Summit will acquire all, or substantially all, of ARP Mountaineer's coal bed methane natural gas production assets in West Virginia and Virginia.⁶³ The Commission granted the waiver because there was no need to post for higher bidders when the rate already exceeded the maximum recourse rate, and the pipeline was financially indifferent to the capacity release.⁶⁴

D. Cost Trackers

1. Trailblazer Pipeline Co., LLC

Trailblazer Pipeline Co. LLC (Trailblazer) "filed *pro forma* tariff records setting forth a proposed cost recovery mechanism (CRM)" that would "implement an additional reservation rate to recover eligible costs incurred for system safety, integrity, reliability, environmental, and cybersecurity issues."⁶⁵ Trailblazer proposed that separate, non-discountable reservation rates be established for its "Existing System and Expansion System—separate rate tranches based on the vintage of the pipeline facilities—and that any eligible costs incurred be allocated to the proper CRM charge depending on the nature of the charge."⁶⁶ Protestors raised several issues with the proposed CRM, including (1) Trailblazer did not comply with the Cost Recovery Mechanism Policy Statement's requirement to engage in a meaningful collaborative effort with its shippers to develop the CRM prior to filing; (2) the CRM relies on speculative costs and events for its justification since Trailblazer did not anticipate any costs incurred under the mechanism until at least 2021; (3) "Trailblazer did not include a list of specific capital modernization projects for inclusion in the tracker nor identify facilities that need upgrading or replacement, along with an upper limit on capital costs projected to be spent and a schedule for completing the projects"; (4) the definition of costs eligible for the CRM "appears to include both capital costs and operating expenses"; (5) Trailblazer did not include accounting controls and procedures necessary that only eligible costs are recovered through the tracker; (6) "Trailblazer's base rates have not first been shown to be just and reasonable, nor has Trailblazer provided any offsetting compensatory base rate reduction from those rates"; and (7) the proposed duration of the CRM, which is the earlier of ten years or the effectiveness of a new

62. *ARP Mountaineer Prod., L.L.C. & Summit Nat. Res.*, 164 F.E.R.C. ¶ 61,143 at P 1 (2018).

63. *Id.* at P 2.

64. *Id.* at P 5.

65. *Trailblazer Pipeline Co.*, 164 F.E.R.C. ¶ 61,074 at PP 1, 17. (2018).

66. *Id.* at PP 4, 17.

section 4 rate case.⁶⁷ The FERC accepted and suspended, subject to refund, the proposed tariff records and established hearing procedures.⁶⁸

2. WBI Energy Transmission, Inc.

WBI Energy Transmission, Inc. (WBI) filed tariff records proposing a surcharge mechanism entitled Capital, Environmental and Safety Cost Recovery Mechanism (CESCRM).⁶⁹ “WBI state[d] that the [] CESCRM surcharge would recover non-recurring System Integrity and Reliability Eligible Costs associated with specific projects and non-recurring pipeline safety eligible costs and environmental compliance eligible costs.”⁷⁰ “WBI state[d] that the amounts to be recovered [under the CESCRM] would be subject to cost limits and that the [] CESCRM would have five annual terms over which projects would be constructed and would be subject to an annual review.”⁷¹ Protestors argued that the CESCRM was inconsistent with the FERC’s Cost Recovery Mechanism Policy Statement for several reasons, including (1) WBI had not demonstrated that its base rates are just and reasonable; (2) the eligible costs included in the CESCRM are not specifically identified, and may not be one-time capital costs, or otherwise require separation from the CESCRM; (3) the CESCRM does not protect against cost shifting as it would use actual billing determinants each year; (4) the CESCRM would continue indefinitely; (5) WBI did not engage with its customers and discuss the CESCRM prior to filing; (6) WBI included general maintenance and repair projects; and (7) WBI did not set an upper limit on includable capital costs for each project.⁷² WBI responded that the direct testimony it filed with its proposal specified four one-time capital projects, as well as an estimate of the costs, included under the CESCRM, and noted that its proposed tariff language included upper limits on capital costs recovered under the CESCRM.⁷³ The FERC accepted and suspended, subject to refund, WBI’s proposed tariff records and established hearing procedures.⁷⁴

3. Columbia Gas Transmission, LLC

The FERC accepted tariff records filed by Columbia Gas Transmission, LLC (Columbia) to implement a Stipulation and Agreement (Modernization II Settlement) approved by the FERC on March 17, 2016, including tariff records concerning Columbia’s Capital Cost Recovery Mechanism (CCRM).⁷⁵ Columbia stated that, pursuant to the Modernization II Settlement, the CCRM allows it to recover, via annual filings, its capital revenue requirement for specified capital investments

67. *Id.* at PP 25-28.

68. *Id.* at P 37.

69. *WBI Energy Transmission, Inc.*, 165 F.E.R.C. ¶ 61,192 (2018).

70. *Id.* at P 10.

71. *Id.*

72. *Id.* at PP 15-17.

73. *Id.* at PP 18-19.

74. 165 F.E.R.C. ¶ 61,192 at P 2.

75. *Columbia Gas Transmission, LLC*, 166 F.E.R.C. ¶ 61,069 (2019).

made under Columbia's modernization program.⁷⁶ Columbia stated that the CCRM permits it to recover its revenue requirement for projects to rehabilitate or replace specifically-identified eligible facilities through a separately-tracked addition to the recourse rate applicable to certain schedules, and that Columbia would file to revise its CCRM rate on or before December 31 of each year, to become effective February 1 of the following year.⁷⁷ Furthermore, Columbia stated that it allocated its revenue requirement to the rate schedules to develop its proposed CCRM rate to become effective February 1, 2019, utilizing billing determinants in effect from February 1, 2019 through January 31, 2020.⁷⁸

In a protest, Washington Gas Light Co. argued that Columbia erroneously excluded a large contract with Antero Resources Corporation (Antero) from the calculation of the CCRM rate, resulting in an understatement of the billing determinants by about 8%.⁷⁹ In response, Columbia argued that it properly excluded the Antero contract from the calculation of the CCRM rate based on the plain language of the Modernization II Settlement, which provides that billing determinants associated with contracts for capacity on incrementally-priced projects are included in the CCRM rate if those contracts meet the FERC's threshold requirements for "rolled-in" rate treatment.⁸⁰ The FERC agreed that Columbia properly excluded the Antero contract from the calculation of the CCRM rate, finding that the Antero contract relates to an incremental project that does not qualify for rolled-in rate treatment and thus is not includable pursuant to the Modernization II Settlement.⁸¹

4. Southern Star Central Gas Pipeline, Inc.

The FERC approved a Stipulation and Agreement of Settlement (Settlement) filed by Southern Star Central Gas Pipeline, Inc. (Southern Star) that implements a Modernization Capital Cost Recovery Mechanism (CRM).⁸² The CRM established by the Settlement describes facility costs eligible for inclusion in a new surcharge. The Settlement states that the CRM will provide for surcharges that will be collected between March 1, 2020 and October 31, 2021.⁸³ Under the terms of the Settlement, during calendar years 2019 and 2020, Southern Star will spend at least \$50 million in capital costs on capital maintenance.⁸⁴ The Settlement also includes a listing of facilities currently planned to be placed into service in 2019 and 2020.⁸⁵ FERC found that the Settlement appears fair and reasonable and in the public interest.⁸⁶

76. *Id.* at P 3.

77. *Id.*

78. *Id.* at P 5.

79. *Id.* at P 8.

80. 166 F.E.R.C. ¶ 61,069 at PP 10-12.

81. *Id.* at P 14.

82. 165 F.E.R.C. ¶ 61,270 at P 1.

83. *Id.* at P 6.

84. *Id.*

85. *Id.*

86. *Id.* at P 12.

5. Port Arthur Pipeline, LLC

The FERC rejected a proposed cost tracker proposed by Port Arthur Pipeline, LLC (Port Arthur Pipeline) in connection with Port Arthur's Pipeline's certification application pursuant to NGA section 7(c) to construct and operate a new natural gas pipeline system designed to transport up to 2 million MMBtu of natural gas per day from interconnections in Cameron Parish, Louisiana and Orange and Jefferson Counties, Texas to a new liquefaction project in Port Arthur, Texas.⁸⁷ In its application, Port Arthur Pipeline proposed tracking mechanisms for cost increases due to any new pipeline safety or greenhouse gas regulations issued after approval of Port Arthur Pipeline's initial rates.⁸⁸ Port Arthur Pipeline's proposed General Terms and Conditions Section 13.29.3 stated that Port Arthur Pipeline would file annually to revise a Transmission Pipeline Safety Costs and Greenhouse Gas Costs Surcharge for each zone on or before September 30 of each year to become effective November 1.⁸⁹ The FERC found that Port Arthur Pipeline's proposal did not meet the Cost Recovery Policy Statement's standards.⁹⁰ Specifically, the FERC found that Port Arthur Pipeline's proposal did not show that its shippers supported the surcharge, nor did the proposal offer a method to allow for a periodic review of whether the surcharge and Port Arthur Pipeline's base rates remain just and reasonable.⁹¹ Moreover, the FERC found it speculative to anticipate what types of costs Port Arthur Pipeline may incur under federal, state, or local legislation, whether such costs should be recoverable, and, if recoverable, the manner in which they should be recovered.⁹² However, the FERC noted that its rejection was without prejudice to Port Arthur Pipeline filing a proposal in the future if it actually incurs such costs or if the proposal complies with the Cost Recovery Policy Statement.⁹³

E. Fuel

1. ANR Pipeline Co.

On March 29, 2019, the Commission accepted and suspended ANR Pipeline Co.'s filed revised Tariff records, revising its annual Transporter's Use percentages and Electric Power Cost Charge for its transportation and storage services pursuant to the fuel and EPC re-determination provisions in the General Terms and Conditions of ANR's FERC Gas Tariff.⁹⁴ At issue was whether ANR's current fuel methodology accurately accounted for the fact that ANR's transportation path recently changed from a predominantly south-to-north flow to a north-to-south flow.⁹⁵ Historically, the south-to-north flow path was considered a forward

87. *Port Arthur LNG, LLC*, 167 F.E.R.C. ¶ 61,052 (2019).

88. *Id.* at P 54.

89. *Id.*

90. *Id.* at P 56.

91. *Id.*

92. 167 F.E.R.C. ¶ 61,052 at P 56.

93. *Id.*

94. *ANR Pipeline Co.*, 166 F.E.R.C. ¶ 61,239 (2019).

95. *Id.* at P 6.

haul and was appropriately charged a corresponding fuel charge for the fuel needed to transport such gas on ANR's system, whereas backhauls are not assessed a fuel charge under ANR's Tariff.⁹⁶

Because of increased supply receipts on the northern end of ANR's Southeast Leg (SE Leg) from Appalachian-region supply sources, the flow patterns on ANR, and the SE Leg in particular, have changed substantially. Data provided by ANR demonstrates that physical natural gas flows on the SE Leg in 2018 reversed such that the gas predominantly flows in a north-to-south direction and has consistently maintained that same direction through 2018.⁹⁷ Allegedly, ANR improperly applied the fuel-use methodology in its Tariff by assuming that all north-to-south flows continue to qualify as backhauls that do not require any fuel and, as such, are not charged ANR's Transporter's Use percentage.⁹⁸ It was alleged that ANR's filing unjustifiably rewarded shippers using north-to-south flow paths by requiring other shippers to subsidize the fuel charges they cause.⁹⁹

The Commission did not find that gas flows on ANR's SE Leg moving predominantly in a north-to-south direction fall within the definition of backhaul; nor did it find the flows to be exempt from Transporter's Use percentage or EPC charges.¹⁰⁰ Given ANR's failure to adequately explain how its current Tariff allows it to exempt north-to-south forward hauls on the SE Leg from its Transporter's Use Percentage calculations, the Commission accepted and suspended ANR's Tariff records, to be effective April 1, 2019, subject to refund, and subject to ANR's filing either (a) revised Tariff records properly assessing the Transporter's Use Percentage and EPC charges on the actual flow of gas, including the forward haul flows on the SE Leg, or (b) a detailed explanation of how ANR's original filing is consistent with its currently effective Tariff.¹⁰¹

2. BP Energy Co., *et al.* v. Dominion Energy Cove Point LNG, LP

On March 21, 2019, the Commission denied a complaint by BP Energy Co., Equinor Natural Gas LLC and Shell NA LNG LLC alleging that Dominion Energy Cove Point LNG, LP (Cove Point) was assessing an improper fuel charge.¹⁰² Observing that the essential purpose of NGA section 5 is to provide a means to re-evaluate previously accepted tariff language, the Commission rejected Cove Point's arguments that the complaint constituted an unlawful collateral attack on Cove Point's most recent fuel tracker filing.¹⁰³ Finding no procedural bar to the Complaint, the Commission considered whether Cove Point properly applied the tariff language to determine whether Cove Point charged Complainants the appropriate rate.¹⁰⁴

96. *Id.*

97. *Id.* at P 7.

98. *Id.* at P 8.

99. 166 F.E.R.C. ¶ 61,239 at P 9.

100. *Id.* at P 16.

101. *Id.*

102. *BP Energy Co. v. Dominion Energy Cove Point LNG, LP*, 166 F.E.R.C. ¶ 61,195 (2019).

103. *Id.* at P 24.

104. *Id.* at P 26.

Complainants argued that Cove Point’s actions in allocating fuel charges did not correspond to the tariff language in effect at the time, and therefore violated NGA section 4(d)¹⁰⁵ and section 154.207 of the Commission’s regulations¹⁰⁶ by making a tariff change without prior notice and without prior Commission approval.¹⁰⁷ The Commission disagreed, holding that Cove Point’s tariff conforms with the general principles of the Commission’s jurisprudence on variable cost trackers. The Commission denied the complaint.¹⁰⁸

3. Transcontinental Gas Pipe Line Co., LLC

On January 18, 2019, the Commission rejected Transcontinental Gas Pipe Line Co., LLC’s (Transco) tariff record revising the firm and interruptible transportation fuel percentages applicable to Zones 1, 2, and 3 of its system.¹⁰⁹ Transco proposed to “clarify that fuel would be retained on [] south-bound and north-bound movements”¹¹⁰ Previously, Transco retained fuel exclusively for north-bound movements.¹¹¹ Transco styled its December 20, 2018 filing as a “Clean-Up Filing for Fuel Matrices and Gulf Connector Rates.”¹¹² Following FERC’s public notice of the filing, Indicated Shippers filed a protest, seeking summary rejection.¹¹³

Transco argued that the instant filing was a clean-up filing that did not include proposals regarding new or increased fuel retention percentages.¹¹⁴ Transco claimed the filing was merely the “appropriate application of Transco’s existing, Commission-approved fuel retention rates,” that its tariff allows for out-of-cycle fuel rate filings, and that its filing cannot be rejected since it complies with the Natural Gas Act and Commission policy.¹¹⁵ Accordingly, Transco requested that the Commission accept the tariff records as proposed.¹¹⁶ The Commission accepted Transco’s proposed tariff record correcting the Gulf Connector Rates, effective December 1, 2018.¹¹⁷

However, “the Commission reject[ed] Transco’s tariff record revising its firm and interruptible fuel percentages.”¹¹⁸ Transco’s tariff filing constituted a rate increase, because it “impose[d] fuel charges on south-bound transactions in Zones 1, 2, and 3 for the first time,” notwithstanding Transco’s claim to the contrary.¹¹⁹ The Commission reasoned that, Transco had never before submitted, nor did the Commission approve fuel charges “on south-bound transactions in Zones 1, 2, and

105. 15 U.S.C. § 717c(d) (2012).

106. 18 C.F.R. § 154.207 (2019).

107. 166 F.E.R.C. ¶ 61,195 at P 27.

108. *Id.* at PP 32, 35.

109. *See generally* 166 F.E.R.C. ¶ 61,044.

110. *Id.* at P 2.

111. *Id.*

112. *Id.*

113. *Id.* at P 3.

114. 166 F.E.R.C. ¶ 61,044 at P 7.

115. *Id.* at P 7.

116. *Id.*

117. *Id.* at P 8.

118. *Id.* at P 9.

119. 166 F.E.R.C. ¶ 61,044 at P 9.

3” and, by “proposing to apply the fuel percentages to transactions that did not previously incur fuel charges, Transco was proposing a rate increase pursuant to section 4 of the NGA.”¹²⁰ The Commission concluded that Transco failed to provide the documentation necessary to meet its burden under NGA section 4 to show its proposal was just and reasonable.¹²¹

4. Spire STL Pipeline LLC

On August 3, 2018, the Commission authorized Spire STL Pipeline LLC to “construct and operate a new 65-mile interstate natural gas pipeline system, extending from an interconnection with Rockies Express Pipeline LLC in Scott County, Illinois, to interconnections with both Spire Missouri Inc. and Enable Mississippi River Transmission, LLC in St. Louis County, Missouri.”¹²² Spire also requested

approval of its proposed pro forma gas tariff, a blanket certificate under Part 157, Subpart F of the Commission’s regulations to perform certain routine construction activities and operations, and a blanket certificate under Part 284, Subpart G of the Commission’s regulations to provide open-access firm and interruptible natural gas transportation and transportation-related services.¹²³

“In footnote 2 of its Statement of Currently Effective Rates, Spire reserve[d] the right to not assess the fuel use percentage when no fuel is used.”¹²⁴ The Commission has permitted pipelines to exempt transactions from fuel charges if the pipeline can demonstrate that the identified transactions listed in a pipeline’s tariff do not require fuel.¹²⁵ The Commission directed Spire to eliminate footnote 2, because it failed to meet the Commission’s criteria.¹²⁶

“Footnote 3 of Spire’s Statement of Currently Effective Rates state[d] ‘Rate Schedule PALS Service will not be assessed Fuel Use and Lost Gas Percentages or the [annual charge adjustment] surcharge.’”¹²⁷ The Commission allows parking and lending service transactions to be exempt from fuel charges if the pipeline can show that no fuel is used in performing a transaction.¹²⁸ Spire’s PALS rate schedule contemplates the return of loaned quantities or the withdrawal of parked quantities at “mutually agreed upon point(s) on Spire’s system,” thereby allowing fuel charges for PALS transactions at different points.¹²⁹ Accordingly, the Commission directed Spire to revise its Statement of Currently Effective Rates.¹³⁰

Section 20.3 of Spire’s general terms & conditions provided that the calculation of current fuel use and lost gas percentages were:

120. *Id.*

121. *Id.* at P 10.

122. *Spire STL Pipeline, LLC*, 164 F.E.R.C. ¶ 61,085 at P 1 (2018) (order issuing certificates). Commissioners LaFleur and Glick wrote separate dissents from the Commission’s order.

123. *Id.*

124. *Id.* at P 143.

125. *Id.*

126. 164 F.E.R.C. ¶ 61,085 at P 143.

127. *Id.* at P 144.

128. *Id.*

129. *Id.*

130. *Id.*

(a) Fuel Use Percentage: The current Fuel Use Percentage shall be determined on the basis of the projected quantities of Gas that shall be used for the routine operation and maintenance of Spire's pipeline system divided by the estimated quantities of Gas for transportation under Rate Schedules FTS and ITS for the Recovery Period.

(b) Lost Gas Percentage: The current Lost Gas Percentage shall be determined on the basis of the projected quantities of Gas that shall be required for Lost Gas divided by the estimated quantities of Gas for transportation under Rate Schedules FTS and ITS for the Recovery Period.¹³¹

The Commission determined that Spire's proposed language in section 20.3 failed to explain how Spire would produce the projections and estimates used to compute the fuel use and lost gas percentages.¹³² Consequently, the Commission directed Spire to revise section 20.3 of the general terms & conditions to explain how Spire would produce those projections and estimates.¹³³

F. Gas Quality: Venture Global Calcasieu Pass, LLC and TransCameron Pipeline, LLC

On February 21, 2019, the Commission authorized a proposal by Venture Global Calcasieu Pass, LLC (Venture Global) under section 3 of the NGA¹³⁴ to site, construct, and operate a new liquefied natural gas export terminal and associated facilities along the Calcasieu Ship Channel in Cameron Parish, Louisiana (East Lateral Project) as well as TransCameron's proposal under section 7(c) of the NGA to construct and operate the East Lateral Project.¹³⁵ Section 3.5 of the general terms & conditions of TransCameron's *pro forma* tariff stated:

Delivery Point Obligations. Upon mutual agreement between Transporter and a downstream Interconnecting Party, Transporter may temporarily deliver Gas that does not conform to the quality specifications set forth in GT&C Section 3.1, if Transporter, in its reasonable operational judgment and in a not unduly discriminatory manner, determines that such delivery will not interfere with its ability to: (1) maintain prudent and safe operation of part or all of Transporter's pipeline system and ensures that such agreement does not adversely affect Transporter's ability to provide firm services. Transporter *may post waivers on its EBB at its discretion* and will report waivers in accordance with Part 358 of the Commission's Regulations.¹³⁶

The Commission found the emphasized language was inconsistent with section 358.7(h)(2) of its regulations requiring a transmission provider to post an internet web site notice of each waiver of a tariff provision granted in favor of an affiliate, unless the waiver had been approved by the Commission.¹³⁷ The Commission directed TransCameron to revise GT&C Section 3.5 accordingly.¹³⁸

131. 164 F.E.R.C. ¶ 61,085 at P 168.

132. *Id.* at P 169.

133. *Id.*

134. 15 U.S.C. § 717b (2012).

135. *Venture Global Calcasieu Pass, LLC and TransCameron Pipeline, LLC*, 166 F.E.R.C. ¶ 61,144 (2019) (*Venture Global*) (order granting authorizations under sections 3 and 7 of the NGA). Commissioner LaFleur wrote a separate concurrence decision and Commissioner Glick dissented.

136. *Id.* at P 44 (emphasis in original).

137. *Id.* at P 45.

138. *Id.*

G. Jurisdiction

1. Big Bend Conservation Alliance v. FERC

The D.C. Circuit denied a petition for review filed by Big Bend Conservation Alliance, which challenged the Commission's jurisdictional determination concerning the interaction between sections 3 and 7 of the NGA in *Trans-Pecos Pipeline, LLC*.¹³⁹ Big Bend argued that the FERC erroneously held it lacked jurisdiction over the upstream intrastate segment of the project that would connect to the export facility approved in the Order.¹⁴⁰ Big Bend also argued that the impacts of that upstream segment had to be considered as part of the National Environmental Policy Act (NEPA) review of the export facility.¹⁴¹ The court found it could not consider arguments that the upstream segments were part of the export facility under NGA section 3 because these arguments were not raised in Big Bend's rehearing request.¹⁴² The court also rejected Big Bend's argument that the upstream segment was jurisdictional as "an interstate pipeline subject to Section 7" of the NGA,¹⁴³ because, although connected to interstate pipelines, the FERC "permissibly found both that there is enough Texas-sourced gas to support the pipeline and that it initially will carry only Texas-sourced gas."¹⁴⁴ In response to arguments that interstate transportation would soon commence under Section 311, the Court found that "such concerns about future developments . . . are misplaced on this record" because the Commission found no evidence of evasion.¹⁴⁵ The court therefore held that "the Commission reasonably concluded that it lacked jurisdiction over the pipeline."¹⁴⁶ The court also rejected arguments that the project was impermissibly segmented and that "the need for this permit 'federalized' the project."¹⁴⁷

2. Gulf South Pipeline Co., LP

The FERC found that it would lack jurisdiction over approximately 189.8 miles of pipeline located in Texas and Louisiana in connection with approving their abandonment by sale to Tristate NLA, LLC (Tristate).¹⁴⁸ Gulf South Pipeline Co., LP (Gulf South) entered into a purchase and sale agreement with Tristate.¹⁴⁹ Concurrent with Gulf South's application for abandonment, Tristate sought a declaratory order finding that after acquisition and reconfiguration, the facilities

139. *Big Bend Conservation Alliance v. FERC*, 896 F.3d 418 (D.C. Cir. 2018), *aff'g Trans-Pecos Pipeline, LLC*, 157 F.E.R.C. ¶ 61,081 (2016), *reh'g denied*, 157 F.E.R.C. ¶ 61,081 (2016); *see also Report of the Natural Gas Committee*, 38 ENERGY L. J. 9 (2017).

140. *Big Bend Conservation Alliance*, 896 F.3d at 419.

141. *Id.* at 423.

142. *Id.* at 421.

143. *Id.*

144. *Id.* at 423.

145. *Big Bend Conservation Alliance*, 896 F.3d at 422-23.

146. *Id.* at 423.

147. *Id.*

148. *Gulf South Pipeline Co.*, 164 F.E.R.C. ¶ 61,028 at P 1 (2018).

149. *Id.* at P 7.

would not be subject to the Commission's jurisdiction.¹⁵⁰ Tristate claimed that the reconfiguration would create two gathering systems, a Hinshaw pipeline, and an intrastate pipeline.¹⁵¹

The Commission applied its "primary function test" to evaluate the jurisdictional status of the gathering facilities.¹⁵² The Commission found that the fact that one of the proposed systems crossed state lines was not inconsistent with its status as a gathering facility.¹⁵³ The Commission also found other relevant elements of the proposal to be consistent with or indicative of the facilities having a gathering function and that they would therefore be exempt from the Commission's jurisdiction.¹⁵⁴ The FERC found that Tristate's proposed 15-mile segment used to transport gas from an interstate line to a local distribution system would be exempt from Commission jurisdiction as a Hinshaw pipeline because (1) it would receive the gas it transports in Louisiana, (2) all the gas transported would be consumed in Louisiana, and (3) its rates and services would be subject to regulation by the Louisiana Department of Natural Resources.¹⁵⁵ Finally, the FERC also found Tristate's proposed two 18.8-mile pipeline segments in Texas would be exempt from Commission regulation as an intrastate pipeline because they would neither receive nor transport any gas flowing in intrastate commerce.¹⁵⁶

3. Ohio River System LLC

The FERC granted Ohio River System LLC's (ORS) request for clarification and rehearing, finding that ORS does not operate certificated facilities subject to the Commission's jurisdiction and need not pay annual assessments or make related filings.¹⁵⁷ On August 3, 2017, ORS filed an application pursuant to section 7(c) of the NGA for a certificate of limited jurisdiction authorizing it to provide interstate transportation service, via displacement.¹⁵⁸ On November 9, 2017, FERC staff granted ORS the certificate through a delegated order.¹⁵⁹ That order, however, denied ORS's request to waive the requirement to file pages 1 and 520 of FERC Form No. 2-A, which are used by the Commission to determine whether a pipeline's throughput exceeds the threshold to assess annual charges.¹⁶⁰ ORS sought clarification that it is exempt from annual charges because it does not operate jurisdictional facilities or, in the alternative, ORS sought rehearing of the November 2017 order to the extent that it requires ORS to file Form 2-A and pay

150. *Id.* at P 8.

151. *Id.* at PP 8-12.

152. *Id.* at P 24 (quoting *Farmland Indus., Inc.*, 23 F.E.R.C. ¶ 61,063, at 61,143 (1983) and citing *Amerada Hess Corp.*, 52 F.E.R.C. ¶ 61,268, at pp. 61,987-88 (1990)).

153. 164 F.E.R.C. ¶ 61,028 at P 28 (citing *Laser Marcellus Gathering Co., LLC*, 130 F.E.R.C. ¶ 61,162 at P 16 (2010)).

154. *Id.* at P 37.

155. *Id.* at PP 38-39.

156. *Id.* at P 40.

157. *Ohio River Sys. LLC*, 164 F.E.R.C. ¶ 61,119 at P 1 (2018).

158. *Id.* at P 4.

159. *Ohio River Sys. LLC*, 161 F.E.R.C. ¶ 62,096 (2017).

160. 164 F.E.R.C. ¶ 61,119 at P 6.

annual charges if it exceeds this threshold.¹⁶¹ The delegated letter order cited the Commission's decision in the *Pioneer* case for the proposition that the Commission did not intend to exempt otherwise non-jurisdictional companies operating certificated facilities subject to FERC jurisdiction to provide jurisdictional services.¹⁶²

The Commission distinguished *Pioneer*, which involved a company constructing, operating, and providing service on a jurisdictional facility.¹⁶³ ORS, by contrast, was authorized "to provide limited jurisdictional transportation service on existing, non-jurisdictional facilities," and therefore the facilities were not subject to Commission jurisdiction.¹⁶⁴ The Commission also granted rehearing and found that ORS was "exempt from annual charge assessments and related filings."¹⁶⁵

4. Northern Natural Gas Co.

The Commission required Northern Natural Gas Co. (Northern) to take action to prevent the loss of jurisdictional storage gas from all open or unplugged production wells with access to Northern's Cunningham storage field.¹⁶⁶ Following an accident in the Cunningham storage field caused by a blowout, the Kansas Corporation Commission requested that FERC order Northern to show cause why it should not be required to take action to eliminate the risk of loss of natural gas from third-party production wells.¹⁶⁷ In response, Northern and other parties asserted that the Commission lacked jurisdiction to require Northern to control and secure the wells at issue because they were production wells excluded from FERC jurisdiction by section 1(b) of the NGA.¹⁶⁸ The FERC rejected this argument because certificate holders are "expected to obtain all land or other property necessary" to provide their jurisdictional service.¹⁶⁹ Therefore, the Commission reasoned, if the rights to production wells are found necessary to the provision of jurisdictional services, the certificate holder may exercise the right of eminent domain pursuant to NGA section 7(h).¹⁷⁰ The Commission therefore found it had jurisdiction under the NGA to require Northern to "obtain the necessary rights to prevent future accidents at production wells."¹⁷¹ Because the record had sufficiently informed the Commission to issue the order, the motion for an order to show cause was found to be moot.¹⁷²

161. *Id.* at P 7.

162. *Id.* at P 8 (citing 161 F.E.R.C. ¶ 62,096 at PP 4-5 (citing *Atlas Pipeline Mid-Continent WestTex, LLC and Pioneer Natural Resources USA, Inc.*, 143 F.E.R.C. ¶ 61,043 (2013) (*Pioneer*)).

163. *Id.* at P 9 (citing *Pioneer*, 143 F.E.R.C. ¶ 61,043 at P 12).

164. *Id.* at P 10.

165. 164 F.E.R.C. ¶ 61,119 at P 11.

166. *Northern Natural Gas Co.*, 164 F.E.R.C. ¶ 61,200 at P 1 (2018).

167. *Id.*

168. *Id.* at P 24 (citing 15 U.S.C. § 717(b) (2012)).

169. *Id.* at P 28.

170. *Id.* (citing 15 U.S.C. § 717f(h)).

171. 164 F.E.R.C. ¶ 61,200 at P 29.

172. *Id.* at P 37.

5. Shell Pipeline Co. LP and Enbridge Offshore Facilities, LLC

The Commission granted a petition for declaratory order filed by Shell Pipeline Co. LP and Enbridge Offshore Facilities, LLC (Petitioners) finding that planned and existing pipelines (the Pipeline) would be used primarily for production and gathering and would not be subject to Commission jurisdiction.¹⁷³ Petitioners planned to use the Pipeline to extract oil and gas from the Gulf of Mexico in three phases.¹⁷⁴ During the second and third phases, oil extraction would depend on gas lift.¹⁷⁵ The Pipeline would therefore operate bidirectionally, sometimes carrying gas seaward for use in extraction.¹⁷⁶ The Commission found that the bidirectional flow of the gas did not bring the Pipeline under the Commission's jurisdiction.¹⁷⁷ Nor did the Commission consider it relevant that the gas would flow intermittently.¹⁷⁸ The Commission concluded that, when transporting gas as described in the petition, the Pipeline would be involved in production or gathering and would therefore not be subject to the Commission's jurisdiction.¹⁷⁹

6. Adorers of the Blood of Christ v. FERC

The United States Court of Appeals for the Third Circuit held that the NGA provided the exclusive means to challenge the Commission's grant of a certificate of public convenience and necessity, and therefore affirmed the district court's determination that it lacked subject matter jurisdiction over the appellants' claim that a Commission order violated the Religious Freedom Restoration Act (RFRA).¹⁸⁰ The appellants were a religious order of women (Adorers) owning a parcel of land affected by a certificate of public convenience and necessity granted to Transcontinental Gas Pipe Line Co., LLC (Transco) in Pennsylvania.¹⁸¹ The petitioners did not participate in the proceedings before the agency regarding the certificate.¹⁸² The Adorers refused to grant Transco an easement and the pipeline initiated condemnation proceedings, in which "the Adorers did not object, appeal or seek rehearing regarding any order."¹⁸³ Rather, they filed a separate complaint in the Eastern District of Pennsylvania asserting that the project would interfere with their ability to use their land consistently with their religious beliefs in violation of RFRA.¹⁸⁴ The district court dismissed the Adorers' claims for lack of subject matter jurisdiction, holding that RFRA did not allow circumvention of "the

173. *Shell Pipeline Co. & Enbridge Offshore Facilities, LLC*, 167 F.E.R.C. ¶ 61,207 (2019).

174. *Id.* at P 6.

175. *Id.*

176. *Id.* at P 7.

177. *Id.* at P 16 (citing *Enbridge Offshore Facilities, LLC*, 150 F.E.R.C. ¶ 61,103, at P 12 (2015)).

178. 167 F.E.R.C. ¶ 61,207 at P 17.

179. *Id.* at P 18.

180. *Adorers of the Blood of Christ v. FERC*, 897 F.3d 187, 189 (3d Cir. 2018); *See also Transcontinental Gas Pipe Line Co., LLC*, 158 F.E.R.C. ¶ 61,125 (2017), *certificate amended*, 159 F.E.R.C. ¶ 62,181 (2017), *reh'g denied*, 161 F.E.R.C. ¶ 61,250 (2017); *Report of the Natural Gas Committee*, 39 ENERGY L.J. 47 (2018).

181. *Adorers of the Blood of Christ*, 897 F.3d at 190.

182. *Id.* at 191.

183. *Id.* at 192.

184. *Id.* at 192-93.

specific procedure prescribed by the NGA for challenging a FERC order.”¹⁸⁵ On appeal, the court of appeals rejected the Adorers’ argument that RFRA superseded all other federal law, giving them a right to assert their claim in district court.¹⁸⁶ Rather, the court of appeals held that RFRA did not abrogate either the NGA’s exclusive jurisdiction of the courts of appeals or the NGA’s exhaustion provision.¹⁸⁷ Because FERC was capable of hearing any claims brought before it, the court found that the Adorers would have had an opportunity for relief before the agency.¹⁸⁸

H. Market-Based Rates

1. Banquete Hub LLC

FERC granted market-based rate (MBR) authority for interruptible wheeling transportation service to Banquete Hub LLC (Banquete).¹⁸⁹ The order represents the first time FERC has permitted MBR for transportation services at a hub without any associated storage services.¹⁹⁰ Banquete’s affiliate Kinder Morgan Tejas Pipeline LLC (KM Tejas) operates the facilities.¹⁹¹ The service is subject to FERC regulation under section 311 of the Natural Gas Policy Act and is provided on intrastate facilities otherwise regulated by the Texas Railroad Commission.¹⁹² The Banquete hub consists of facilities previously owned by KM Tejas in addition to four new compression stations and 660 feet of station piping, and can transport up to 300 million cubic feet per day to interconnections with Natural Gas Pipeline Co. of America, Tennessee Gas Pipeline Co. (Tennessee), KM Tejas, Transcontinental Gas Pipe Line Co., LLC, Enterprise Texas Pipeline LLC (receipts only) and EnLink LIG, LLC (deliveries only). FERC evaluated Banquete’s MBR application in accordance with the *Alternative Rate Policy Statement*,¹⁹³ which it held governs MBR analyses for both section 311 pipelines and NGA pipelines.¹⁹⁴ It assessed Banquete’s ability to exercise market power with respect to its relevant geographic and product markets, its market share, and its market concentration.¹⁹⁵

185. *Id.* at 193.

186. *Adorers of the Blood of Christ*, 897 F.3d at 193.

187. *Id.* at 194-96.

188. *Id.* at 197-98.

189. *Banquete Hub LLC*, 166 F.E.R.C. ¶ 61,101 at P 1 (2019).

190. *Id.* at P 14.

191. *Id.* at PP 2-3.

192. *Id.* at P 4.

193. *Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines; Regulation of Negotiated Transportation Services of Natural Gas Pipelines*, 74 F.E.R.C. ¶ 61,076 (1996), *order granting clarification*, 74 F.E.R.C. ¶ 61,194 (1996), *order on reh’g and clarification*, 75 F.E.R.C. ¶ 61,024 (1996), *reh’g denied*, 75 F.E.R.C. ¶ 61,066, *reh’g dismissed*, 75 F.E.R.C. ¶ 61,291 (1996), *petitions for review denied and dismissed sub nom.*, *Burlington Resources Oil & Gas Co. v. FERC*, 172 F.3d 918 (D.C. Cir. 1998) (*Alternative Rate Policy Statement*), *criteria modified*, *Final Rulemaking, Rate Regulation of Certain Natural Gas Storage Facilities*, 115 F.E.R.C. ¶ 61,343 (codified at 18 C.F.R. pt. 284), *order on clarification and reh’g*, 117 F.E.R.C. ¶ 61,190 (2006).

194. 166 F.E.R.C. ¶ 61,101 at P 11.

195. *Id.* at P 6.

The Commission identified the Gulf Coast Production Area as the relevant geographic market.¹⁹⁶ It used a “bingo card” analysis that identified all possible interconnections for pipelines attached to a hub. It determined that there were “21 alternative paths that include pipelines both directly and indirectly connected to Banquete.”¹⁹⁷ The FERC also agreed with Banquete’s conclusion that it had a market share of 1.43 percent of receipt capacity and 1.23 percent of delivery capacity, as well as a Herfindahl-Hirschman Index (HHI) level for receipt capacity of 965 and the HHI for delivery capacity of 1,011 indicating low market share and low market concentration.¹⁹⁸ The FERC directed Banquete to “notify the Commission if future changes in circumstances significantly affect Banquete’s present market power status,” including any “event which would affect Banquete’s ability to withhold or restrict services or increase its ability to discriminate unduly in price or terms of service.”¹⁹⁹ The FERC also directed Banquete to refile its Statement of Operating Conditions to remove any references to firm service as Banquete was not seeking to provide firm service.²⁰⁰

I. New Services

1. Dominion Energy Cove Point LNG, LP

On April 25, 2019, FERC accepted new and revised tariff records filed by Dominion Energy Cove Point LNG, LP (Cove Point) to establish Rate Schedule LTS, which is a new limited firm transportation service subject to the right to declare the shipper’s service to be unavailable for up to thirty consecutive or non-consecutive days per annual period.²⁰¹ Cove Point proposed to only offer LTS service under proposed section 1.1(a) of Rate Schedule LTS on capacity that was previously posted as unsubscribed and available.²⁰² Cove Point stated that service under Rate Schedule LTS would generally be scheduled, curtailed, and otherwise performed in the same manner as conventional firm transportation service under Rate Schedule FTS, except on “unavailable days.”²⁰³ “Cove Point proposed to charge the LTS customer the same rate that would be applicable to unsubscribed capacity under Rate Schedule FTS.”²⁰⁴

Equinor, a shipper, did “not object to Rate Schedule LTS”²⁰⁵ but did object “to Rate Schedule LTS having a higher scheduling and curtailment priority than Rate Schedule OTS on days when both services are available,” because Equinor was concerned that “the proposed Rate Schedule LTS service may lack sufficient conditions to ensure that service to Equinor is not degraded.”²⁰⁶

196. *Id.* at P 13.

197. *Id.* at P 15.

198. *Id.* at PP 17-18.

199. 166 F.E.R.C. ¶ 61,101 at P 22.

200. *Id.* at P 24.

201. *Dominion Energy Cove Point LNG, LP*, 167 F.E.R.C. ¶ 61,074 at P 1 (2019).

202. *Id.* at P 3.

203. *Id.*

204. *Id.* at P 5.

205. *Id.* at P 7.

206. 167 F.E.R.C. ¶ 61,074 at P 7.

The Commission ruled that Cove Point's proposed Rate Schedule LTS was just and reasonable.²⁰⁷ It rejected Equinor's protests that the new Rate Schedule LTS will have a higher scheduling priority than the existing Rate Schedule OTS, finding that "it is not unjust or unreasonable for a pipeline to propose a limited firm service that has a higher priority than another interruptible service," and that "it is clear that Rate Schedule OTS is considered as an interruptible service."²⁰⁸ Section 284.7 of the Commission's regulations states that "[s]ervice on a firm basis means that the service is not subject to a prior claim by another customer or another class of service and receives the same priority as any other class of firm service."²⁰⁹ Reviewing Cove Point's existing tariff, the Commission found that Rate Schedule OTS "is explicitly listed as lower priority than all firm services."²¹⁰ Consequently, the Commission found that "the scheduling priority proposed by Cove Point for Rate Schedule LTS is appropriate" and that "Equinor knew, or should have known, at the time it purchased this service at a rate lower than Cove Point's other firm services, that such service was not entitled to the same priority afforded firm services."²¹¹

2. D'Lo Gas Storage, LLC

The Commission authorized D'Lo Gas Storage, LLC (D'Lo) to provide a new wheeling transportation service under market-based rates under Rate Schedule FWS.²¹² D'Lo filed a market power study to support its firm wheeling service at market-based rates.²¹³ It stated that "prospective customers would like firm wheeling services, which would afford them flexibility and reliability not available in services currently offered."²¹⁴ The Commission evaluated the product and geographic markets, market concentration, market share, and other factors described in its *Alternative Rate Policy Statement* and Order No. 678.²¹⁵ The Commission approved D'Lo's request for authority to charge market-based rates for its proposed firm wheeling service, finding that "there are many transportation service alternatives for potential shippers and that D'Lo will have a small market share."²¹⁶

J. *Open Seasons: Rockies Express Pipeline LLC*

The Commission required Rockies Express Pipeline LLC (Rockies Express) to amend its tariff to provide interactive auction procedures for bidding on posted available capacity based on discounted or maximum rate availability.²¹⁷ Rockies Express had argued that it only needed to post net present value (NPV), term, and

207. *Id.* at P 12.

208. *Id.*

209. *Id.* (citing 18 C.F.R. § 284.7(a)(3) (2018)).

210. *Id.*

211. 167 F.E.R.C. ¶ 61,074 at P12.

212. *D'Lo Gas Storage, LLC*, 166 F.E.R.C. ¶ 61,102 (2019).

213. *Id.* at P 5.

214. *Id.* at P 12.

215. *Id.* at P 13.

216. *Id.* at P 19.

217. 166 F.E.R.C. ¶ 61,102 at P 1.

quantity information for winning bids in internet auction procedures.²¹⁸ The Commission held, however, that Rockies Express must also post NPV, term, and quantity information after-the-fact upon the completion of auction procedures associated with an open season.²¹⁹ The Commission noted that each of “these methods for obtaining capacity contain auction bidding and award procedures [and a]s noted above, the Commission has directed information to be posted with regard to winning bids following open seasons in order to ensure transparency.”²²⁰ The pipeline also “failed to demonstrate any harm in the requirement to post winning bid information for open seasons, given existing disclosure requirements.”²²¹ Rockies Express was accordingly directed under NGA section 5 to incorporate the posted language in its tariff, or “explain why it should not be required to do so.”²²²

K. *Pressure Commitments: Transcontinental Gas Pipe Line Co., LLC*

The Commission granted Transcontinental Gas Pipeline Co., LLC (Transco) authorization to construct and operate the Rivervale South to Market Project, an expansion of Transco’s pipeline system in New Jersey intended to increase the available capacity without adding compression.²²³ Transco asked the Commission to find that certain non-conforming provisions included in the project customers’ service agreements constitute permissible deviations from Transco’s *pro forma* service agreement, including a provision that the shipper shall provide or cause to be provided a minimum daily average pressure of 685 psig at the Rivervale Interconnect receipt point.²²⁴ The Rivervale Interconnect is an interconnection between Transco and Tennessee Gas Pipeline Co., L.L.C. in Bergen County, New Jersey.²²⁵ Although the application did not mention the effect on existing shippers, the pipeline filed a superseding service agreement with the existing shipper that included a non-conforming pressure provision that provided the existing shipper would also deliver gas to the receipt point at the same minimum pressure.²²⁶ The Commission found the pressure provision to be a permissible non-conforming provision via delegated letter order.²²⁷

L. *Rate Cases*

1. Texas Eastern Transmission, LP

On December 31, 2018, the FERC accepted and suspended Texas Eastern Transmission, LP’s (Texas Eastern) tariff record to implement a general rate

218. *Rockies Express Pipeline LLC*, 165 F.E.R.C. ¶ 61,017 (2018).

219. *Id.* at P 1.

220. *Id.* at P 15.

221. *Id.*

222. *Id.*

223. *Transcontinental Gas Pipe Line Co.*, 164 F.E.R.C. ¶ 61,101 at P 1 (2018).

224. *Id.* at P 7.

225. *Id.* at P 4.

226. *Id.* at PP 27-28.

227. Letter from Marsha K. Palazzi, Director, Division of Pipeline Regulation, Docket No. RP18-1004-000 (Aug. 30, 2018) (on file with FERC).

case.²²⁸ On November 30, 2019, Texas Eastern proposed rate increases to reflect significant growth in rate base, a realignment of depreciation and negative salvage rates, an increase in overall cost-of-service, and a weighted average cost of capital to allow the attraction of new capital at reasonable terms.²²⁹ Texas Eastern seeks to increase revenues by approximately \$365 million.²³⁰ Numerous parties filed protests to the tariff record, taking issue with the rate increase and rate design.²³¹ Some of the significant issues in the case include: the treatment of Accumulated Deferred Income Tax (ADIT) and excess ADIT, the proposal to roll-in several incremental rate schedules, the proposed return on equity and depreciation rates and negative salvage.²³² The Commission suspended the rates for the full statutory period and set the case for hearing, finding that Texas Eastern's filing raises many typical rate case issues warranting a hearing.²³³

2. Transcontinental Gas Pipe Line Co., LLC

On September 28, 2019, the FERC issued an order accepting and suspending Transcontinental Gas Pipe Line Co., LLC's (Transco) tariff record to implement a general rate case.²³⁴ On August 31, 2019, Transco proposed rate increases to reflect significant increases in its cost of service and rate base.²³⁵ Transco's proposal would increase its revenue requirement from the currently effective rates of \$1.337 billion to \$2.450 billion.²³⁶ Transco also proposed changes to its depreciation rates and negative salvage rates for several gathering, transmission, and storage categories.²³⁷ Multiple parties filed protests to the tariff record, taking issue with the rate increases and rate design.²³⁸ Protestors also sought summary rejection of Transco's proposal to establish an emissions reduction surcharge.²³⁹ The Commission found that Transco's filing raises many typical rate case issues and set all of the issues, including the proposed emissions reduction surcharge mechanism, for hearing.²⁴⁰

3. Enable Mississippi River Transmission, LLC

The FERC accepted and suspended Enable Mississippi River Transmission, LLC's (Enable MRT) tariff record to implement a general rate case.²⁴¹ The FERC summarily rejected Enable MRT's proposed tax allowance, because its parent

228. *Texas E. Transmission, LP*, 165 F.E.R.C. ¶ 61,287 at P 1 (2018).

229. *Id.* at P 4.

230. *Id.* at P 9.

231. *Id.* at PP 15-16.

232. *Id.* at P 16.

233. 165 F.E.R.C. ¶ 61,287 at P 27.

234. *Transcontinental Gas Pipe Line Co.*, 164 F.E.R.C. ¶ 61,236 at P 1 (2018).

235. *Id.* at P 4.

236. *Id.*

237. *Id.* at P 6.

238. *Id.* at PP 10-12.

239. 164 F.E.R.C. ¶ 61,236 at P 21.

240. *Id.* at P 16.

241. *Enable Mississippi River Transmission, LLC*, 164 F.E.R.C. ¶ 61,075 at P 1 (2018).

company is a master limited partnership.²⁴² The FERC also rejected Enable MRT's proposed billing determinants, because they failed to reflect that Spire Missouri renewed its commitment for the capacity at issue.²⁴³ The Commission required Enable MRT to file revised tariff records in accordance with the order.²⁴⁴

4. Trailblazer Pipeline Co., LLC

Following a paper hearing to address whether Trailblazer Pipeline Co., LLC (Trailblazer) should be permitted an income tax allowance in its cost of service, the Commission preliminarily made two findings.²⁴⁵ First, the Commission found that permitting Trailblazer to recover an income tax allowance for its private owners' ownership share would result in a double recovery.²⁴⁶ Second, the Commission found that no double-recovery occurs from permitting Trailblazer to recover an income tax allowance for the corporate income tax liability attributable to Tallgrass Energy, LP's ownership share.²⁴⁷ The Commission also found that the return on equity methodologies raised in FERC's *Coakley v. Bangor Hydro-Elec.* proceeding did not alter either of the findings referenced above regarding whether the inclusion of an income tax allowance in Trailblazer's cost of service does, or does not, result in a double recovery.²⁴⁸ Nonetheless, the Commission emphasized the preliminary nature of these findings and recognized that the complex issues raised in determining Trailblazer's ROE and income tax allowance, and the Commission stated that all parties should fully litigate all income tax allowance issues during the ongoing administrative law judge hearing.²⁴⁹

M. Rate Investigations

1. Bear Creek Storage Co., L.L.C.

On January 16, 2019, the FERC opened an investigation into whether Bear Creek Storage Co., L.L.C.'s (Bear Creek) rates were unjust and unreasonable.²⁵⁰ On July 18, 2018, the Commission issued Order No. 849,²⁵¹ a final rule adopting procedures for determining which jurisdictional natural gas pipelines may be collecting unjust and unreasonable rates in light of (1) the income tax reductions provided by the Tax Cuts and Jobs Act,²⁵² and (2) the Commission's Revised Policy

242. *Id.* at P 39.

243. *Id.* at P 28.

244. *Id.* at P 45.

245. *Trailblazer Pipeline Co.*, 166 F.E.R.C. ¶ 61,141 at PP 1-2 (2019).

246. *Id.* at P 2.

247. *Id.*

248. *Id.* at P 3.

249. *Id.*

250. *Bear Creek Storage Co.*, 166 F.E.R.C. ¶ 61,034 at P 1 (2019).

251. Final Rulemaking, *Interstate and Intrastate Natural Gas Pipelines; Rate Changes Relating to Federal Income Tax Rate*, 83 Fed. Reg. 36,672 (2018) (to be codified at 18 C.F.R. Pts 154, 260, & 284).

252. An Act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018, 115 P.L. 97, 131 Stat. 2054 Enacted H.R.1 (2017) (Tax Cuts and Jobs Act).

Statement²⁵³ and Opinion No. 511-C²⁵⁴ establishing a policy that master limited partnerships (MLP) may not recover an income tax allowance in response to the decision of the D.C. Circuit in *United Airlines, Inc., v. FERC*.²⁵⁵ Consistent with Order No. 849, Bear Creek filed its Form No. 501-G, which the Commission used to calculate Bear Creek's return on equity and determined that Bear Creek's rates may have allowed it to recover revenue substantially in excess of its cost of service and thus were potentially unjust and unreasonable.²⁵⁶ The Commission directed Bear Creek to file a full cost and revenue study within seventy-five days of the issuance of the order.²⁵⁷

2. East Tennessee Natural Gas, LLC

On November 30, 2018, the FERC opened an investigation into whether East Tennessee Natural Gas, LLCs (East Tennessee) rates were unjust and unreasonable.²⁵⁸ East Tennessee filed its Form No. 501-G and filed a limited NGA section 4 rate reduction, wherein it proposed to reduce its rates by 1.0%.²⁵⁹ The Commission accepted the rate reduction but still found that East Tennessee might "be collecting unjust and unreasonable rates, and establishe[d] procedures to investigate those rates under NGA section 5."²⁶⁰ FERC directed East Tennessee to file a full cost and revenue study within seventy-five days of the issuance of the order.²⁶¹

3. Northern Natural Gas Co.

On January 16, 2019, the FERC opened an investigation into whether Northern Natural Gas Co.'s (Northern) rates were unjust and unreasonable.²⁶² Northern filed its Form No. 501-G, which the Commission used to calculate Northern's return on equity for the previous two years and determined that Northern's rates may have allowed it to recover revenue "substantially in excess of its cost of service" and thus were potentially unjust and unreasonable.²⁶³ The Commission directed Northern to file a full cost and revenue study within seventy-five days of the issuance of the order.²⁶⁴

253. *Inquiry Regarding the Commission's Policy for Recovery of Income Tax Costs*, Revised Policy Statement, 83 Fed. Reg. 12,362 (Mar. 21, 2018), F.E.R.C. STATS & REGS. ¶ 35,060 (2018), *order on reh'g*, 164 F.E.R.C. ¶ 61,030 (2018).

254. *SFPP, L.P.*, 162 F.E.R.C. ¶ 61,228 at P 9 (2018).

255. *United Airlines, Inc. v. FERC*, 827 F.3d 122, 126 (D.C. Cir. 2016).

256. 166 F.E.R.C. ¶ 61,034 at P 12.

257. *Id.* at P 15.

258. *East Tennessee Natural Gas, LLC*, 165 F.E.R.C. ¶ 61,198 (2019).

259. *Id.* at P 7.

260. *Id.* at P 16.

261. *Id.* at P 27.

262. *Northern Natural Gas Co.*, 166 F.E.R.C. ¶ 61,033 (2019).

263. *Id.* at P 20.

264. *Id.* at P 24.

4. Panhandle Eastern Pipe Line Co., LP

On January 16, 2019, the FERC opened an investigation into whether Panhandle Eastern Pipe Line Co., LP's (Panhandle) rates were unjust and unreasonable.²⁶⁵ Panhandle filed its Form No. 501-G and "elect[ed] not to modify its rates and to provide an explanation why no rate changes [were] necessary."²⁶⁶ The FERC reviewed Panhandle's filing and determined that Panhandle's rates may have allowed it "to recover revenue substantially in excess of its cost of service"²⁶⁷ and thus were potentially unjust and unreasonable.²⁶⁸ The Commission directed Panhandle to file a full cost and revenue study within seventy-five days of the issuance of the order.²⁶⁹

5. Southwest Gas Storage Co.

On February 19, 2019, the FERC opened an investigation into whether Southwest Gas Storage Co.'s (Southwest Gas) rates were unjust and unreasonable.²⁷⁰ Southwest Gas filed its Form No. 501-G and "elect[ed] not to modify its rates and to provide an explanation why no rate changes [were] necessary."²⁷¹ The FERC determined that the company's rates "may substantially exceed its actual cost of service, including a reasonable [return on equity]."²⁷² The Commission directed Southwest Gas to file a full cost and revenue study within seventy-five days of the issuance of the order.²⁷³

6. Stagecoach Pipeline and Storage Co. LLC

On March 20, 2019, the FERC opened an investigation into whether Stagecoach Pipeline and Storage Co. LLC's (Stagecoach) rates were unjust and unreasonable.²⁷⁴ Stagecoach filed its Form No. 501-G, which the Commission used to calculate Stagecoach's return on equity and determined that Stagecoach's rates may have allowed it to recover revenue "substantially in excess of its estimated cost of service" and thus were potentially unjust and unreasonable.²⁷⁵ The Commission directed Stagecoach to file a full cost and revenue study within seventy-five days of the issuance of the order.²⁷⁶

265. *Panhandle Eastern Pipe Line Co.*, 166 F.E.R.C. ¶ 61,032 at P 1 (2018).

266. *Id.* at PP 4-5.

267. *Id.* at P 13.

268. *Id.* at P 15.

269. *Id.* at P 16.

270. *Southwest Gas Storage Co.*, 166 F.E.R.C. ¶ 61,117 at P 1 (2019).

271. *Id.* at P 5.

272. *Id.* at P 9.

273. *Id.* at P 11.

274. *Stagecoach Pipeline & Storage Co.*, 166 F.E.R.C. ¶ 61,199 (2019).

275. *Id.* at P 12.

276. *Id.* at P 13.

N. Reservation Charge Credits

1. Equitrans, L.P.

On June 14, 2019, the Commission issued a letter order accepting Equitrans, L.P.'s revised tariff record modifying the reservation charge crediting exemption provisions contained in Section 6.9[6(b)] of the General Terms & Conditions of its tariff.²⁷⁷ Equitrans' filing was intended to clarify that reservation charge credits will not apply when a party other than Equitrans fails to maintain facilities for which they are responsible, or when the downstream party refuses to accept delivery from Equitrans.²⁷⁸ Commission policy "requires the pipeline to provide reservation charge credits for outages where the failure to deliver is due to events within the pipeline's control."²⁷⁹ Antero filed comments on the proposal, maintaining that "the Commission has required pipelines to clarify" that exemptions from reservation charge crediting based on the conduct of upstream or downstream operators "are only applicable when the pipeline's failure to perform is caused solely by the conduct of others not controllable by the pipeline (*i.e.*, operating conditions on upstream or downstream facilities)."²⁸⁰ In response to Antero's comments, the Commission explained that Equitrans' proposed exemptions are expressly limited to situations where the failure to perform is due solely to the behavior of the upstream or downstream party, or to the conduct of a customer.²⁸¹ The Commission found Equitrans' proposed reservation charge crediting exemption provisions to be just and reasonable and accepted its tariff record, effective June 17, 2019.²⁸²

2. Driftwood LNG LLC and Driftwood Pipeline LLC

On April 18, 2019, the Commission authorized Driftwood Pipeline LLC to construct and operate a new interstate natural gas pipeline system (Driftwood Pipeline Project) in Louisiana, comprised of "a new 96-mile [] mainline pipeline, a new 3.4-mile [] lateral pipeline, fifteen new meter stations, and three new compressor stations to transport natural gas" to a proposed liquefied natural gas terminal (Driftwood LNG Project).²⁸³ Driftwood Pipeline filed a *pro forma* open-access tariff applicable to services provided on its proposed pipeline.²⁸⁴ The Commission approved the tariff as generally consistent with Commission policies.²⁸⁵ However, the Commission found that certain proposed provisions were inconsistent with

277. *Equitrans, L.P.*, 167 F.E.R.C. ¶ 61,220 (2019).

278. *Id.* at P 2.

279. *Id.* at P 7 (citing *Equitrans, L.P.*, 148 F.E.R.C. ¶ 61,250 (2014); *Gulf South Pipeline Co.*, 141 F.E.R.C. ¶ 61,224 (2012)).

280. *Id.* (citing *Atlantic Coast Pipeline, LLC*, 161 F.E.R.C. ¶ 61,042 (2017)).

281. *Id.*

282. *Id.* at P 9.

283. *Driftwood LNG LLC and Driftwood Pipeline LLC*, 167 F.E.R.C. ¶ 61,054 (2019) (order granting authorizations under sections 3 and 7 of the NGA). Commissioner LaFleur wrote a separate concurrence and Commissioner Glick dissented. *See generally id.* (LaFleur, C., concurring) (Glick, R., dissenting).

284. *Id.*

285. *Id.* at P 47.

Commission policy and required modification, including Driftwood's force majeure and reservation charge credit provision.²⁸⁶

"First, GT&C Section 6.8.G proposed that a '[s]hipper shall not be entitled to reservation charge credits'" resulting from issues involving gas supply, markets, or transportation upstream of Driftwood's pipeline.²⁸⁷ Citing *Sierrita Gas Pipeline, LLC*, the Commission noted that it allows exemptions from reservation charge crediting only "when the pipeline's failure to perform is caused solely by the conduct of others or events beyond the control of the pipeline."²⁸⁸ The Commission requires partial reservation charges if a *force majeure* situation affects multiple pipelines.²⁸⁹ The Commission therefore directed Driftwood to add a qualifier to ensure consistency with Commission policy.²⁹⁰

"Second, proposed GT&C Section 6.8.H provided that reservation charge credits will be provided based on the 'lesser of Shipper's average usage of primary Rate Schedule FTS service for the seven (7) Gas Days prior to the first day of the curtailment or interruption of service or the Shipper's nominations to Primary Receipt or Primary Delivery Points for that Gas Day.'"²⁹¹ The Commission found this language to be inconsistent with its policy that only allows credits based on seven days' usage when shippers have been provided notice in advance of the outage.²⁹² The Commission directed Driftwood to revise the first sentence of Section 6.8.H.²⁹³

Third, proposed GT&C Section 6.8.I provided the allocation of reservation charge credits between releasing and replacement shippers when the underlying capacity release transaction is not unduly discriminatory.²⁹⁴ The Commission found this inconsistent with its policy, because pipeline operators are not allowed discretion in dividing credits.²⁹⁵ The Commission directed Driftwood to revise Section 6.8.I to conform with its policy.²⁹⁶

286. *Id.* at P 50.

287. 167 F.E.R.C. ¶ 61,054 at P 50.

288. *Id.* (citing *Sierrita Gas Pipeline, LLC*, 147 F.E.R.C. ¶ 61,192 at P 91 (2014)).

289. *Id.* (citing *Paiute Pipeline Co.*, 139 F.E.R.C. ¶ 61,089 at PP 30-31 (2012) (finding that where a *force majeure* event was not solely caused by the upstream pipeline, the general policy regarding partial *force majeure* credits should apply)).

290. *Id.*

291. *Id.* at P 51.

292. 167 F.E.R.C. ¶ 61,054 at P 51, n.56 (citing *Rockies Express Pipeline LLC*, 142 F.E.R.C. ¶ 61,075 at PP 29-34 (2013) (finding that "in situations where [a pipeline] has given notice of an outage before the first opportunity to schedule service for a Gas Day, the credits for that day will be based solely on each shipper's usage during the preceding seven days up to their contract demand, and not on shippers' nominations."); and *Sierrita*, 147 F.E.R.C. ¶ 61,192 at P 93 (requiring *Sierrita* to revise its proposal on how it will calculate the level of reservation credits because "if *Sierrita* has not given advance notice of an outage before the first opportunity to nominate service for the day, the shipper's credits must be based on the quantities it nominates for scheduling . . . which were not delivered . . . and not on any measure of historical usage.")).

293. *Id.*

294. *Id.* at P 52.

295. *Id.*

296. *Id.* (citing *Paiute*, 139 F.E.R.C. ¶ 61,089 at PP 15-18 (explaining that "during periods when a shipper releases its capacity to a replacement shipper the reservation charge credit applicable to the replacement shipper will be the reservation rate of either the releasing or replacement shipper, whichever is lower.")).

3. Venture Global Calcasieu Pass, LLC and TransCameron Pipeline, LLC

On February 21, 2019, the Commission issued TransCameron Pipeline, LLC (TransCameron) a Certificate of Public Convenience and Necessity pursuant to NGA section 7(c) to construct and operate a new interstate natural gas pipeline system consisting “of approximately 23.4 miles of 42-inch-diameter pipeline and related facilities extending from the Grand Chenier Station in Cameron Parish, Louisiana,” to connect to a new liquefied natural gas export terminal and associated facilities along the Calcasieu Ship Channel in Cameron Parish, Louisiana proposed by Venture Global Calcasieu Pass, LLC.²⁹⁷

TransCameron’s proposed definition of *force majeure* events in GT&C Section 11.12(b) included “priority limitation or restraining orders of any kind of the government of the United States or a State or of any civil or military entity.”²⁹⁸ The Commission held that TransCameron’s proposed tariff language “conflicts with Commission policy because it can be interpreted to include regular, periodic maintenance activities required to comply with government actions as *force majeure* events”, while the Commission previously has clarified whether outages resulting from governmental actions are *force majeure* or non-*force majeure* events.²⁹⁹ The Commission found that outages necessitated by compliance with government standards concerning the regular, periodic maintenance activities a pipeline must perform in the ordinary course of business to ensure the safe operation of the pipeline – including the Pipeline and Hazardous Materials Safety Administration’s integrity management regulations – are non-*force majeure* events requiring full reservation charge credits while outages resulting from one-time, non-recurring government requirements – including special, one-time testing requirements after a pipeline failure – are *force majeure* events requiring only partial crediting.³⁰⁰

In addition, TransCameron’s proposed definition of *force majeure* events in GT&C Section 11.12(b) included “any other causes, whether of the kind herein enumerated or otherwise, not reasonably within the control of the party claiming suspension,” while the Commission has defined *force majeure* outages as events that are both “unexpected and uncontrollable.”³⁰¹ The Commission directed TransCameron to revise GT&C Section 11 to comply with Commission policy.³⁰²

297. *Venture Global Calcasieu Pass, LLC and TransCameron Pipeline, LLC*, 166 F.E.R.C. ¶ 61,144 (2019) (order granting authorizations under sections 3 and 7 of the NGA). Commissioner LaFleur wrote a separate concurrence and Commissioner Glick dissented. *Id.* (LaFleur, C., concurring) (Glick, R., dissenting).

298. *Id.* at P 63.

299. *Id.* at P 64 (citing *Kinder Morgan Louisiana Pipeline LLC*, 154 F.E.R.C. ¶ 61,145 at P 30 (2016); *TransColorado Gas Transmission Co.*, 144 FERC ¶ 61,175 at PP 35-43 (2013); *Gulf South*, 141 F.E.R.C. ¶ 61,224 at PP 14-47).

300. *Id.* (citing *Algonquin Gas Transmission, LLC*, 153 F.E.R.C. ¶ 61,038, at P 104 (2015)).

301. 166 F.E.R.C. ¶ 61,144 at P 65 (citing *North Baja Pipeline, LLC v. FERC*, 483 F.3d 819, 823 (D.C. Cir. 2007), *aff’g North Baja Pipeline, LLC*, 109 F.E.R.C. ¶ 61,159 (2004), *order on reh’g*, 111 F.E.R.C. ¶ 61,101 (2005). *See also, e.g., Kinder Morgan Louisiana Pipeline*, 154 F.E.R.C. ¶ 61,145 at P 29; and *Algonquin*, 153 F.E.R.C. ¶ 61,038 at P 103).

302. *Id.*

4. Saltville Gas Storage Co., L.L.C.

On September 24, 2018, the Commission issued a letter order accepting Saltville Gas Storage Co., L.L.C.'s (Saltville) modifications to the reservation charge crediting provisions of its FERC gas tariff.³⁰³ The revised tariff records were filed pursuant to a prior order of the Commission.³⁰⁴ Saltville's customers challenged the proposed reservation charge crediting provisions as unjust and unreasonable, despite the provisions' consistency with other Enbridge pipeline tariffs, because they failed to reflect the impact of Order No. 712 on capacity releases.³⁰⁵ Saltville's customers argued that Order No. 712 provided that pipeline's public electronic bulletin board does not need to include commercially sensitive information.³⁰⁶ In addition, the required posting for a delivery or purchase obligation that qualifies the release as an asset management agreement must only specify the volumetric level effective time period of the replacement shipper's obligation.³⁰⁷ Saltville's customers contended that Saltville's reservation charge crediting language requires asset managers to either forgo reservation charge credits or disclose commercially sensitive information in the form of posting a release rate, the latter of which may not be available for some asset management agreements with complex revenue-sharing mechanisms.³⁰⁸

The Commission found Saltville's reservation charge crediting provisions to be just and reasonable and consistent with Commission policy regarding reservation charge credits in the capacity release context.³⁰⁹ Saltville's proposal to credit the replacement customer the lesser of the reservation rate applicable to the replacement customer or the original releasing customer is consistent with Commission policy.³¹⁰ While the Commission has recognized the commercially sensitive nature of asset management agreements, capacity release transactions with asset management agreements remain subject to existing capacity release posting and reporting requirements.³¹¹ The Commission therefore denied Saltville Customers' protest and accepted Saltville's filed tariff records.³¹²

5. Midship Pipeline Co., LLC

On August 13, 2018, the Commission granted Midship Pipeline Co., LLC's (Midship) application filed pursuant to section 7(c) of the NGA and Part 157 of the Commission's regulations for authorization to construct and operate the Mid-

303. *Saltville Gas Storage Co., L.L.C.*, 164 F.E.R.C. ¶ 61,212 at P 1 (2018).

304. *Id.*

305. *Id.* at P 3.

306. *Id.* (citing *Promotion of a More Efficient Capacity Release Market*, Order No. 712, F.E.R.C. STATS. & REGS. ¶ 31,271 (2008), *order on reh'g*, Order No. 712-A, F.E.R.C. STATS. & REGS. ¶ 31,284, at P 101 (2008); 18 C.F.R. § 284.13(b)(1)(x)).

307. *Id.*

308. *Id.*

309. 164 F.E.R.C. ¶ 61,212 at P 7.

310. *Id.*

311. *Saltville Gas Storage Co., L.L.C.*, 163 F.E.R.C. ¶ 61,140 (2018).

312. *Id.*

continent Supply Header Interstate Pipeline Project, a new interstate pipeline system.³¹³ Midship designed the project to provide up to 1,440 million standard cubic feet per day of firm transportation capacity from the South Central Oklahoma Oil Province and the Sooner Trend Anadarko Basin Canadian and Kingfisher gas plays in the Anadarko Basin in Oklahoma to existing natural gas pipelines near Bennington, Oklahoma, for subsequent transport to Gulf Coast and Southeast markets.³¹⁴ Midship proposed to construct an approximately 199.7-mile mainline pipeline in Oklahoma, including compressor stations, metering and regulation stations, and appurtenant facilities, and 34.4 miles of lateral pipeline and appurtenant facilities.³¹⁵

Section 6.8.3 of Midship's general terms & conditions included within its definition of *force majeure* "the inability of Transporter's pipeline system to deliver gas . . .,"³¹⁶ which the Commission found overly broad and in conflict with established Commission policy for including circumstances that were not both unexpected and outside the pipeline's control.³¹⁷ Midship's proposed definition of *force majeure* events also included "acts of civil or military authority (including, but not limited to, courts, the government or any administrative or regulatory agencies) . . .,"³¹⁸ which conflicted with Commission policy because it can be interpreted to include regular, periodic maintenance activities required to comply with government actions as *force majeure* events.³¹⁹ Previously, the Commission has delineated whether outages resulting from governmental actions are *force majeure* or non-*force majeure* events.³²⁰ The Commission found that outages necessitated by compliance with government standards concerning the regular, periodic maintenance activities a pipeline must perform in the ordinary course of business to ensure the safe operation of the pipeline, including the Pipeline and Hazardous Materials Safety Administration's integrity management regulations, are non-*force majeure* events requiring full reservation charge credits.³²¹ Outages resulting from one-time, non-recurring government requirements, including special, one-time testing requirements after a pipeline failure, are *force majeure* events requiring only partial crediting.³²² The Commission directed Midship to revise general terms & conditions section 6.8.3 to comply with Commission policy.³²³

313. *Midship Pipeline Co.*, 164 F.E.R.C. ¶ 61,103 (2018) (order issuing certificate). Commissioner Glick dissented from the decision with a separate statement. *Id.* at PP 29-30.

314. *Id.* at P 1.

315. *Id.*

316. *Id.* at P 41.

317. 164 F.E.R.C. ¶ 61,103 at P 41.

318. *Id.*

319. *Id.* at P 42.

320. *Id.* (citing 154 F.E.R.C. ¶ 61,145 at P 30; 144 F.E.R.C. ¶ 61,175 at PP 35-43; and 141 F.E.R.C. ¶ 61,224 at PP 28-47).

321. *Id.*

322. 164 F.E.R.C. ¶ 61,103 at P 42. (citing 153 F.E.R.C. ¶ 61,038 at P 104).

323. *Id.* at P 41.

6. Spire STL Pipeline LLC

On August 3, 2018, the Commission granted the authorizations requested by Spire STL Pipeline LLC (Spire), subject to certain conditions, to construct and operate a new, 65-mile-long interstate natural gas pipeline system, extending from an interconnection with Rockies Express Pipeline LLC in Scott County, Illinois, to interconnections with both Spire Missouri Inc. and Enable Mississippi River Transmission, LLC in St. Louis County, Missouri.³²⁴ Spire also requested approval of its proposed pro forma gas tariff, a blanket certificate under Part 157, Subpart F of the Commission's regulations to perform certain routine construction activities and operations, and a blanket certificate under Part 284, Subpart G of the Commission's regulations to provide open-access firm and interruptible natural gas transportation and transportation-related services.³²⁵

Spire proposed that it will share the risk of a *force majeure* event with its customers through the adoption of the "no-profit" reservation charge crediting methodology.³²⁶ Spire's proposed GT&C section 35.1(a) provides that Spire's reservation charge credit "shall be limited to that portion of the daily Reservation Rate that represents Spire's equity return and associated income taxes," and GT&C section 35.1(b) states that

the equity return and associated income taxes shall be that portion of the applicable Reservation Rate that exceeds the cost of service component of the otherwise applicable maximum recourse Reservation Rate, where such a cost of service component is equal to the maximum recourse Reservation Rate less the equity return and associated taxes component.³²⁷

The Commission recognized that all parties bear part of the risk of a *force majeure* event, and under the no-profit method, customers only bear the limited burden of paying that portion of the reservation charge representing the cost of service component consisting of Spire's equity return and income taxes.³²⁸ The Commission concluded this was an acceptable methodology.³²⁹ However, Spire's tariff did not clearly indicate what the equity return and associated income tax quantities or percentages would be for the purpose of calculating reservation charge credits.³³⁰ Therefore, the Commission directed Spire to revise its tariff to state clearly the equity return and associated income tax components necessary to calculate reservation charge credits.³³¹

O. Termination: Enable Mississippi River Transmission, LLC

The Commission rejected a pipeline's proposal to limit shippers' ROFR rights if such shippers chose not to extend their agreements under existing

324. *Spire STL Pipeline LLC*, 164 F.E.R.C. ¶ 61,085 at P 1 (2018). Commissioners LaFleur and Glick separately dissented.

325. *Id.*

326. *Id.* at P 170.

327. *Id.*

328. *Id.* at P 171.

329. 164 F.E.R.C. ¶ 61,085 at P 1.

330. *Id.*

331. *Id.*

contractual evergreen provisions.³³² Despite the pipeline's claims that its customers no longer needed traditional ROFR protections because of their ability to avail themselves of competitive alternatives from competing pipeline projects, the Commission concluded that the proposal violated 18 C.F.R. § 284.221(d)(2) of its regulations.³³³ The Commission observed that this regulation "requires that pipelines provide a ROFR to firm shippers with contracts for service for a year or more at the applicable maximum rate[, and that it] 'provide[s] a ROFR for shippers when they terminate their contracts or when the contracts expire, as well as when the pipeline terminates a contract.'"³³⁴ The pipeline's proposal to revise its tariff so as to limit the ROFR rights of firm shippers with evergreen provisions to situations where the pipeline terminates the contract "is precisely the type of limit on ROFR rights that the Commission [has previously] found unjust and unreasonable."³³⁵

P. Force Majeure

1. Midship Pipeline Co., LLC

The Commission issued a Certificate of Public Convenience and Necessity to Midship Pipeline Co., LLC (Midship), subject to certain conditions, authorizing Midship to construct and operate the Midcontinent Supply Header Interstate Pipeline Project, a new interstate pipeline system to transport capacity from the South Central Oklahoma Oil Province and the Sooner Trend Anadarko Basin Canadian and Kingfisher gas plays in the Anadarko Basin in Oklahoma to existing natural gas pipelines near Bennington, Oklahoma.³³⁶ In the process, the Commission addressed the *force majeure* section of Midship's tariff. The Commission found Midship's definition of *force majeure*, which included the "inability of Transporter's pipeline system to deliver gas . . ." to be overly broad and could include circumstances that are not both unexpected and outside Midship's control, which conflicts with Commission policy.³³⁷ In addition, Midship's definition of *force majeure* included "acts of civil or military authority (including, but not limited to, courts, the government or any administrative or regulatory agencies) . . ."³³⁸ The Commission determined this language in the definition could be interpreted to include regular, periodic maintenance activities to comply with government actions, which are non-*force majeure* events.³³⁹ As such, the Commission ordered Midship to revise the definition of *force majeure* in its tariff to comply with these directives and Commission policy.³⁴⁰

332. *Enable Mississippi River Transmission, LLC*, 165 F.E.R.C. ¶ 61,285 at P 118 (2018).

333. *Id.*

334. *Id.* (citing *Texas Eastern Transmission LP*, 103 F.E.R.C. ¶ 61,135 at P 13 (2003)).

335. *Id.*

336. *Midship Pipeline Co.*, 164 F.E.R.C. ¶ 61,103 (2018).

337. *Id.* at P 41.

338. *Id.*

339. *Id.* at P 42.

340. *Id.*

2. RH energytrans, LLC

The Commission issued a Certificate of Public Convenience and Necessity to RH energytrans, LLC (RH energytrans), subject to certain conditions, authorizing it to acquire and convert certain existing pipeline and compression facilities, to construct additional pipeline, compression, and auxiliary facilities, and to operate the existing and new facilities as a new interstate pipeline system in Crawford and Erie Counties, Pennsylvania, and Ashtabula County, Ohio.³⁴¹ In its certificate order, the Commission noted that RH energytrans's definition of *force majeure* included "compliance with any court order, law, regulation or ordinance promulgated by any governmental authority having jurisdiction, whether federal, Indian, state or local, civil or military . . . that are not reasonably within the control of the party claiming suspension."³⁴² FERC clarified that *force majeure* events involving governmental requirements must pertain to matters that are not reasonably in the pipeline's control and are unexpected, and ordered RH energytrans to revise its definition of *force majeure* accordingly.³⁴³

3. Venture Global Calcasieu Pass, LLC; TransCameron Pipeline LLC

The Commission issued a Certificate of Public Convenience and Necessity to TransCameron Pipeline, LLC (TransCameron), subject to certain conditions, authorizing it to construct and operate approximately 23.4 miles of natural gas pipeline and related facilities extending from the Grand Chenier Station in Cameron Parish, Louisiana, to a proposed new liquefied natural gas export terminal along the Calcasieu Ship Channel in Cameron Parish, Louisiana.³⁴⁴ The Commission noted that TransCameron's proposed tariff language could be interpreted to include regular, periodic maintenance activities required to comply with government actions as *force majeure* events, rather than non-*force majeure* events.³⁴⁵ In addition, the Commission concluded that the definition of *force majeure* failed to clarify that qualifying events must be both unexpected and uncontrollable.³⁴⁶ FERC ordered TransCameron to revise its tariff accordingly.³⁴⁷

4. Port Arthur LNG, LLC; PALNG Common Facilities Co., LLC

The Commission issued a certificate of public convenience and necessity to Port Arthur Pipeline, LLC (Port Arthur Pipeline), subject to certain conditions, authorizing it to construct and operate a new natural gas pipeline system designed to transport up to 2,000,000 million British thermal units of natural gas per day from (1) interconnections in Cameron Parish, Louisiana, and Orange and Jefferson Counties, Texas, and (2) Eunice Parish, Louisiana, to new facilities for the export

341. *RH energytrans, LLC*, 165 F.E.R.C. ¶ 61,218 (2018).

342. *Id.* at P 57.

343. *Id.* at P 58.

344. *Venture Global Calcasieu Pass, LLC and TransCameron Pipeline LLC*, 166 F.E.R.C. ¶ 61,144 (2019).

345. *Id.* at P 64.

346. *Id.* at P 65.

347. *Id.* at P 120.

of LNG in the vicinity of Port Arthur, Texas.³⁴⁸ The Commission noted that Port Arthur Pipeline's proposed definition of *force majeure*, which included "any other cause, whether of the kind herein enumerated, or otherwise, not within the control of the party claiming suspension and which by the exercise of Good Utility Practice, reasonable care and due diligence such party is unable to prevent or overcome," failed to clarify that qualifying events must be both unexpected and uncontrollable.³⁴⁹ As such, it ordered Port Arthur Pipeline to revise its tariff accordingly.³⁵⁰

III. INFRASTRUCTURE

A. Pipelines

1. City of Boston Delegation v. FERC

The D.C. Circuit dismissed and denied petitions for review, thus upholding the FERC's certificate of public convenience and necessity for the Algonquin Incremental Market Project (AIM Project).³⁵¹ Among other things, the D.C. Circuit ruled that the FERC did not act arbitrarily and capriciously in declining to consider two other Algonquin projects in a single environmental impact statement, because the FERC was not reviewing the projects simultaneously and the projects were not financially and functionally interdependent.³⁵² The D.C. Circuit also rejected petitioner's arguments that the FERC failed to adequately consider the cumulative impacts of other projects and that the FERC failed to substantiate its finding that the project posed no increased threat to a nuclear power plant.³⁵³ Accordingly, the D.C. Circuit denied the petitions for review.³⁵⁴

2. Birckhead v. FERC

On June 4, 2019, D.C. Circuit issued *Birckhead v. FERC*, which offered non-binding advice to the FERC on how it should perform environmental reviews of greenhouse gas (GHG) emissions when it considers new natural gas pipeline projects under NGA section 7.³⁵⁵ While the opinion ultimately upheld the FERC's order permitting a Tennessee Gas Pipeline expansion project, including a compressor station located near Nashville, Tennessee, the court devoted several pages of *dicta* on what upstream and downstream GHG emissions data FERC should be gathering to comply with the NEPA under NGA section 7.³⁵⁶ NEPA requires FERC to ascertain a pipeline project's reasonably foreseeable direct and indirect

348. *Port Arthur LNG, LLC; PALNG Common Facilities Co., LLC; Port Arthur Pipeline LLC*, 167 F.E.R.C. ¶ 61,052 (2019).

349. *Id.* at P 84.

350. *Id.* at P 88.

351. *City of Boston Delegation v. FERC*, 897 F.3d 241 (D.C. Cir. 2018).

352. *Id.* at 253.

353. *Id.* at 253-55.

354. *Id.* at 256.

355. *Birckhead v. FERC*, 924 F.3d 510 (D.C. Cir. 2019).

356. *Id.* at 514-16.

environmental effects.³⁵⁷ *Birckhead* rejected the notion that GHG emissions created by upstream production and downstream combustion were unforeseeable indirect effects because the record was devoid of data that made it so.³⁵⁸ It declared itself “troubled” by the FERC’s reasoning that it could avoid review on these grounds, found “dubious” statements that the data was unavailable, and was “skeptical” that it was unobtainable by a project’s applicant.³⁵⁹ *Birckhead* suggested that the FERC should at least attempt to obtain such information in order to fulfill its statutory duties under NEPA.³⁶⁰ Ultimately, the court determined that the petitioners, a group of landowners opposed to the compressor station, had not raised the record development issue before the court.³⁶¹ This led the court to conclude that it could not decide whether the FERC’s failure to develop the record on GHG emissions was arbitrary and capricious.³⁶²

The court also offered additional analysis of its 2017 *Sierra Club v. FERC* decision, which vacated an NGA section 7 pipeline certificate on grounds that the FERC’s NEPA review failed to consider reasonably foreseeable indirect impacts from downstream emissions.³⁶³ Relying on *Sierra Club*’s broad reading of NGA section 7’s “public convenience and necessity” authority, the court suggests that the FERC has the statutory authority to deny a pipeline project that would be too harmful to the environment.³⁶⁴ However, *Birckhead* also explains that *Sierra Club* does not stand for the proposition that downstream GHG emissions are always a reasonably foreseeable indirect effect of a pipeline project.³⁶⁵

3. Midship Pipeline Co., LLC

On August 13, 2018, the FERC issued a Certificate of Public Convenience and Necessity to Midship Pipeline Co., LLC (Midship) for authorization to construct and operate the Midcontinent Supply Header Interstate Pipeline Project to provide up to 1,440 million standard cubic feet (MMcf) per day of capacity from production fields in Oklahoma to markets in the Gulf Coast and Southeast.³⁶⁶ The FERC adopted the environmental recommendations in the final Environmental Impact Statement (FEIS) drafted by its staff, and ordered Midship to abide by environmental conditions.³⁶⁷ Commissioner Glick dissented on claims that the FERC failed to fully consider the potential environmental damages that could be caused by the pipeline, including the potential impact of greenhouse gas emissions.³⁶⁸

357. *Id.* at 519.

358. *Id.* at 517.

359. *Id.* at 517-20.

360. *Birckhead*, 925 F.3d at 520.

361. *Id.* at 520-21.

362. *Id.*

363. *Id.* at 514-15.

364. *Id.*

365. *Birckhead*, 925 F.3d at 518-19.

366. *Midship Pipeline Co.*, 164 F.E.R.C. ¶ 61,103 (2018).

367. *Id.* at PP 96-97.

368. *Id.*

4. Spire STL Pipeline, LLC

On August 3, 2018, the FERC issued a Certificate of Public Convenience and Necessity to Spire STL Pipeline LLC (Spire) to construct and operate a new 65-mile natural gas pipeline extending across Illinois and Missouri.³⁶⁹ The FERC considered whether Spire demonstrated “sufficient need” for the project given that it relies upon a precedent agreement with an affiliate, Spire Missouri Inc. (Spire Missouri).³⁷⁰ The FERC ultimately refused to “look behind the precedent agreements”³⁷¹ and second guess the “business decision” of Spire Missouri to ship on Spire,³⁷² and rejected calls for a market study to establish project need.³⁷³ The FERC held that Spire had not engaged in anticompetitive behavior or affiliate abuse, and left it to state agencies to assess whether Spire Missouri acted prudently in its purchasing decisions.³⁷⁴ Commissioners Glick and LaFleur dissented.³⁷⁵ Both criticized the majority for refusing to conduct a market study to determine whether the pipeline was needed, and for failing to adequately consider the project’s “no action alternative” given that existing pipelines serve Spire Missouri.³⁷⁶

5. Transcontinental Gas Pipe Line Co., LLC

On May 3, 2019, the FERC issued a Certificate of Public Convenience and Necessity to Transcontinental Gas Pipe Line Co., LLC (Transco) to construct and operate its Northeast Supply Enhancement Project (NESE).³⁷⁷ NESE would transport up to 400,000 dekatherms per day of incremental firm transportation service from Pennsylvania to New York.³⁷⁸ The FERC addressed potential “adverse environmental impacts” identified in the project’s final Environmental Impact Statement (FEIS) related to “construction and operation of Compressor Station 206 and the impacts to aquatic resources from construction of the Raritan Bay Loop.”³⁷⁹ The FERC ultimately concluded that the project, “if constructed and operated as described in the final EIS, is an environmentally acceptable action,” subject to the environmental conditions appended to the order.³⁸⁰ Commissioner LaFleur concurred in the Commission’s decision after undertaking her own downstream greenhouse gas emissions analysis.³⁸¹ She expressed her appreciation for Transco providing information on downstream indirect effects, which allowed for

369. *Spire STL Pipeline LLC*, 164 F.E.R.C. ¶ 61,085 (2018).

370. *Id.* at P 35.

371. *Id.* at PP 75, 79 (citing 132 F.E.R.C ¶ 61,204 at P 13, n.13) (upholding the idea that precedent agreements between affiliates should be treated equally).

372. *Id.* at P 83.

373. *Id.* at P 80.

374. 164 F.E.R.C. ¶ 61,085 at P 86.

375. *Id.* at 119, 126.

376. *Spire STL Pipeline LLC*, Docket Nos. CP17-40-000 *et al.*, at 9 (Aug. 3, 2018) (Glick, C., dissenting).

377. *Transcontinental Gas Pipe Line Co.*, 167 F.E.R.C. ¶ 61,110 (2019).

378. *Id.* at P 1.

379. *Id.* at P 29.

380. *Id.* at P 91.

381. *Transcontinental Gas Pipe Line Co.*, Docket Nos. CP17-101-000 *et al.*, at 1 (May 3, 2019) (LaFleur, C., concurring).

the analysis.³⁸² Commissioner Glick dissented and argued that the FERC is not prevented from adopting a standard to evaluate greenhouse gas emissions.³⁸³

6. PennEast Pipeline Co., LLC

On August 10, 2018, the FERC rejected requests for rehearing of its January 19, 2019 order authorizing PennEast Pipeline Co., LLC to construct and operate the PennEast Project, a new 116-mile greenfield natural gas pipeline, laterals, compressor station, and appurtenant facilities between Luzerne County, Pennsylvania and Mercer County, New Jersey. The FERC stressed that the project's 1,107,000 dekatherms per day of capacity would provide "firm transportation service to a diverse group of customers for a variety of purposes, including supply flexibility, diversity, and reliability."³⁸⁴ This language responds to rehearing requests to look behind the project's precedent agreements given the affiliate status of some of the project's shippers.³⁸⁵ The FERC held "[a] shipper's need for new capacity and its obligation to pay for such service under a binding contract are not lessened just because it is affiliated with the project sponsor."³⁸⁶ The FERC also rejected requests that it must make a separate "public use" finding to allow PennEast to exercise eminent domain in addition to finding that the project is in the public convenience and necessity.³⁸⁷ It also explained that the NGA confers eminent domain authority on a pipeline once it receives a certificate, dismissing requests that the FERC limit a pipeline company's eminent domain use.³⁸⁸ The FERC also upheld its approval of PennEast's proposed 14% return on equity for its initial recourse rates, pointing out that PennEast's rates would be up for review in three years.³⁸⁹ The FERC also rejected environmental challenges and upheld its authority to issue conditional certificates that are subject to additional federal authorizations, including Clean Water Act (CWA) section 401.³⁹⁰ The FERC also declined to forecast potential environmental impacts of the project on grounds that it could not "meaningfully predict production-related impacts"³⁹¹ and lack of a "specific end use of the gas transported."³⁹² Commissioner LaFleur filed a separate concurrence in part and dissent in part, reiterating that she "strongly disagree[s] with the majority's continued refusal to ascribe significance" to greenhouse gas emissions.³⁹³ Commissioner Glick dissented on these grounds.³⁹⁴

382. *Id.* at 3 (LaFleur, C., concurring).

383. *Id.* Glick Dissent at 3.

384. *PennEast Pipeline Co.*, 164 F.E.R.C. ¶ 61,098 (2018).

385. *Id.* at P 12.

386. *Id.* at P 17.

387. *Id.* at P 29 (citing *Kelo v. City of New London*, 545 U.S. 469, 479-480 (2005)).

388. *Id.* at P 33 (citing 15 U.S.C. § 717f(h)).

389. 164 F.E.R.C. ¶ 61,098 at PP 36-37.

390. *Id.* at P 55.

391. *Id.* at P 109.

392. *Id.* at P 111.

393. *Id.* (LaFleur, C., concurring in part and dissenting in part).

394. 164 F.E.R.C. ¶ 61,098 (Glick, C., dissenting).

7. Atlantic Coast Pipeline, LLC

On August 10, 2018, the FERC issued an order on rehearing (Rehearing Order) that rejected, dismissed, denied, or granted certain requests for rehearing of its October 13, 2017 order granting a Certificate of Public Convenience and Necessity to Atlantic Coast Pipeline, LLC to construct and operate the Atlantic Coast Pipeline Project (ACP), consisting of approximately 600 miles of new interstate pipeline, compression, and other related facilities extending from West Virginia to North Carolina and eastern Virginia.³⁹⁵ The FERC also dismissed as moot requests for stay. Commissioner LaFleur wrote a separate dissent reiterating positions she took in response to the Certificate Order, including: (1) lack of public interest; (2) route and system alternatives in light of the decision in *Sierra Club v. U.S. Dept. of the Interior*³⁹⁶; (3) the treatment of environmental impacts; and (4) environmental impacts more generally.³⁹⁷ The majority addressed each of these concerns in the Rehearing Order.³⁹⁸

8. NEXUS Gas Transmission, LLC

On July 25, 2018, the FERC denied and dismissed rehearing requests of its August 25, 2017 order authorizing NEXUS Gas Transmission, LLC (NEXUS) to construct and operate a new interstate pipeline system designed to provide firm transportation service from the Appalachian Basin to consuming markets in northern Ohio and Southeastern Michigan.³⁹⁹ The Commission declined to look beyond the market need reflected by the applicant's contracts with shippers and rejected rehearing requests arguing that NEXUS failed to show market need because shippers only contracted for 59% of the project's capacity.⁴⁰⁰ FERC found that beyond serving the customers that have contracted for the capacity, the project also will benefit end users by ensuring future domestic energy supplies and enhancing the pipeline grid.⁴⁰¹ The Commission also rejected arguments that it violated the NGA because the project is an export pipeline that should have been filed under NGA section 3, holding that the petitioners' argument mistakenly assumes that the natural gas to be transported by the project is not for domestic consumption.⁴⁰² For these reasons, and others, the Commission rejected the petitions for rehearing.⁴⁰³

395. *Atlantic Coast Pipeline, LLC*, 164 F.E.R.C. ¶ 61,100 (2018) (reviewing 161 F.E.R.C. ¶ 61,042 (2018) (Certificate Order)).

396. *Sierra Club v. U.S. Dept. of the Interior*, 164 F.E.R.C. ¶ 61,100 (4th Cir. Aug. 6, 2018) (citing *Sierra Club v. U.S. Dept. of the Interior*, 899 F.3d 260 (4th Cir. 2018) (vacating the National Park Service's (NPS) right-of-way permit allowing the ACP Project to cross under the Blue Ridge Parkway).

397. *Atlantic Coast Pipeline, LLC*, Docket Nos. CP15-554-002 *et al.* (Aug. 10, 2018) (LaFleur, C., dissenting).

398. See generally *Atlantic Coast Pipeline, LLC*, 164 F.E.R.C. ¶ 61,100 (2018).

399. *NEXUS Gas Transmission, LLC*, 164 F.E.R.C. ¶ 61,054 (2018).

400. *Id.* at PP 26-27.

401. *Id.* at P 35.

402. *Id.* at P 45.

403. *Id.* at P 125.

B. Storage Projects: Young Gas Storage Co., Ltd.

On June 6, 2019, the FERC granted Young Gas Storage Co., Ltd.'s (Young) request to increase total certificated gas storage inventory at its facility in Morgan County, Colorado by one billion cubic feet.⁴⁰⁴ The FERC found “no impact on the storage field’s, reservoir pressure, and reservoir or buffer boundaries” and that “Young will remain fully capable of meeting all firm storage obligations.”⁴⁰⁵ Accordingly, the FERC approved Young’s proposal following a finding that the proposed “increase in total certificated gas storage capacity” was “permitted by the public convenience [and] necessity.”⁴⁰⁶

C. LNG Projects

1. Gulf Energy Liquefaction Co., LLC, *et al.*

On July 16, 2019, the Commission granted the application of Gulf Energy Liquefaction Co., LLC and Gulf LNG Energy, LLC (Gulf Liquefaction) for authorization under section 3 of the NGA to site, construct, and operate new facilities for the export of liquefied natural gas at Gulf Energy’s existing LNG import terminal in Jackson County, Mississippi, near the city of Pascagoula. “The project will enable the receipt, treatment, liquefaction, and export of up to 10.85 million metric tons per year (mtpy) of natural gas as LNG.”⁴⁰⁷ “Gulf Liquefaction propos[ed] to construct two natural gas liquefaction trains, pretreatment facilities, and ancillary and support facilities, and to extend the storm surge protection system” as well as “two marine offloading facilities—one permanent and one temporary—to receive equipment and materials during construction.”⁴⁰⁸ “Additional modifications to the existing terminal facilities include replacing in-tank LNG pumps, increasing tank riser piping size, and modifying piping to permit bi-directional LNG flow.”⁴⁰⁹ The Commission found that, “subject to the conditions imposed in [its] order, Gulf Liquefaction’s proposal is not inconsistent with the public interest.”⁴¹⁰ Therefore, the Commission granted “Gulf Liquefaction’s application for authorization under section 3 of the NGA to site, construct, and operate its proposed LNG export terminal facilities.”⁴¹¹

In connection with its discussion of Greenhouse Gas Emissions (GHGs), the Commission found that “the final EIS included a qualitative discussion addressing various effects of climate change” and acknowledged that “the quantified GHG emissions from the construction and operation of the project will contribute incrementally to climate change.”⁴¹² However, the Commission noted that it has previously concluded it could not determine a project’s incremental physical impacts

404. *Young Gas Storage Co., Ltd.*, 167 F.E.R.C. ¶ 62,147 at P 1 (2019).

405. *Id.* at P 13.

406. *Id.* at P 16.

407. *Gulf LNG Liquefaction Co.*, 168 F.E.R.C. ¶ 61,020 at PP 1, 6 (2019).

408. *Id.* at P 7.

409. *Id.*

410. *Id.* at P 15.

411. *Id.*

412. 168 F.E.R.C. ¶ 61,020 at P 55.

on the environment caused by GHG emissions and it “could not determine whether a project’s contribution to climate change would be significant.”⁴¹³

2. Freeport LNG Development, L.P. and FLNG Liquefaction 4, LLC

On May 17, 2019, the Commission granted Freeport LNG Development, L.P. and FLNG Liquefaction 4, LLC’s application under NGA section 3 and Part 153 of the Commission’s regulations to site, construct, and operate additional facilities for the liquefaction and export of domestically-produced natural gas (“Train 4 Project”) at an existing liquefied natural gas terminal near Freeport, Brazoria County, Texas.⁴¹⁴

The existing Freeport LNG Terminal includes facilities to import up to 1.5 billion cubic feet (Bcf) per day of [] LNG, and to store and re-vaporize that LNG. . . . In 2014, the Commission approved Freeport LNG’s Phase II Modification Project and the Liquefaction Project . . . to alter the previously approved (but not constructed) Phase II facilities to enable the export of LNG at the Freeport LNG Terminal.⁴¹⁵

“The proposed Train 4 Project is an expansion of the Liquefaction Project currently under construction at the Freeport LNG Terminal.”⁴¹⁶ The proposed expansion would allow the applicants to liquefy approximately 0.74 Bcf per day of natural gas.⁴¹⁷

Sierra Club-Houston argued that the Commission violated the National Environmental Policy Act by failing to prepare an Environmental Impact Statement (EIS) because the project will significantly impact the quality of the human environment.⁴¹⁸ Sierra Club-Houston asserted that the project’s impacts are significant because the project would contribute to climate change worldwide from additional direct and indirect greenhouse gas emissions.⁴¹⁹

The Commission decided that the Environmental Assessment (EA) correctly concluded that its approval of the proposal with conditions “would not constitute a major federal action significantly affecting the quality of the human environment . . .”⁴²⁰ The EA included a “qualitative discussion that addresses climate change,” and acknowledged that GHG emissions “will contribute incrementally to climate change.”⁴²¹ However, the Commission concluded that it “could not determine the project’s incremental physical impacts on the environment” and “has also previously concluded it could not determine whether a project’s contribution to climate change would be significant.”⁴²² Accordingly, the Commission found that it did

413. *Id.*

414. *Freeport LNG Development, L.P. and FLNG Liquefaction 4, LLC*, 167 F.E.R.C. ¶ 61,155 (2019). Commissioner LaFleur wrote a separate concurrence and Commissioner Glick dissented.

415. *Id.* at P 3.

416. *Id.* at P 4.

417. *Id.* at P 6.

418. *Id.* at P 33.

419. 167 F.E.R.C. ¶ 61,155 at P 33.

420. *Id.* at P 34.

421. *Id.* at P 36.

422. *Id.*

not need to prepare an EIS, because the project will not significantly impact the quality of the human environment.⁴²³

3. Dominion Energy Cove Point LNG, LP

Dominion Energy Cove Point LNG, LP operates a liquefied natural gas import/export terminal in southern Maryland and a pipeline which transports natural gas to and from the terminal to interconnections with other interstate pipelines in northern Virginia.⁴²⁴ On April 25, 2019, the Commission found Dominion Energy Cove Point LNG, LP's proposed Rate Schedule LTS – a new limited firm transportation service giving the transporter the right to declare shipper's service unavailable for up to thirty consecutive or non-consecutive days per annual period – which Dominion Energy Cove Point LNG, LP proposed to schedule and curtail at the same priority level accorded to firm services, to be just and reasonable.⁴²⁵

On August 10, 2018, the Commission denied the Accokeek Intervenors' request for rehearing of the Commission's January 23, 2018 Certificate Order authorizing Dominion Energy Cove Point LNG, LP to construct, install, operate, and maintain natural gas compression facilities in Charles County, Maryland, and Loudoun and Fairfax Counties, Virginia, to provide up to 294,000 dekatherms per day (Dth/d) of firm transportation service, on the grounds that the Commission, *inter alia*, violated NEPA.⁴²⁶

On November 27, 2018, the Commission denied a complaint filed by KMC Thermo, LLC pursuant to section 5 of the NGA and Rule 206 of the Commission's rules of practice and procedure alleging Dominion Energy Cove Point LNG, LP unlawfully charged KMC the General System Commodity Electric Surcharge that Cove Point recently had introduced into its tariff.⁴²⁷ The Commission denied KMC's complaint.⁴²⁸ Having determined that Cove Point properly assessed KMC a Commission-approved tariff surcharge to recover the costs of compression used to provide service to KMC at the Columbia Interconnection as provided for in KMC's firm transportation agreement, KMC's arguments that the surcharge should not apply to it or that KMC is subsidizing Liquefaction Project shippers lacked merit and were unavailing, according to the Commission.⁴²⁹

4. Driftwood LNG LLC and Driftwood Pipeline LLC

On April 18, 2019, the Commission authorized Driftwood LNG LLC's application for authorization under section 3 of the NGA and Part 153 of the Commission's regulations to site, construct, and operate facilities for the liquefaction

423. *Id.* at P 39.

424. *Dominion Energy Cove Point LNG, LP*, 167 F.E.R.C. ¶ 61,074 (2019).

425. *Id.* at PP 1, 12.

426. *Dominion Energy Cove Point LNG, LP*, 164 F.E.R.C. ¶ 61,102 (2018) (order denying rehearing). Commissioners Glick and LaFleur separately dissented.

427. *KMC Thermo, LLC v. Dominion Energy Cove Point LNG, LP*, 165 F.E.R.C. ¶ 61,166 (2018) (order on complaint).

428. *Id.* at P 1.

429. *Id.* at P 28.

and export of natural gas at a proposed liquefied natural gas terminal on 790 acres of land near the city of Carlyss in Calcasieu Parish, Louisiana.⁴³⁰

The Commission also authorized Driftwood Pipeline LLC's application under NGA section 7(c) and Part 157 of the Commission's regulations for a certificate of public convenience and necessity to construct and operate a new interstate natural gas pipeline system in Evangeline, Acadia, Jefferson Davis, and Calcasieu Parishes, Louisiana comprised of a new 96-mile-long mainline pipeline, a new 3.4-mile-long lateral pipeline, 15 new meter stations, and three new compressor stations to transport natural gas to the Driftwood LNG Project for liquefaction and export.⁴³¹ Driftwood LNG sought authorization to construct and operate the Driftwood LNG Project on the west bank of the Calcasieu River near the city of Carlyss in Calcasieu Parish, Louisiana in order to produce up to 27.6 million metric tonnes per annum of LNG for export.⁴³²

The Driftwood LNG Project consists of five liquefaction plants, three LNG storage tanks, marine facilities, and associated infrastructure and support facilities.⁴³³ Each of the liquefaction plants, which will liquefy the natural gas delivered to the facility, will consist of: "one gas pre-treatment unit, one condensate stabilization unit, and four heavy hydrocarbon removal and liquefaction units and the LNG produced by the five plants will be stored in the three on-site, aboveground storage tanks having a net capacity of approximately 235,000 cubic meters."⁴³⁴

5. Port Arthur LNG, LLC, et al.

On April 18, 2019, the Commission authorized Port Arthur LNG's application for authorization under section 3 of the NGA and Part 153 of the Commission's regulations to site, construct, and operate new facilities for the export of liquefied natural gas in the vicinity of Port Arthur, Texas ("Liquefaction Project").⁴³⁵ The Commission also authorized Port Arthur Pipeline's application under NGA section 7(c) and Parts 157 and 284 of the Commission's regulations, for a certificate of public convenience and necessity to construct and operate (a) a new natural gas pipeline system designed to transport up to 2,000,000 million British thermal units (MMBtu) of natural gas per day from interconnections in Cameron Parish, Louisiana, and Orange and Jefferson Counties, Texas, to the Liquefaction Project," and (b) an additional new natural gas pipeline system designed to transport up to 2,000,000 MMBtu of natural gas per day originating in Eunice Parish, Louisiana, to serve as another source of feed gas for the Liquefaction Project.⁴³⁶

430. *Driftwood LNG LLC and Driftwood Pipeline LLC*, 167 F.E.R.C. ¶ 61,054 (2019) (order granting authorizations under sections 3 and 7 of the NGA). Commissioner LaFleur wrote a separate concurrence and Commissioner Glick dissented and Commissioner LaFleur wrote a separate concurrence.

431. *Id.* at P 2.

432. *Id.* at P 5.

433. *Id.* at P 6.

434. *Id.*

435. *Port Arthur LNG, LLC, PALNG Common Facilities Co. and Port Arthur Pipeline, LLC*, 167 F.E.R.C. ¶ 61,052 (2019) (order granting authorizations under sections 3 and 7 of the NGA). Commissioner Glick wrote a separate dissent and Commissioner LaFleur wrote a separate concurrence in the decision.

436. *Id.* at P 2.

6. Venture Global Calcasieu Pass, LLC and TransCameron Pipeline, LLC

On February 21, 2019, the Commission granted Venture Global Calcasieu Pass, LLC's application pursuant to section 3 of the NGA and Part 153 of the Commission's regulations, subject to certain conditions, for authorization to site, construct, and operate a new liquefied natural gas export terminal and associated facilities ("Export Terminal") along the Calcasieu Ship Channel in Cameron Parish, Louisiana.⁴³⁷ The Commission also authorized TransCameron Pipeline, LLC's request pursuant to section 7 of the NGA and Part 157 of the Commission's regulations, for authorization to construct and operate a new interstate natural gas pipeline system consisting of an East Lateral consisting of approximately 23.4 miles of 42-inch-diameter pipeline and related facilities extending from the Grand Chenier Station in Cameron Parish, Louisiana, to the proposed Export Terminal.⁴³⁸ TransCameron was also issued a blanket transportation certificate under Subpart G of Part 284 of the Commission's regulations to provide open-access firm transportation services and a blanket construction certificate under Subpart F of Part 157 of the Commission's regulations to perform certain routine construction activities and operations.⁴³⁹

7. Aguirre Offshore GasPort, LLC

On January 28, 2019, the Commission granted Aguirre Offshore GasPort, LLC's request to vacate the authorization it had been granted on July 24, 2015 under section 3 of the NGA to site, construct, and operate liquefied natural gas import terminal facilities along the southern shore of the Commonwealth of Puerto Rico near the municipality of Salinas where no construction has been undertaken and no facilities were in service and Aguirre Offshore GasPort, LLC no longer intended to proceed with the project.⁴⁴⁰

8. Golden Pass LNG Terminal LLC and Golden Pass Products LLC

On December 20, 2018, the Commission authorized the transfer of Golden Pass Products LLC's existing authorization for liquefied natural gas terminal export facilities to Golden Pass LNG Terminal LLC as part of an anticipated merger of the two companies.⁴⁴¹ The Commission authorized Golden Pass Products to transfer its NGA section 3 authorization to site, construct, own, operate, and maintain LNG terminal export facilities to Golden Pass LNG on the effective date of the merger of Golden Pass Products into Golden Pass LNG.⁴⁴²

437. *Venture Global Calcasieu Pass, LLC and TransCameron Pipeline, LLC*, 166 F.E.R.C. ¶ 61,144 (2019) (order granting authorizations under sections 3 and 7 of the NGA). Commissioner LaFleur wrote a separate concurrence and Commissioner Glick dissented.

438. *Id.* at P 2.

439. *Id.*

440. *Aguirre Offshore GasPort, LLC*, 166 F.E.R.C. ¶ 61,055 (2019) (order vacating authorization).

441. *Golden Pass LNG Terminal LLC and Golden Pass Products LLC*, 165 F.E.R.C. ¶ 61,261 (2018) (order authorizing transfer of NGA section 3 authorization).

442. *Id.* at P 2.

9. UGI NGL, Inc.

On October 18, 2018, the Director of the Commission's Office of Energy Projects granted UGI LNG, Inc.'s application made pursuant to section 7(c) of the NGA and Part 157 of the Commission's regulations for certificate authorization to construct, own, and operate the Temple Truck Rack Expansion Project consisting of two new trailer loading and unloading racks at UGI LNG's Temple liquefied natural gas storage facility in Ontelaunee Township, Berks County, Pennsylvania.⁴⁴³

10. National Grid LNG LLC

On October 17, 2018, the Commission granted National Grid LNG LLC's request for certificate authorization, subject to conditions, under section 7(c) of the NGA and Part 157 of the Commission's regulations requesting authorization to add liquefaction facilities at its existing Fields Point liquefied natural gas storage facility in Providence, Rhode Island, enabling customers to transport gas as vapor by pipeline to Fields Point for liquefaction and storage rather than trucked in as LNG from other facilities.⁴⁴⁴

D. Clean Water Act Section 401

1. National Fuel Gas Supply Corporation

On April 2, 2019, FERC issued an order denying rehearing of its August 6, 2018 determination "that New York State Department of Environmental Conservation [(NYSDEC)] [had] waived its authority, under section 401 of the [Clean Water Act] CWA, to issue or deny a water quality certification [(WQC)] for the Northern Access 2016 Project sponsored by National Fuel Gas Supply Corporation and Empire Pipeline, Inc." (collectively, "National Fuel"), an approximately 99-mile pipeline expansion project to be located in New York and Pennsylvania.⁴⁴⁵ CWA section 401 requires a state to act on a WQC request "within a reasonable period of time (not to exceed one year) after receipt of such request." NYSDEC and the Sierra Club had sought rehearing, in part, on grounds that a contract between NYSDEC and National Fuel permitted NYSDEC to deem the receipt date of National Fuel's application to be April 8, 2016, instead of March 2, 2016.⁴⁴⁶ Hence, they argued that NYSDEC had lawfully denied the application on April 7, 2017, as opposed to waiving its right by failing to act by March 2, 2017.⁴⁴⁷ FERC bolstered its initial August 2018 waiver finding with reliance on *Hoopa Valley Tribe v. FERC*, a February 2019 decision deciding CWA section 401 waiver issues

443. *UGI LNG, Inc.*, 165 F.E.R.C. ¶ 62,040 (2018) (order issuing certificate). The Commission's Director of the Office of Energy Projects issued the order as a final agency action. *Id.* at P 5.

444. *National Grid LNG LLC*, 165 F.E.R.C. ¶ 61,031 (2018) (order issuing certificate Commissioners Glick and LaFleur wrote separate concurrences to the decision. *Id.*

445. *National Fuel Gas Supply Corp.*, 167 F.E.R.C. ¶ 61,007 at P 1 (2019) (denying rehearing of *National Fuel Gas Supply Corp.*, 164 F.E.R.C. ¶ 61,084 (2018)).

446. *Id.* at P 7.

447. *Id.* at P 9.

related to a FERC-regulated hydroelectric project.⁴⁴⁸ *Hoopa Valley Tribe* concluded that a state agency and a WQC applicant could not contract around the CWA's one-year deadline by the applicant agreeing to withdraw and resubmit the application to provide the state with more time. FERC held that *Hoopa Valley Tribe's* "disapproval of an agreement to withdraw and resubmit as a failure and refusal to act resulting in a scheme that thwarts a Congressionally-imposed statutory limit – to apply equally to the facts here."⁴⁴⁹ It found the state agency's "suitable recourse" would be to deny an incomplete application "with or without prejudice," albeit within the one-year window.⁴⁵⁰

2. Executive Orders and EPA Guidance

On April 10, 2019, President Trump signed an Executive Order (EO), titled "Promoting Energy Infrastructure and Economic Growth"⁴⁵¹, requiring the U.S. Environmental Protection Agency (EPA) and other federal agencies to undertake a series of regulatory actions to clarify the Clean Water Act (CWA) section 401 water quality certification (WQC) process. CWA section 401 provides states delegated authority to assess water quality impacts from discharges of proposed projects by certifying whether the discharge will comply with applicable water quality standards.⁴⁵² States waive this requirement if they do not act within "a reasonable period of time (which shall not exceed one year) after receipt."⁴⁵³ On June 7, 2019, EPA released guidance pursuant to the EO clarifying timelines for state review, the agency's interpretation of the scope of review and the information that can be considered.⁴⁵⁴ EPA's regulations implementing Section 401 have not been updated since 1971.⁴⁵⁵

Specifically, EPA now advises if a state or tribe issues a Section 401 certification that has

conditions beyond the scope of Section 401 (i.e., conditions not related to water quality requirements), or has denied a water quality certification for reasons beyond the scope of Section 401," federal permitting agencies should work with their Office of General Counsel and the EPA to determine whether a permit or license should be issued with those conditions or if waiver has occurred.⁴⁵⁶

448. *Id.* at P 11 (referencing *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (D.C. Cir. 2019)).

449. *Id.* at P 14.

450. 167 F.E.R.C. ¶ 61,007 at P 17.

451. Exec. Order No. EO 13868.

452. ENVTL. PROT. AGENCY, CLEAN WATER ACT SECTION 401 GUIDANCE FOR FEDERAL AGENCIES, STATES, AND AUTHORIZED TRIBES (June 7, 2019), https://www.epa.gov/sites/production/files/2019-06/documents/cwa_section_401_guidance.pdf [hereinafter CWA Section 401 Guidance].

453. *New York State Dep't of Env'tl. Conservation v. FERC*, 884 F.3d 450, 455 (2d Cir. 2018) (citing 33 U.S.C. § 1321(a)(1)).

454. CWA Section 401 Guidance, *supra* note 457, at 1.

455. *Id.* at 2.

456. *Id.* at 4.

EPA also clarified that the one-year period for states and tribes to review and act on requests for certification should begin at the “receipt of the certification request,” rather than upon receipt of a “completed application.”⁴⁵⁷ EPA also incorporated a current appellate ruling⁴⁵⁸ that the one-year period cannot be reset when a project applicant voluntarily withdraws an application and then resubmits an almost indistinguishable certification application request.

IV. PHMSA & PIPELINE SAFETY

A. *Plastic Pipe Final Rule*

On November 20, 2018, the Pipeline and Hazardous Materials Safety Administration (PHMSA) published a final rule amending Part 192 of the federal pipeline safety regulations regarding the use of plastic pipe in the transportation of gas.⁴⁵⁹ The amended regulations apply to new, repaired, and replaced plastic pipe. PHMSA delayed adopting the proposed definitions of “traceability information” and “tracking information” and the proposed requirements that operators implement the tracking and traceability provisions of industry standard ASTM F2897-11a and retain tracking and traceability records for the life of the pipeline.⁴⁶⁰ PHMSA explained that incorporating the 2012 editions of material standards for polyethylene (PE) pipe and PA-12 pipe, which require that operators mark plastic pipe with the 16 character ASTM F2897-11a markings, will promote standardization of how component attributes are marked and captured in asset management systems.⁴⁶¹ PHMSA will, however, require that “markings be legible until the time of installation.”⁴⁶²

Provisions included in the final rule include:

(1) *Increasing the design factor of PE pipe.* The final rule increases the allowable design factor for new and replaced PE pipe from 0.32 to 0.40, subject to limiting the minimum wall thickness for 0.40 design factor pipe to 0.090 inches. The higher design factor also will apply to pipe sizes less than one-inch Iron Pipe Size and Copper Tubing Size.⁴⁶³

(2) *Expanding use of Polyamide-11 (PA-11) pipe.* The design factor for new and replaced PA-11 pipe was increased to 0.40. In addition, the maximum operating pressure was increased from 200 pounds per square inch gauge (psig) to 250 psig and the maximum pipe diameter was increased to 6 inches. Similar to PE pipe, the increased design factor for PA-11 pipe also applies to smaller diameter pipe. PHMSA incorporated by reference

457. *Id.* at 3.

458. *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (D.C. Cir. 2019).

459. *Pipeline Safety: Plastic Pipe Rule*, 83 Fed. Reg. 58,694 (2018) (to be codified at 49 C.F.R. Part 192).

460. *Id.* at 58,695-96.

461. *Id.* at 58,696.

462. *Id.* at 58,697.

463. *Id.* at 58,698-99; 58,716-17.

ASTM F2945-12a, an industry standard for PA-11 pipe, and other modern industry standards for PA-11 and PA-12.⁴⁶⁴

(3) *Allows use of Polyamide-12 (PA-12) pipe*: For the first time, operators may install PA-12 pipe and use a design factor of 0.40. PA-12 pipe may be used at pressures up to 250 psig and for pipe up to 6 inches in diameter. PHMSA incorporated by reference ASTM F2785-12 which defines material properties, manufacturing tolerances, test methods and requirements, marking requirements, and minimum quality control program requirements for PA-12 pipe, and ASTM F2767-12 which sets forth specifications for electrofusion fittings on PA-12 systems.⁴⁶⁵

The final rule also added new requirements for the design and construction of plastic risers, and incorporated by reference ASTM F1973, an industry standard for plastic pipe risers.⁴⁶⁶ PHMSA also incorporated a requirement to use “Category One” joints which provide resistance to lateral forces so that a large force on a connection causes the pipe to yield before the joint.⁴⁶⁷ PHMSA also adopted revised cathodic protection requirements for newly installed electrically isolated metal fittings.⁴⁶⁸ The final rule adopted new requirements for a number of installation processes, but PHMSA did not adopt proposed repair criteria which will be revisited in a future rulemaking.⁴⁶⁹ Finally, the final rule allows the use of PVC pipe⁴⁷⁰ and adopted several modern industry standards.⁴⁷¹ Type B regulated on-shore gathering lines constructed with plastic pipe must comply with the regulations for plastic pipe.⁴⁷²

B. Advance Notice of Proposed Rulemaking on Alternative Safety Measures in Response to Class Location Changes

On July 31, 2018, PHMSA issued an advance notice of proposed rulemaking (ANPRM) seeking comments regarding actions an operator of a gas transmission pipeline is required to take when population growth near a pipeline causes its class location to change.⁴⁷³ The ANPRM does not propose new regulatory initiatives, but invites discussion about whether expanding integrity management (IM) requirements may provide an alternative to current requirements when a pipeline’s class location changes.⁴⁷⁴

464. 83 Fed. Reg. 58,694, at 58,699, 58,716-17.

465. *Id.* at 58,699-700, 58,716-17.

466. *Id.* at 58,700-01, 58,715, 58,718.

467. *Id.* at 58,701, 58,718-19.

468. *Id.* at 58,701-02, 58,719.

469. 83 Fed. Reg. 58,694, at 58,707.

470. *Id.* at 58,708.

471. *Id.* at 58,710-12, 58,715.

472. *Id.* at 58,708, 58,716.

473. *Pipeline Safety: Class Location Change Requirements*, 83 Fed. Reg. 36,861 (2018).

474. *Id.*

The class location of a gas transmission pipeline is based on the number and type of dwellings intended for human occupancy located near the pipeline. Class locations range from less populated rural “Class 1” areas to more densely populated “Class 4” areas containing taller buildings.⁴⁷⁵ Class location is used to determine a pipeline’s design factor, which in turn, is used to calculate the pipeline’s design pressure and maximum allowable operating pressure (MAOP).⁴⁷⁶ A pipeline’s class location also affects other design, construction and operation and maintenance requirements.⁴⁷⁷ If the class location of a pipeline segment increases, the operator is required to perform a study of the design, construction, testing, condition, and operating and maintenance history of the segment.⁴⁷⁸ The operator must confirm that the hoop stress imposed by the MAOP is commensurate with the class location, and may be required to lower MAOP.⁴⁷⁹ Under the existing pipeline safety regulations, when the class location of a pipeline changes, an operator may be required to either reduce the line’s pressure, perform a pressure test, or replace the line.⁴⁸⁰

In the Pipeline Safety, Regulatory Certainty and Job Creation Act of 2011, Congress required that PHMSA evaluate whether expanding IM requirements beyond high-consequence areas would mitigate the need for class location requirements.⁴⁸¹ In response to this directive, the ANPRM seeks comments on ten topic areas addressing the potential safety consequences of permitting an operator to implement IM measures in response to a class location change instead of having to replace pipe, reduce pressure, or perform a pressure test.⁴⁸² After receiving comments, PHMSA may issue a proposal to amend current regulations.⁴⁸³

475. 49 C.F.R. § 192.5 (2018).

476. *Id.* at Subpart C.

477. *Id.*

478. *Id.*

479. *Id.*

480. 49 C.F.R. § 192.5.

481. Pub. L. No. 112-90, § 5(a)(2), 125 Stat. 1904, 1907 (2012) (codified as amended in scattered sections of 49 U.S.C.).

482. 83 Fed. Reg. 36,861, at 36,868.

483. *Id.* at 36,861.

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