

REPORT OF THE NATURAL GAS COMMITTEE

This report summarizes policy developments and legal decisions that have occurred at the Federal Energy Regulatory Commission (FERC or Commission) and the United States Courts of Appeals in the area of natural gas regulation between July 1, 2015, and June 30, 2016.*

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I. RATES, TERMS, AND CONDITIONS OF SERVICE

A. Abandonments

- 1. *Transcontinental Gas Pipe Line Company, LLC*, 152 F.E.R.C. ¶ 62,226 (2015).

The FERC granted Transcontinental Gas Pipe Line Company, LLC (Transco) authorization to abandon by sale to Tana Exploration Company, LLC (Tana), 26.55 miles of twenty-inch diameter gathering pipeline facilities located in federal waters, offshore Texas.¹ Transco had used the facilities for receipt of volumes from two Arena Energy LP (Arena) offshore platforms, which Transco used to

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1. *Transcon. Gas Pipe Line Co., LLC*, 152 F.E.R.C. ¶ 62,226 at P 1 (2015).

provide interruptible service to six shippers.² Arena's abandonment of its platforms prompted Transco to abandon its facilities by sale to Tana, which allowed volumes to continue flowing. The FERC granted abandonment based on a previous finding that the facilities perform a gathering function and not a transmission function, and do not provide firm transportation service.³ Further, Transco's abandonment by sale created no adverse effect on its existing transmission services and no shipper protested the filing.⁴

2. *Columbia Gas Transmission, LLC*, 153 F.E.R.C. ¶ 62,108 (2015).

The FERC granted the application of Columbia Gas Transmission, LLC (Columbia) for authorization to abandon certain facilities by sale to Columbia Gas of Ohio (COH), a local distribution company.⁵ The facilities consisted of 13.1 miles of three and six-inch diameter pipeline, 594 measuring stations, and thirty-five mainline consumer taps in three Ohio counties.⁶ The FERC found that following abandonment, the facilities would perform local distribution services exempt from the FERC's jurisdiction.⁷ The FERC also determined that there would be no adverse impacts to transportation service because COH was the pipeline's only transportation customer.⁸ The FERC also held that the facilities would not perform jurisdictional service based on their post-sale use for local distribution service within the state of Ohio and subject to the regulations of the Public Utilities Commission of Ohio.⁹

3. *Columbia Gas Transmission, LLC*, 153 F.E.R.C. ¶ 62,109 (2015).

The FERC granted the application of Columbia Gas Transmission, LLC (Columbia) for authorization to abandon certain facilities by sale to Columbia Gas of Pennsylvania (CPA), a local distribution company.¹⁰ The transfer involved 3.6 miles of four-inch diameter pipeline, 213 measuring stations and seven mainline consumer taps in Pennsylvania.¹¹ Abandonment by sale did not affect transportation service because CPA was the pipeline's only transportation customer.¹² The FERC also granted Columbia's request for a finding that the facilities will perform local distribution services within the state of Pennsylvania and would therefore be exempt from Commission jurisdiction following the abandonment by sale.¹³ The

2. *Id.* at P 4.

3. *Id.* at P 10.

4. *Id.*

5. *Columbia Gas Transmission, LLC*, 153 F.E.R.C. ¶ 62,108 at P 1 (2015).

6. *Id.* at P 3.

7. *Id.* at P 11.

8. *Id.* at P 10.

9. *Id.* at P 11.

10. *Columbia Gas Transmission, LLC*, 153 F.E.R.C. ¶ 62,109 at P 1 (2015).

11. *Id.* at P 3.

12. *Id.* at P 10.

13. *Id.* at P 11.

FERC also noted that: (1) CPA would continue to provide service to all of Columbia's existing customers served through mainline consumer and farm taps, and (2) there would be no impact on Columbia's current system rates.¹⁴

4. *National Fuel Gas Supply Corporation and National Fuel Gas Supply, LLC*, 153 F.E.R.C. ¶ 61,202 (2015).

The FERC granted National Fuel Gas Supply Corporation's (National Fuel) and National Fuel Gas Supply, LLC's (Supply LLC) application for National Fuel to abandon all of its jurisdictional facilities through transfer to Supply LLC.¹⁵ The impetus for the transaction was National Fuel's change in legal ownership and its state of incorporation from Pennsylvania to Delaware.¹⁶ National Fuel created Supply LLC for the sole purpose of facilitating this transaction.¹⁷ In approving the transaction, the FERC reiterated that gas corporations may change their corporate structure without seeking reissuance of certificate authorizations so long as they continue to be the same company under the laws of the state in which they are organized and remain subject to Commission and Natural Gas Act (NGA) regulations.¹⁸ Even though the FERC found this abandonment proceeding unnecessary, it granted the application because it involved no change in the ability to meet customer service obligations.¹⁹ The FERC noted that most natural gas pipelines simply provide notice of name and corporate structure changes through a tariff filing within thirty days of the change and provide the new name of the successor company.²⁰

5. *Gulf South Pipeline Company, LP*, 153 F.E.R.C. ¶ 62,193 (2015).

The FERC granted the application of Gulf South Pipeline Company (Gulf South) to abandon by sale to Enerfin Field Service LLC, (Enerfin), 26.65 miles of fourteen-inch diameter pipeline.²¹ In its application, Gulf South noted that the pipeline had been idle since 2014, with no active receipt or delivery points.²² Enerfin proposed to use the facilities as a portion of its gathering system.²³ The FERC authorized the abandonment, finding that "abandonment by sale will not impact the daily design or operating conditions of the overall Gulf South system."²⁴ It further noted that the "facilities do not support any transportation agreements at this time and there will be no disruption of service to any customer."²⁵

14. *Id.* at P 10.

15. *Nat'l Fuel Gas Supply Corp.*, 153 F.E.R.C. ¶ 61,202 at P 1 (2015).

16. *Id.*

17. *Id.* at P 2.

18. *Id.* at P 8.

19. *Id.* at P 11.

20. 153 F.E.R.C. ¶ 61,202, at P 9.

21. *Gulf S. Pipeline Co., LP*, 153 F.E.R.C. ¶ 62,193 at PP 1, 3 (2015).

22. *Id.* at P 4.

23. *Id.*

24. *Id.* at P 2.

25. *Id.*

6. *Regency Field Services, LLC*, 154 F.E.R.C. ¶ 61,103 (2016).

Regency Field Services, LLC (Regency) sought rehearing of an October 15, 2015, FERC order granting it certificate authorization under NGA section 7(c) to continue to operate and maintain a twenty-inch diameter, 8.1-mile-long pipeline (the Coyanosa Residue Line) in Pecos County, Texas.²⁶ Regency had acquired the residue line in 2013 as part of its acquisition of the Coyanosa Gathering System.²⁷ Regency used the Coyanosa Residue Line to transport processed gas (lean residue gas) from the outlet of a processing plant to four intrastate pipelines.²⁸ The line terminated at an interconnection with an interstate pipeline.²⁹

In its October 15 order, the FERC concluded that Regency was transporting gas in interstate commerce and was therefore subject to its jurisdiction.³⁰ Specifically, the FERC held that “because the Coyanosa Residue Line was longer than five miles and was delivering gas owned by third parties to an interstate pipeline, it failed the ‘stub line’ test, and thus could not be considered an incidental extension of the non-jurisdictional processing plant.”³¹ The FERC also clarified that because the residue line delivered gas to an interstate pipeline, “jurisdictional interstate transportation began when the Coyanosa Residue Line took receipt of pipeline quality gas at the tailgate of the processing plant.”³² Regency sought rehearing of the FERC’s determination and argued that “because the Coyanosa Residue Line is attached to and receives gas from a non-jurisdictional processing plant; the pipeline should be viewed as a non-jurisdictional extension of plant operations.”³³

As an alternative to its rehearing request, Regency proposed abandoning the line by transfer to Oasis Pipeline LP (Oasis).³⁴ Oasis operates an intrastate pipeline that provides NGPA section 311 interstate transportation service.³⁵ As a result, the FERC held that abandonment was appropriate under the circumstances and would not result in any degradation of services for customers currently making use of the pipeline.³⁶

26. *Regency Field Servs., LLC*, 154 F.E.R.C. ¶ 61,103 at P 1 (2015).

27. *Id.* at P 2.

28. *Id.* FERC explains that “NGA section 1(b) exempts from the Commission’s jurisdiction ‘facilities used for . . . the production or gathering of natural gas.’ Processing plants that remove liquids and impurities from a gas stream, thereby rendering the treated gas compatible with the quality standards of interstate pipelines, are generally viewed as performing a gathering function, and as such are exempt from our NGA jurisdiction.” *Id.* at P 3, n.5.

29. *Id.* at P 2.

30. 154 F.E.R.C. ¶ 61,103, at P 3.

31. *Id.* at P 3, n. 4. The FERC explains that “The ‘stub line’ test was described in *Amerada Hess Corporation*, 67 F.E.R.C. ¶ 61,254 (1994) and *Superior Offshore Pipeline Company*, 67 F.E.R.C. ¶ 61,253 (1994), wherein we determined that pipelines more than five miles long carrying lean residue gas from the tailgate of a processing plant are not incidental extensions of gathering operations, but are instead providing transportation, and are thus potentially subject to our NGA jurisdiction.” *Id.*

32. *Id.* at P 3.

33. *Id.* at P 1.

34. 154 F.E.R.C. ¶ 61,103, at P 5.

35. *Id.*

36. *Id.* at PP 7-9.

7. *Iroquois Gas Transmission System, L.P.*, 154 F.E.R.C. ¶ 61,106 (2016).

The FERC granted a payment-in-lieu-of-taxes (PILOT) transaction between Iroquois Gas Transmission System, L.P., and Schoharie County Industrial Development Agency (Agency).³⁷ Under the transaction, Iroquois would abandon by lease certain jurisdictional facilities to Agency while gaining a certificate of public convenience and necessity to lease back the facilities.³⁸ At the end of the lease term, Iroquois would reacquire the facilities.³⁹ The FERC found that when the lease and leaseback proposals were necessary, given they were meant to implement a court settlement and would not affect any of Iroquois' service obligations.⁴⁰ The FERC granted the request for pre-granted authorization, finding that no action was necessary for Iroquois to reacquire the facilities upon the end of the lease term.⁴¹

8. *Transcontinental Gas Pipe Line Company, LLC*, 155 F.E.R.C. ¶ 62,108 (2016).

The FERC granted Transcontinental Gas Pipe Line Company, LLC's (Transco) and UGI Mt. Bethel Pipeline Company, LLC's (UGI) joint request for Transco to abandon its 12.5-mile Allentown Lateral pipeline by sale to UGI.⁴² Following its acquisition of the Allentown Lateral, UGI proposed to rename it the Mt. Bethel Pipeline and to provide open-access transportation services.⁴³ Because there were no firm shippers on the pipeline, UGI conducted an open season for the full 72,000 Dth per day of firm transportation service.⁴⁴ UGI Energy Service, LLC entered into a precedent agreement for the full 72,000 Dth at the maximum recourse tariff rate.⁴⁵ The FERC also granted UGI's request for a certificate of public convenience and necessity, a blanket construction certificate, and a blanket transportation certificate to provide open-access transmission service.⁴⁶ The FERC found that because UGI was a new pipeline with no existing shippers there were no subsidization concerns.⁴⁷ It also found that there would be no impact on existing pipelines and their captive customers since the facilities already exist and will continue to provide gas to existing markets.⁴⁸

9. *MoGas Pipeline, LLC*, 155 F.E.R.C. ¶ 61,221 (2016).

The FERC granted, in part, the application of MoGas Pipeline LLC (MoGas) to: (1) abandon and transfer jurisdictional natural gas facilities to its affiliate CorEnergy Pipeline Company, LLC (CorEnergy); (2) lease the facilities back

37. *Iroquois Gas Transmission Sys., L.P.*, 154 F.E.R.C. ¶ 61,106 at P 1 (2015).

38. *Id.*

39. *Id.*

40. *Id.* at P 4.

41. *Id.* at P 10.

42. *Transcon. Gas Pipe Line Co., LLC*, 155 F.E.R.C. ¶ 62,108 at P 1 (2016).

43. *Id.* at P 2.

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

45. *Id.*

46. *Id.* at P 4.

47. 155 F.E.R.C. ¶ 62,108, at P 4.

48. *Id.*

from CorEnergy; and (3) consolidate and combine its accounting with CorEnergy.⁴⁹ MoGas explained that under the terms of the lease it would maintain all of the rights, obligations, and responsibilities under its existing certificate authorizations.⁵⁰ CorEnergy would be a passive owner and MoGas would continue to have complete operational control of and responsibility for the system facilities.⁵¹

The FERC granted the abandonment and leaseback while granting in part the proposed accounting system.⁵² In explaining its decision, the FERC broke the transaction down into its component parts, finding that the abandonment was proper given no effects on service obligations.⁵³ Turning to the leaseback relationship, the FERC relied on the Certificate Policy Statement and weighed the public benefits versus the potentially adverse consequences from this transaction.⁵⁴ The FERC held that the leaseback provided greater financial flexibility leading to greater reliability and had few, if any, adverse consequences.⁵⁵ Regarding the accounting change, the Commission granted the consolidation while requiring that MoGas enact controls and procedures to track accounts carried over from CorEnergy's books and ensure that the amounts relate only to the MoGas-operated pipelines.⁵⁶ The FERC also denied MoGas' request for authorization to combine accounts if an independent third party acquired MoGas.⁵⁷

B. Capacity Allocation

1. *Maritimes & Northeast Pipeline, L.L.C.*, 154 F.E.R.C. ¶ 61,084 (2016).

The FERC approved tariff revisions proposed by Maritimes & Northeast Pipeline, L.L.C. (Maritimes) to change the way Maritimes allocates available capacity from a first-come, first-served method to an approach based on the net present value (NPV) of open season bids.⁵⁸ Denying the protest of Maritimes' anchor shipper, the FERC accepted Maritimes' proposal that requests by existing firm shippers to add or change primary receipt or delivery points would be assigned an NPV of zero, unless the shipper proposed to increase the rate, quantity, or term.⁵⁹ The FERC found that Maritimes' proposal was "consistent with longstanding Commission policy," and would not inhibit receipt and delivery point changes "to the extent that those points are truly available."⁶⁰ The FERC observed, however, that "[w]here capacity at a point is in demand . . . it is just and reasonable for a pipeline to prefer the proposal that would maximize its ability to market mainline capacity."⁶¹ The FERC found that the protesting customer's status as an anchor

49. *MoGas Pipeline, LLC*, 155 F.E.R.C. ¶ 61,221 at PP 1-2 (2016).

50. *Id.* at P 7.

51. *Id.*

52. *Id.* at P 2.

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

54. 155 F.E.R.C. ¶ 61,221, at PP 20-25.

55. *Id.* at P 23.

56. *Id.* at PP 22-24.

57. *Id.* at PP 45-48.

58. *Mars. & Nw. Pipeline, L.L.C.*, 154 F.E.R.C. ¶ 61,084 at P 1 (2016).

59. *Id.* at PP 30-31.

60. *Id.* at P 30.

61. *Id.*

shipper did not entitle it to “special treatment.”⁶² The FERC also approved Mari-times’ proposal to reserve capacity for future expansions, subject to first posting the available capacity for at least five business days.⁶³

2. *Columbia Gas Transmission, LLC, Columbia Gulf Transmission, LLC*, 153 F.E.R.C. ¶ 61,098 (2015).

The FERC addressed non-conforming provisions in negotiated rate service agreements between affiliated interstate pipelines and an anchor shipper for an expansion project.⁶⁴ While accepting a number of the proposed non-conforming provisions, the FERC rejected as unduly discriminatory a provision that would have given the anchor shipper a priority right to shift up to 93,000 Dth per day of primary delivery point capacity without using the pipeline’s tariff procedures relating to primary point changes.⁶⁵ The FERC also rejected a non-conforming provision that would have exempted the anchor shipper from *pro rata* capacity allocation for up to 20% of new incremental delivery point capacity at interstate pipeline interconnections created by *future* expansions, agreeing with the objection “that providing an anchor shipper for one project special priority rights with respect to capacity on a different project is unduly discriminatory.”⁶⁶

C. *Capacity Release*

1. *Algonquin Gas Transmission, LLC*, 154 F.E.R.C. ¶ 61,269 (2016).

The FERC established a technical conference to examine issues presented by tariff changes proposed by Algonquin Gas Transmission, LLC (Algonquin) that would exempt from FERC capacity release bidding requirements certain firm transportation capacity releases by electric distribution companies (EDC) participating in state-regulated electric reliability programs.⁶⁷ Algonquin’s proposal would exempt from bidding requirements prearranged releases by an EDC to an asset manager and/or electric generators providing generation to the wholesale market serving the EDC as part of a state-regulated electric reliability program.⁶⁸ Algonquin asserted that its proposal would support efforts of EDCs to increase the reliability of supply in New England for natural gas-fired generation, particularly during constrained winter months.⁶⁹ Numerous parties filed protests or comments concerning Algonquin’s proposal. The technical conference established by the FERC was held on May 9, 2016.⁷⁰

2. *Coordination of the Scheduling Processes of Interstate Nat. Gas*

62. *Id.* at P 31.

63. 154 F.E.R.C. ¶ 61,084, at P 35.

64. *Columbia Gas Transmission, LLC*, 153 F.E.R.C. ¶ 61,098 (2015).

65. *Id.* at P 42.

66. *Id.* at P 43.

67. *Algonquin Gas Transmission, LLC*, 154 F.E.R.C. ¶ 61,269 at P 1 (2016).

68. *Id.* at P 8.

69. *Id.* at P 9.

70. *Id.* at P 15.

Pipelines and Pub. Utils., 153 F.E.R.C. ¶ 61,049 (2015).

In response to a request for clarification of Order No. 809, the FERC, after requesting further public comment, specified the default interpretations it would apply to intraday recall provisions contained in capacity release contracts that spanned the April 1, 2016, implementation date for the revised interstate pipeline nomination timeline adopted in Order No. 890.⁷¹ In justifying its adoption of default contract interpretations, the FERC observed, “[g]iven the changes in the intraday cycles, and in the absence of the parties’ agreement otherwise, it will be unclear what intraday recall rights a releasing shipper has on April 1, 2016 if the capacity release transaction spans a period before and after April 1, 2016.”⁷² The FERC stated that any agreement between the parties as to alternative recall rights would apply in place of the default interpretation, and the FERC also specified a process to be followed if a dispute arose as to alternative recall rights.⁷³ Finally, the FERC rejected a request that it provide a releasing shipper exercising recall rights under affected contracts with a right to terminate the release transaction prior to the expiration date, unless such early termination was permitted by the capacity release agreement.⁷⁴

3. *Exelon Generation Co., LLC and Summit Nat. Gas of Maine, Inc.*, 153 F.E.R.C. ¶ 61,282 (2015).

The FERC granted temporary and limited waivers of certain of its capacity release regulations and policies, as well as relevant pipeline tariff provisions, to facilitate a prearranged, permanent capacity release.⁷⁵ The FERC also clarified one aspect of its policy concerning the delivery obligation of an asset manager under an asset management agreement (AMA).⁷⁶ Specifically, the FERC agreed that, prior to any given month, a releasing shipper may notify its asset manager under a long-term AMA that the asset manager is relieved of its delivery obligation for all or part of the month, provided “the asset manager is not relieved of its full delivery obligation for more than seven months (or 210 days) in any 12-month period.”⁷⁷ The FERC emphasized, however, “that the delivery or purchase obligation under an AMA must be met on an annual basis.”⁷⁸

71. Order No. 809, *Coordination of the Scheduling Processes of Interstate Nat. Gas Pipelines and Pub. Utils.*, F.E.R.C. STATS. & REGS. ¶ 31,368, 80 Fed. Reg. 23,197 (2015), *order on clarification*, 152 F.E.R.C. ¶ 61,095 (2015); 152 F.E.R.C. ¶ 61,095 at P 14; *Coordination of the Scheduling Processes of Interstate Nat. Gas Pipelines and Pub. Utils.*, 153 F.E.R.C. ¶ 61,049 (2015).

72. 153 F.E.R.C. ¶ 61,049, at P 18.

73. *Id.* at PP 21-23.

74. *Id.* at P 22.

75. *Exelon Generation Co., LLC*, 153 F.E.R.C. ¶ 61,282 at P 12 (2015).

76. *Id.* at P 13.

77. *Id.*

78. *Id.* For example, a releasing shipper could not “relieve an asset manager of its delivery or purchase obligation for the first year of a 3-year agreement figuring the asset manager would still be liable for the total number of days under the original agreement in the final year of the contract.” *Id.*

4. *Rice Energy Mktg. LLC*, 153 F.E.R.C. ¶ 61,048 (2015).

Addressing a petition for declaratory order, the FERC clarified that the prohibition on buy/sell arrangements adopted in Order No. 636 does not apply to natural gas volumes that an asset manager under a *supply* AMA purchases from the releasing shipper under the AMA and then resells to the same shipper.⁷⁹ The FERC found that, while Order No. 712 had only expressly granted an exemption from the buy/sell prohibition for *delivery* AMAs, the exemption should also apply to supply AMAs because “Order No. 712’s rationale for holding that the buy/sell prohibition adopted in Order No. 636 is not applicable to delivery AMAs applies equally to supply AMAs.”⁸⁰ As with a delivery AMA, the FERC explained, the releasing shipper in a supply AMA “is not releasing unneeded capacity, but capacity that will continue to be used for the same purpose for which the releasing shipper in the supply AMA originally purchased it – to transport its natural gas to market.”⁸¹

5. *Gulf South Pipeline Co., LP*, 152 F.E.R.C. ¶ 61,091 (2015); *Gulf South Pipeline Co., LP*, 152 F.E.R.C. ¶ 61,002, order granting clarification, 153 F.E.R.C. ¶ 61,277 (2015); *Equitrans, L.P.*, 152 F.E.R.C. ¶ 61,003 (2015).

In several orders, the FERC directed interstate natural gas pipelines to file a tariff record summarizing the negotiated rate rather than filing the contract itself when filing future replacement shipper agreements containing negotiated usage and/or fuel charges.⁸² In each case, the FERC found that the “Award Download” electronic version of the replacement agreements under North American Energy Standards Board Standard No. 5.4.26 filed by the pipeline did not provide adequate transparency as required by the FERC’s alternative rate policy.⁸³

6. *Cost Recovery Mechanisms for Modernization of Nat. Gas Facilities*, 152 F.E.R.C. ¶ 61,046 (2015).

The FERC denied a request for clarification of its policy statement regarding cost recovery for modernizing pipeline facilities and infrastructure, including a request that the FERC clarify that cost responsibility for any surcharge approved under the policy statement would be borne by the replacement shipper in existing

79. Order No. 636, *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transp. Under Part 284 of FERC’s Regulations; and Regulation of Nat. Gas After Partial Wellhead Decontrol*, F.E.R.C. STATS. & REGS. ¶ 30,939, 57 Fed. Reg. 13,267 (1992) (to be codified at 18 C.F.R. pt. 284); *Rice Energy Mktg. LLC*, 153 F.E.R.C. ¶ 61,048 at P 1 (2015).

80. Order No. 712, *Promotion of a More Efficient Capacity Release Mkt.*, F.E.R.C. STATS. & REGS. ¶ 31,271 (2008), 73 Fed. Reg. 37,058 (2008) (to be codified at 18 C.F.R. pt. 284); 153 F.E.R.C. ¶ 61,048 at PP 26-30.

81. *Id.* at P 32.

82. *Gulf S. Pipeline Co., LP*, 152 F.E.R.C. ¶ 61,091 (2015); *Gulf S. Pipeline Co., LP*, 152 F.E.R.C. ¶ 61,002, order granting clarification, 153 F.E.R.C. ¶ 61,277 (2015); *Equitrans, L.P.*, 152 F.E.R.C. ¶ 61,003 (2015).

83. See, e.g., 152 F.E.R.C. ¶ 61,091 at PP 5-6 (discussing *Alternatives to Traditional Cost-of-Service Ratemaking for Nat. Gas Pipelines*, 74 F.E.R.C. ¶ 61,076, order granting clarification, 74 F.E.R.C. ¶ 61,194, order on reh’g, 75 F.E.R.C. ¶ 61,024 (1996)).

capacity release arrangements.⁸⁴ In denying the requested clarification, the FERC explained “the issue of cost responsibility for modernization costs during the term of a capacity release is a contractual issue between the relevant parties, and that issue cannot be resolved on a generic basis.”⁸⁵ The FERC noted, however, that, under its regulations, the releasing shipper would remain liable for a modernization surcharge (if permitted by the releasing shipper’s service agreement) during a temporary release, unless otherwise agreed by the pipeline.⁸⁶

7. Waiver of Capacity Release Regulations

The FERC granted numerous limited and temporary waivers of its capacity release regulations during the period July 1, 2015, to June 30, 2016.⁸⁷ Common reasons for requesting waiver included asset sales and internal corporate reorganizations.⁸⁸ Among the rules and policies often waived by the FERC were the capacity release posting and bidding requirements, the prohibition on buy/sell arrangements, the shipper-must-have-title rule, and the prohibition on tying capacity releases to other conditions.⁸⁹

D. Cost Trackers

1. *Tallgrass Interstate Gas Transmission, LLC*, 153 F.E.R.C. ¶ 61,258 (2015).

The FERC found that the Cost Recovery Mechanism (CRM) that Tallgrass Interstate Gas, LLC (Tallgrass) proposed violated the FERC’s policy requiring pipelines to use a Straight Fixed Variable (SFV) rate design.⁹⁰ “Tallgrass proposed the CRM to recover certain ‘system safety, integrity, reliability, and environmental-related costs’ through a volumetric surcharge to its usage rates.”⁹¹ The FERC stated that fixed costs, such as the capital costs and the operating and maintenance costs that Tallgrass proposed to include in its CRM, must be included

84. *Cost Recovery Mechanisms for Modernization of Nat. Gas Facilities*, 151 F.E.R.C. ¶ 61,047 (2015); *Cost Recovery Mechanisms for Modernization of Nat. Gas Facilities*, 152 F.E.R.C. ¶ 61,046 at P 20 (2015).

85. 152 F.E.R.C. ¶ 61,046, at P 20.

86. *Id.*

87. *Mercuria Energy Am., Inc.*, 155 F.E.R.C. ¶ 61,253 (2016); *SWN Energy Servs. Co.*, 155 F.E.R.C. ¶ 61,245 (2016); *Chesapeake Energy Mktg., L.L.C.*, 155 F.E.R.C. ¶ 61,092 (2016); *Shell Energy N. Am. (US), LP*, 155 F.E.R.C. ¶ 61,032 (2016); *CenterPoint Energy Servs., Inc.*, 155 F.E.R.C. ¶ 61,024 (2016); *Transcon. Gas Pipe Line Co.*, 154 F.E.R.C. ¶ 61,239 (2016); *WPX Energy Mktg., LLC*, 154 F.E.R.C. ¶ 61,221 (2016); *Columbia Gas Transmission, LLC*, 154 F.E.R.C. ¶ 61,162 (2016); *S. Star Cent. Gas Pipeline, Inc.*, 154 F.E.R.C. ¶ 61,062 (2016); *MMGS, Inc.*, 154 F.E.R.C. ¶ 61,018 (2016); *Talen Energy Mktg., LLC*, 153 F.E.R.C. ¶ 61,319 (2015); *Range Res. – Appalachia, LLC*, 153 F.E.R.C. ¶ 61,294 (2015); *QEP Mktg. Co., Inc.*, 153 F.E.R.C. ¶ 61,280 (2015); *Apache Corp.*, 153 F.E.R.C. ¶ 61,262 (2015); *Anadarko Energy Servs. Co.*, 153 F.E.R.C. ¶ 61,124 (2015); *Union Power Partners, L.P.*, 153 F.E.R.C. ¶ 61,070 (2015); *Excelsior Gas Mktg., L.P.*, 152 F.E.R.C. ¶ 61,243 (2015); *MidAmerican Energy Co.*, 152 F.E.R.C. ¶ 61,196 (2015); *Eni Petroleum US LLC*, 152 F.E.R.C. ¶ 61,174 (2015); *Wash. Gas Light Co.*, 152 F.E.R.C. ¶ 61,159 (2015); *Dogwood Energy LLC*, 152 F.E.R.C. ¶ 61,083 (2015); *Barclays Bank, PLC*, 152 F.E.R.C. ¶ 61,069 (2015).

88. *E.g.*, 155 F.E.R.C. ¶ 61,253 at P 2 (corporate reorganization); 155 F.E.R.C. ¶ 61,245 at P 2 (transfer of oil and gas production properties).

89. 18 C.F.R. § 284.8(d)-(e) (2016). *See, e.g.*, 155 F.E.R.C. ¶ 61,253 at P 3.

90. *Tallgrass Interstate Gas Transmission, LLC*, 153 F.E.R.C. ¶ 61,258 at PP 21-22 (2015).

91. *Id.* at P 15.

in a pipeline's reservation charge, not usage charge.⁹² Moreover, the FERC noted that Tallgrass's customers did not agree to the non-SFV rate design and that the non-SFV rate design was inconsistent with the SFV method used to calculate Tallgrass's base rates.⁹³ Thus, the FERC directed Tallgrass to file within thirty days of the order to revise its proposed CRM to be consistent with the FERC's SFV policy.⁹⁴

In addition, protesters objected to other aspects of Tallgrass's proposed CRM, arguing that: (1) Tallgrass included ordinary, routine costs in the CRM charge; (2) Tallgrass's proposal may not have contained limits on the costs to be included in the charge; (3) the ten-year period for the review of the CRM was too long; and (4) Tallgrass gave merely informational presentations on its CRM proposal instead of working collaboratively with its shippers.⁹⁵ On these issues, the FERC accepted Tallgrass's proposed tariff records subject to refund and set the issues for hearing.⁹⁶

2. *Empire Pipeline, Inc., et al.*, 153 F.E.R.C. ¶ 61,379 (2015).

The FERC rejected the tracking mechanism Empire Pipeline, Inc. (Empire) filed to flow through costs associated transportation and storage capacity Empire was planning to lease on the National Fuel Gas Supply Corporation (National Fuel) system in connection with Empire's proposed Tuscarora Lateral Project.⁹⁷ Under Empire's proposal, Empire would submit a tracker filing to modify its firm no-notice storage service (Rate Schedule FSNN) and interruptible storage (Rate Schedule ISS) rates to reflect changes to National Fuel's rates and fuel retainages.⁹⁸ The FERC had rejected the flow-through mechanism in its order issuing certificates for the Tuscarora Lateral Project.⁹⁹ On rehearing, the FERC dismissed Empire's arguments that Rate Schedule FSNN was the appropriate place to allocate costs associated with the capacity lease and that the flow through mechanism would properly reflect changes in National Fuel's firm storage and transportation rates approved by the FERC.¹⁰⁰ Instead, the FERC maintained concern that Empire could also use an administrative provision in its firm no-notice transportation service to recover lease costs.¹⁰¹ The FERC also distinguished Empire's filing from the tracker in *Millennium Pipeline Company, L.L.C.*, stating that the pipeline in *Millennium* was permitted to allocate costs for leased capacity on the Columbia Gas Transmission Corporation (Columbia) system in Account 858 (Transmission and Compression of Gas by Others) and to recover those costs through a filing permitted by Columbia's tariff, whereas Empire's proposed filing

92. *Id.* at P 21.

93. *Id.* at P 22.

94. *Id.*

95. 153 F.E.R.C. ¶ 61,258, at P 17.

96. *Id.*

97. *Empire Pipeline, Inc.*, 153 F.E.R.C. ¶ 61,379 at PP 22-23 (2015).

98. *Id.* at P 17.

99. *Id.*

100. *Id.* at PP 18-20.

101. *Id.* at P 20.

was inconsistent with the FERC's regulations for changing a rate.¹⁰² Accordingly, the FERC required Empire to propose any flow through mechanism in Rate Schedules FSN and ISS in an NGA section 4 proceeding.¹⁰³

3. *Gulf S. Pipeline Co., LP*, 154 F.E.R.C. ¶ 61,115, *reh'g denied*, 155 F.E.R.C. ¶ 61,132 (2016).

The FERC accepted the tracking mechanism Gulf South Pipeline Company LP (Gulf South) proposed for the recovery of Fuel and Company-Used Gas (CUG) and Lost and Unaccounted for Gas (LAUF), subject to conditions.¹⁰⁴ Under the proposal, Gulf South would establish a fuel tracking mechanism to establish Effective Fuel Retention Percentage (EFRP) rates, which were comprised of Project Fuel Retention Percentage (PFRP) rates, based on a projection of its total CUG and LAUF volumes for the next year, and a true-up Fuel Adjustment Percentage (FAP).¹⁰⁵ As part of its PFRP calculation, Gulf South proposed that the gas equivalent quantity for electric compression would be calculated based on a tariff section unrelated to the tracking mechanism that did not require Gulf South to use a particular pricing methodology for determining an electric cost conversion price.¹⁰⁶ In accepting Gulf South's proposed tariff records, the FERC found that Gulf South's proposal was consistent with the FERC's policy for fuel trackers, subject to Gulf South filing tariff language specifying the methodology it will use to calculate the electric cost conversion price and calculating the Southeast Market Expansion (SEME) fuel in its tracker to only include fuel for the compressor station as required in the FERC's SEME certificate order.¹⁰⁷ Furthermore, the FERC determined that Gulf South's proposed tariff language required it to offset any negative LAUF percentage against a positive CUG percentage when calculating the EFRP rates applicable to transactions subject to both CUG and LAUF charges, and thus, Gulf South could not set the LAUF percentage at zero inconsistent with the FERC's policy.¹⁰⁸ In its request for rehearing, Gulf South argued that, to the extent the LAUF reflects a gain, Gulf South should be able to set the LAUF percentage at zero in all instances, including for transactions that are subject to both CUG and LAUF charges.¹⁰⁹ However, the FERC rejected this claim, holding that if the LAUF rate is negative, but is treated as zero, rather than being deducted from a higher, positive CUG charge, Gulf South's shippers would be forced to pay a higher overall fuel use and LAUF charge than would be justified by Gulf South's actual costs.¹¹⁰

102. *Millennium Pipeline Co., L.L.C.*, 117 F.E.R.C. ¶ 61,319 (2006); 153 F.E.R.C. ¶ 61,379, at P 21.

103. *Id.* at P 22.

104. *Gulf S. Pipeline Co., LP*, 154 F.E.R.C. ¶ 61,115 at P 1 (2016).

105. *Id.* at PP 2-4.

106. *Id.* at P 4.

107. *Id.* at PP 11, 18.

108. *Id.* at P 13.

109. *Gulf S. Pipeline Co., LP*, 155 F.E.R.C. ¶ 61,132 at P 5 (2016).

110. *Id.* at P 7.

E. Fuel

1. *Paiute Pipeline Co.*, 155 F.E.R.C. ¶ 61,267 (2016).

In *Paiute Pipeline Company*, the FERC reevaluated a prior rehearing order and permitted the pipeline to charge zero fuel and a stand-alone Lost and Unaccounted For Gas (LAUF) retention charge for service on a new lateral that does not include compression.¹¹¹ Although the FERC viewed Paiute as an integrated system, including the lateral, it concluded that without compression, there would be no fuel used by shippers to the only delivery point on the lateral and that Paiute had properly provided for and justified a specific fuel charge exemption in its proposed tariff.¹¹²

2. *Southern Star Central Gas Pipeline, Inc.*, 154 F.E.R.C. ¶ 61,258 (2016).

The FERC denied Southern Star Central Gas Pipeline's (Southern Star) request, to reflect adjustments to its fuel and loss reimbursement percentages among other things, 23,107 Dth of natural gas lost during five incidents reportable to the Department of Transportation's Pipeline and Hazardous Materials Safety Administration (PHMSA).¹¹³ The FERC followed its policy and ruled that fuel tracking mechanisms may track only costs related to normal pipeline operations and it is inappropriate for Southern Star to recover through its fuel tracker the cost of gas losses caused by flooding, line damage caused by a fallen communications tower, and other similar losses that are not in the normal course of the pipeline's operations.¹¹⁴

3. *Tennessee Gas Pipeline Co., L.L.C. and National Fuel Gas Supply Corp.*, 150 F.E.R.C. ¶ 61,160 (2015).

On rehearing of an order approving a certificate of public convenience and necessity permitting Tennessee Gas Pipeline Company and National Fuel Gas Supply Corporation (National Fuel) to construct new interstate pipeline facilities, the FERC revisited and clarified its finding that the pipelines' existing customer will not subsidize or be adversely affected by the new facilities under the Certificate Policy Statement.¹¹⁵ In applying the policy statement, the FERC had not separately considered the cost of fuel.¹¹⁶ The record demonstrated that National Fuel

111. *Paiute Pipeline Co.*, 155 F.E.R.C. ¶ 61,267 (2016); *Paiute Pipeline Co.*, 153 F.E.R.C. ¶ 61,292 (2015).

112. 155 F.E.R.C. ¶ 61,267, at P 12. For all other transactions, however, the pipeline must charge its system-wide fuel and LAUF gas retention charge. *Id.*

113. *S. Star Cent. Gas Pipeline, Inc.*, 154 F.E.R.C. ¶ 61,258 (2016).

114. *Id.* at PP 9-10, n. 5 (citing *CenterPoint Energy Gas Transmission Co.*, 131 F.E.R.C. ¶61,047 (2010); *Colo. Interstate Gas Co.*, 121 F.E.R.C. ¶61,161 at P 24 (2007), *order on reh'g*, 123 F.E.R.C. ¶61,183 (2008), *aff'd*, *Colo. Interstate Gas Co. v. FERC*, 599 F.3d 698 (D.C. Cir. 2010) (finding that the pipeline could not recover gas lost as a result of a well casing failure through its fuel tracking mechanism); *Williams Natural Gas Co.*, 73 F.E.R.C. ¶61,394, at 62,215 (1995)).

115. *Tenn. Gas Pipeline Co.*, 150 F.E.R.C. ¶ 61,160 (2015), *reh'g*, 154 F.E.R.C. ¶ 61,184 (2016); *Certification of New Interstate Natural Gas Pipeline Facilities, Statement of Policy*, 88 F.E.R.C. ¶ 61,227, at p. 61,746-47 (1999), *clarified*, 90 F.E.R.C. ¶ 61,128, *further clarified*, 92 F.E.R.C. ¶ 61,094 (2000).

116. 155 F.E.R.C. ¶ 61,184, at P 16.

concluded in its fuel study that it “cannot predict or determine what the retainage rate of the system will be with or without the Compression Additions on a future day.”¹¹⁷ Accordingly, the FERC found on rehearing that National Fuel has not demonstrated that its existing customers will not subsidize or be adversely affected by fuel retainage.¹¹⁸ In such circumstances, the FERC requires the establishment of an incremental fuel rate.¹¹⁹ The FERC directed National Fuel to “separately identify the incremental fuel associated with the [certificated facilities] and to charge incremental fuel rates” without prejudice to a future proposal to roll the fuel and LAUF costs associated with the facilities into its system-wide retention rates.¹²⁰

4. *Texas Gas Transmission, LLC*, 154 F.E.R.C. ¶ 61,032 at P 26 (2016).

In an order granting a certificate of public convenience and necessity to Texas Gas Transmission (Texas Gas), the FERC observed that Texas Gas’s application did “not address the collection of fuel” or LAUF on the proposed lateral facilities and required the pipeline to “explain how it will determine the retention level for LAUF on the . . . Lateral when it makes its first fuel tracker filing after the in-service date of the project.”¹²¹ The FERC’s policy is that pipelines must recover fuel and “LAUF from shippers on a lateral.”¹²² Pipelines need not use the system retainage rate to recover fuel and LAUF gas on a new lateral, “but may develop a methodology that fits the operational characteristics of the lateral.”¹²³

5. *Equitrans, L.P.*, 153 F.E.R.C. ¶ 61,381 at P 35 (2015).

The FERC “direct[ed] Equitrans to charge its currently-effective system fuel retainage factor” for a proposed pipeline project because the incremental fuel and LAUF retainage factor was “lower than the system rate” and the new facilities will be an integrated part of the pipeline’s system.¹²⁴ Also, FERC policy requires “the use of a pipeline’s currently-effective fuel rate is appropriate where the incremental fuel rate is lower than the system rate.”¹²⁵

6. *KPC Pipeline, LLC*, 152 F.E.R.C. ¶ 61,186 at P 5 (2015).

The FERC found that it is appropriate for KPC Pipeline (KPC) to “ensure that operational purchases and sales” of natural gas are not included in its LAUF.¹²⁶ The FERC also clarified that a prior order should not be interpreted “to preclude KPC from recovering reductions in line pack due to fuel usage and lost

117. *Id.* at P 15.

118. *Id.*

119. *Id.* (citing *ANR Pipeline Co.*, 152 F.E.R.C. ¶ 61,021 at P 10 (2015); *Se. Supply Header, LLC*, 151 F.E.R.C. ¶ 61,032 (2015)).

120. 154 F.E.R.C. ¶ 61,184, at P 15.

121. *Tex. Gas Transmission, LLC*, 154 F.E.R.C. ¶ 61,032 at P 26 (2016).

122. *Id.* (citing *E. Shore Nat. Gas Co.*, 145 F.E.R.C. ¶ 62,153, at 64,309 (2013); *Transcon. Gas Pipe Line Co.*, 130 F.E.R.C. ¶ 61,019; *Columbia Gas Transmission Corp.*, 100 F.E.R.C. ¶ 61,240 at P 6 (2002)).

123. *Id.*

124. *Equitrans, L.P.*, 153 F.E.R.C. ¶ 61,381 at P 35 (2015).

125. *Id.*

126. *KPC Pipeline, LLC*, 152 F.E.R.C. ¶ 61,186 at P 5 (2015).

and unaccounted for gas.”¹²⁷ The FERC explained it was merely restating “the general rule that KPC may not recover operational purchases from shippers through its fuel adjustment.”¹²⁸

F. Gas Quality

1. *Transwestern Pipeline Co., LLC*, 155 F.E.R.C. ¶ 61,321 (2016).

The FERC accepted Transwestern Pipeline Company, LLC’s (Transwestern) proposed “tariff record to implement a maximum Btu limit” of 1,110 Btu/scf in its FERC Gas Tariff following a technical conference.¹²⁹ “Transwestern filed an uncontested Stipulation and Agreement of Settlement (Settlement) that resolved many issues raised in Transwestern’s . . . general section 4 rate” case, but reserved the issue concerning Transwestern’s proposal to implement a “maximum heating value.”¹³⁰ The Commission accepted and suspended the effectiveness of the tariff record subject to refund and the outcome of a technical conference.¹³¹ At the technical conference, Transwestern “provided data on Btu levels at all receipt points on the Transwestern system, the geographic location of such receipt points, the volumes and geographic location of receipt points with high Btu gas, and the geographic location of the local distribution company (LDC) delivery points.”¹³² Additionally, Transwestern also provided “data reflecting five years of Btu and volume data for each receipt point in each of the supply areas on its system where significant volumes of gas are received.”¹³³ Transwestern argued that “the unique factor on its system of having LDC delivery points in close proximity to receipts of high Btu gas” supports approval of its proposed 1,110 Btu/scf limit . . .”¹³⁴ Ultimately approving the tariff record, the FERC noted that Transwestern “provided substantial technical and operational data that demonstrates changing conditions, and a trend toward higher Btu levels for gas at receipt points on its system,” and “provided heating value data for the last five years” to support its “need for a maximum heating standard to address the changes . . .”¹³⁵ Additionally, the FERC noted that, consistent with the Gas Quality Policy Statement, Transwestern demonstrated that the Btu limit “is consistent with the heating value standards for the multiple pipelines that interconnect with Transwestern’s system,” and that Transwestern “negotiated with its customers to arrive at technically based solutions.”¹³⁶

127. *Id.* at P 6.

128. *Id.*

129. *Transwestern Pipeline Co., LLC*, 155 F.E.R.C. ¶ 61,321 at P 1 (2016).

130. *Id.* at PP 3-4.

131. *Transwestern Pipeline Co., LLC*, 154 F.E.R.C. ¶ 61,051 at PP 1-2 (2016).

132. 155 F.E.R.C. ¶ 61,321, at P 6.

133. *Id.* at P 7.

134. *Id.* at P 8.

135. *Id.* at P 25.

136. *Nat. Gas Interchangeability: Policy Statement on Provisions Governing Nat. Gas Quality and Interchangeability in Interstate Nat. Gas Pipeline Tariffs*, 115 F.E.R.C. ¶ 61,325 (2006); 155 F.E.R.C. ¶ 61,321, at P 27.

*G. Jurisdiction*1. *City of Clarksville, Tennessee*, 155 F.E.R.C. ¶ 61,184 (2016).

In *City of Clarksville*, the Commission rejected the City of Clarksville's (Clarksville) request for rehearing based upon its contention that it did not "need authorization under section 7 of the NGA," nor did it "need to apply for a blanket certificate under section 284.224 of the regulations" to transport and sell gas to the City of Guthrie, Kentucky (Guthrie) for resale and consumption in Kentucky, because it is a municipality, is exempt from the Commission's jurisdiction under the NGA.¹³⁷ Clarksville argued that "the Commission has found that 'the plain language of the [NGA], found in section 2, subsections (1), (2), (3), and (6) expressly exclude municipalities from the ambit of Commission jurisdiction.'"¹³⁸

The Commission rejected Clarksville's contentions.¹³⁹ It discussed the Federal Power Act (FPA), and the Supreme Court precedent that held a municipality was a "person" under the FPA, "and that the Commission had jurisdiction over the electric company's sales of electricity to the county for resale."¹⁴⁰ Because the NGA was modeled substantively after the FPA, the Commission applied the same reasoning to the case at issue, and found that a municipality could "be a jurisdictional 'person'" under the NGA, and therefore could be deemed a "natural gas company" under the NGA.¹⁴¹

The Commission went on to explain that even if the municipality could not be deemed a natural gas company under the NGA, its gas service provided to Guthrie, which is in Kentucky, not Tennessee, constituted the "transportation of natural gas in interstate commerce under section 1(b) of the NGA."¹⁴²

The Commission further explained that interpreting the municipal exemption to allow municipal gas utilities to "avoid NGA jurisdiction over the transportation and sale of gas for consumption in *other states* . . . would create a regulatory gap."¹⁴³ Interpreting the NGA as requested by Clarksville would result in perpetuating this regulatory gap, because a municipality selling gas in a different state would be exempt both from federal jurisdiction and the jurisdiction of that different state where the gas is ultimately transported or sold.¹⁴⁴ The Commission believed that this result was contrary to the intent of the NGA municipal exemption, as the NGA was intended to allow states to regulate gas services and rates for end-users within the state and prevent the NGA from occupying a field that the states were already regulating.¹⁴⁵ Thus, the Commission found that Congress did not intend for there to be no jurisdiction by any entity over municipal transportation to, or sales in, another state.¹⁴⁶

137. *City of Clarksville, Tenn.*, 155 F.E.R.C. ¶ 61,184 at P 7 (2016).

138. *Id.*

139. *Id.* at PP 11-12.

140. *Id.* at P 12.

141. *Id.* at P 13.

142. 155 F.E.R.C. ¶ 61,184, at P 14.

143. *Id.* at P 11.

144. *Id.* at P 16.

145. *Id.* at P 18.

146. *Id.*

The Commission concluded that earlier cases “relied on an interpretation and application of the NGA’s exemption for municipalities that was too expansive to the extent they would support Clarksville’s position that its status as a municipality in Tennessee allows it to set its own rates for service for customers in another state.”¹⁴⁷ However, the Commission also found that “Clarksville ha[d] been providing service for Guthrie for some time” and that the supplies were necessary to “Guthrie’s local distribution system in Kentucky,” and therefore issued a case-specific certificate of limited jurisdiction to authorize the existing transportation service for Guthrie.¹⁴⁸ The Commission further ordered Clarksville to file the rate for the transportation service with the Commission.¹⁴⁹

2. *Aguirre Offshore Gasport, LLC*, 152 F.E.R.C. ¶ 61,071 (2015).

In this case, the Commission held, *inter alia*, that it did not have jurisdiction over a Floating Storage and Regasification Unit (FSRU) that was proposed as part of an application for NGA section 3 authority to site, construct and operate an LNG import terminal offshore of Salinas, Puerto Rico.¹⁵⁰ The Commission based this finding on its interpretation of section 2(11) of the NGA, which defines the term “LNG Terminal” as including:

[A]ll natural gas facilities located onshore or in State waters that are used to receive, unload, load, store, transport, gasify, liquefy, or process natural gas that is imported to the United States from a foreign country, exported to a foreign country from the United States, or transported in interstate commerce by waterborne vessel, but does not include — (A) waterborne vessels used to deliver natural gas to or from any such facility; or (B) any pipeline or storage facility subject to the jurisdiction of the Commission under section 7.¹⁵¹

According to the applicant, the FSRU is a vessel that incorporates “onboard equipment for the vaporization of LNG and delivery of high-pressure natural gas.”¹⁵² The application stated that the FSRU would receive LNG cargo from carriers and would store, regasify, and deliver regasified natural gas to the berthing platform.¹⁵³ The FSRU would be capable of ocean travel, and would be moored long-term to the berthing platform.¹⁵⁴ Based on this information, the Commission found that the FSRU was a “waterborne vessel” under section (2)11 of the NGA, and that it therefore did not have jurisdiction over the FSRU.¹⁵⁵

3. *Comanche Trail Pipeline, LLC*, 155 F.E.R.C. ¶ 61,182 (2016).

In this case, the Commission considered Comanche Trail Pipeline, LLC’s (Comanche Trail) application requesting a Presidential Permit and authorization

147. 155 F.E.R.C. ¶ 61,184, at P 20.

148. *Id.*

149. *Id.*

150. *Aguirre Offshore Gasport, LLC*, 152 F.E.R.C. ¶ 61,071 at PP 1, 3, 5, 13 (2015).

151. *Id.* at P 10.

152. *Id.* at P 11.

153. *Id.* at P 11.

154. *Id.* at P 12.

155. 152 F.E.R.C. ¶ 61,071, at P 13.

under section 3 of the NGA to site, construct, and operate a border-crossing facility to export gas to and import gas from Mexico.¹⁵⁶ The proposed border-crossing facility consisted of 1,086 feet of forty-two-inch diameter pipeline.¹⁵⁷ Comanche Trail also proposed an intrastate pipeline in Texas that consisted of 195 miles of forty-two-inch-diameter pipeline that would connect with the border crossing facilities as well as other Texas intrastate pipelines and processing plants, and that at a later date it may interconnect with interstate pipelines.¹⁵⁸

Several commenters challenged Comanche Trail's assumption that its pipeline facilities would be non-NGA jurisdictional intrastate pipeline facilities. The Commission addressed these comments, stating that only a small segment of the pipeline close to the border is deemed to be the import or export facility for which the NGA section 3 authorization is necessary.¹⁵⁹ The rest of the pipeline can either be jurisdictional under NGA section 7 if it will be used to transport gas in interstate commerce, or NGA-exempt if it is used for gathering purposes or intrastate transportation service.¹⁶⁰ The Commission stated that Comanche Trail's pipeline would be entirely within Texas and that none of the gas being transported initially would enter interstate commerce.¹⁶¹ The Commission further stated that the NGA section 3 border-crossing facilities would be operated as part of the NGA-exempt intrastate pipeline and that therefore the intrastate pipeline would not be subject to Commission jurisdiction.¹⁶² The Commission definitively held that only the 1,086 feet of pipeline that would constitute the border crossing facility is subject to its jurisdiction under section 3 of the NGA and required to obtain a Presidential Permit; the remaining 195 miles of upstream pipeline facilities in Texas, on the other hand, would be subject to state jurisdiction.¹⁶³

In response to further challenges arguing that Comanche Trail will use its pipeline to provide interstate transportation services under the Natural Gas Policy Act of 1978 (NGPA) section 311(a)(2) in the future, the Commission stated that “[a]n expectation of future changes to a project's configuration of operation is not sufficient to confer NGA section 7 jurisdiction on facilities.”¹⁶⁴ The Commission further stated that, if at some point in the future, Comanche Trails begins providing service under the NGPA, the Commission's jurisdiction would only apply to that service, and that service would not subject the pipeline facilities “to the Commission's jurisdiction under either section 311 of the NGPA or section 7 of the NGA.”¹⁶⁵

156. *Comanche Trail Pipeline, LLC*, 155 F.E.R.C. ¶ 61,182 (2016).

157. *Id.* at P 4.

158. *Id.* at P 5.

159. *Id.* at P 19.

160. *Id.*

161. 155 F.E.R.C. ¶ 61,182, at P 28.

162. *Id.*

163. *Id.* at P 20.

164. *Id.*

165. *Id.*

H. Market-Based Rates

1. *Arcadia Gas Storage, LLC*, 155 F.E.R.C. ¶ 61,161 (2016).

The FERC granted a petition by Arcadia Gas Storage, LLC (Arcadia) to implement market-based rates for the expansion of its firm wheeling transportation service and reaffirmed its market-based rate authority for firm and interruptible storage services.¹⁶⁶ The FERC concluded that neither the new wheeling service nor continuation of storage service would allow Arcadia to exercise market power in the relevant market, and since the application was unopposed, its authority was approved.¹⁶⁷ The FERC noted that its approval of market-based rates is subject to re-examination in the event that: (1) Arcadia or an affiliate adds storage capacity; (2) an affiliate links storage facilities to Arcadia; (3) Arcadia or an affiliate acquires an interest in, or is acquired by, a pipeline connected to Arcadia; (4) an expansion of capacity; or (5) the acquisition of additional transportation facilities or an affiliate providing transportation services in the same market area.¹⁶⁸

2. *Central New York Oil and Gas Co., L.L.C.*, 153 F.E.R.C. ¶ 61,278 (2015).

The FERC granted a petition by Stagecoach Pipeline & Storage Company, LLC (Stagecoach) to implement market-based rates for interruptible park and loan storage (PAL) service.¹⁶⁹ The FERC relied heavily on an earlier decision in which it approved market-based rates for PAL service proposed by Rager Mountain Storage Company LLC (Rager Mountain), whose storage facilities are located in the same relevant geographic market as Stagecoach.¹⁷⁰ Moreover, the FERC agreed with Stagecoach regarding the Commission's purported encouragement of interstate natural gas pipelines to provide PAL services.¹⁷¹ The FERC also agreed that Stagecoach's market power study was more comprehensive than the study presented in *Rager Mountain* given that Stagecoach included local production as an alternative to gas storage services.¹⁷²

I. New Services

1. *Rager Mountain Storage Co. LLC*, 152 F.E.R.C. ¶ 61,098 (2015).

The FERC accepted a proposal by Rager Mountain Storage Company LLC (Rager Mountain) to implement a new interruptible lending and parking service under Rate Schedule ILPS at market-based rates.¹⁷³ Under Rate Schedule ILPS, customers can borrow gas to cover supply losses or market needs, park gas to

166. *Arcadia Gas Storage, LLC*, 155 F.E.R.C. ¶ 61,161 at P 1 (2016).

167. *Id.* at PP 17, 19.

168. *Id.* at P 20.

169. *Cent. N.Y. Oil and Gas Co., L.L.C.*, 153 F.E.R.C. ¶ 61,278 at P 1 (2015). Stagecoach was previously named Central New York Oil and Gas Company, L.L.C. The company's name change occurred in November 2015, subsequent to the filing of the petition.

170. *Id.* at PP 12-13.

171. *Id.* at PP 3, 13.

172. *Id.* at P 11-12.

173. *Rager Mtn. Storage Co. LLC*, 152 F.E.R.C. ¶ 61,098 at PP 1, 3, 16 (2015).

offset demand decreases, or take advantage of short-term swings in the open market.¹⁷⁴ Rager Mountain supported its proposal with a market power study.¹⁷⁵ The FERC concluded that Rager Mountain met the requirements for market-based rates for this new service, finding that Rager Mountain had a relatively small market share in the Pennsylvania/New York storage market.¹⁷⁶

2. *Equitrans, L.P.*, 152 F.E.R.C. ¶ 61,103 (2015).

The FERC accepted a proposal by Equitrans, L.P. (Equitrans) to implement a new Firm Lending and Parking Service under Rate Schedule FLPS.¹⁷⁷ Under Rate Schedule FLPS, customers may borrow or park gas on Equitrans' Mainline and Sunrise Transmission Systems on a firm basis.¹⁷⁸ In view of a protest, Equitrans subsequently revised its proposal to include the following language:

Equitrans shall not provide FLPS service that will result in the total contracted firm storage capacity exceeding Equitrans' peak operationally available capacity on the Mainline System unless Equitrans, exercising reasonable discretion, determines that an FLPS transaction will have a positive effect on its system. Equitrans shall not provide an FLPS service that will result in the total contracted firm storage capacity exceeding unsubscribed storage capacity. In addition, Equitrans shall not provide FLPS service if, in its reasonable discretion, providing such service would interfere with the primary rights of any Customer that holds firm capacity.¹⁷⁹

Subsequent to Equitrans' reply, the party withdrew its protest to the proposal.¹⁸⁰ The FERC found that "Equitrans' revised tariff records with the revisions to which it has agreed are consistent with Commission policy and just and reasonable."¹⁸¹ The FERC removed the suspension of the revised tariff records and accepted them.¹⁸²

3. *Gulf S. Pipeline Co., LP*, 155 F.E.R.C. ¶ 61,287 (2016).

The FERC accepted a proposal by Gulf South Pipeline Company, LP (Gulf South) to establish new firm and interruptible service on Gulf South's proposed Coastal Bend Header facilities under Rate Schedule Options FCB and ICB.¹⁸³ These new rate schedules entitled shippers to service on the Coastal Bend Header facilities, but not on Gulf South's Legacy System; Coastal Bend Header shippers would need to contract separately for service on the Legacy System.¹⁸⁴ The FERC granted Gulf South a certificate of public convenience and necessity to construct

174. *Id.* at P 3.

175. *Id.* at PP 1, 9.

176. *Id.* at PP 10, 12.

177. *Equitrans, L.P.*, 152 F.E.R.C. ¶ 61,103 at P 1 (2015).

178. *Id.* at P 2.

179. *Id.* at P 10.

180. *Id.*

181. *Id.* at P 11.

182. *Id.*

183. *Gulf S. Pipeline Co., LP*, 155 F.E.R.C. ¶ 61,287 (2016).

184. *Id.* at P 10.

and operate the Coastal Bend Header facilities and accepted Gulf South's proposal for the new rate schedules and services.¹⁸⁵

J. Open Seasons

1. *Rockies Express Pipeline LLC*, 155 F.E.R.C. ¶ 61,018 (2016).

The FERC issued Rockies Express Pipeline LLC (REX) a certificate to construct and operate its Zone 3 East-to-West Project (Project).¹⁸⁶ Allegheny Defense Project (Allegheny) filed a request for rehearing on grounds that the FERC's review of the Project failed to comply with the National Environmental Policy Act (NEPA) because it failed to consider the occurrence of an open season on a related project as evidence of the related project's potential cumulative environmental effect.¹⁸⁷ The FERC denied Allegheny's request, noting that the occurrence of an open season does not render a project "proposed" for purposes of compelling a cumulative NEPA review.¹⁸⁸ The FERC emphasized that an open season is very preliminary in nature and not representative of whether a given project will ultimately proceed.¹⁸⁹ To support this principle, the FERC pointed out that a section 7 application for the related project was not submitted until nearly eight months following the close of the open season.¹⁹⁰

K. Pressure Commitments

1. *Nat. Gas Pipeline Co. of Am. LLC*, 154 F.E.R.C. ¶ 61,220 (2016).

The FERC issued a certificate of public convenience and necessity to Natural Gas Pipeline of America LLC (Natural) to construct and operate its Chicago Market Expansion Project.¹⁹¹ In its certificate application, Natural sought a predetermination to add non-conforming pressure obligations to a project shipper's existing negotiated rate agreement.¹⁹² Natural's existing tariff stated that Natural will deliver gas to customers at not less than 300 psig, unless Natural and a customer agree on a different minimum pressure.¹⁹³ If the parties agree on a different minimum pressure, that alternative pressure is designated in a blank space in the service agreement.¹⁹⁴ For the project shipper's agreement, however, Natural included pressure obligations up to specified flow limits, notice requirements, rate credits for failure to make deliveries at the minimum pressure, and an arbitration provision that was different than the provision in Natural's tariff.¹⁹⁵ The FERC rejected Natural's request for predetermination, finding that "Natural has neither explained

185. *Id.* at P 35.

186. *Rockies Express Pipeline LLC*, 155 FERC ¶ 61,018 at P 1 (2016).

187. *Id.*

188. *Id.* at PP 2, 12-13.

189. *Id.* at P 13.

190. *Id.*

191. *Nat. Gas Pipeline Co. of Am. LLC*, 154 F.E.R.C. ¶ 61,220 (2016).

192. *Id.* at P 28.

193. *Id.* at 33.

194. *Id.*

195. *Id.* at P 34.

nor supported the various components of the negotiated pressure provisions” and the non-conforming provisions “present a significant potential for undue discrimination among customers.”¹⁹⁶ The FERC stated that “[i]f Natural wishes to serve [the project shipper] subject to such provisions, Natural may present and support its request to do so in an NGA section 4 filing.”¹⁹⁷

2. *UGI Sunbury, LLC*, 155 F.E.R.C. ¶ 61,115 (2016).

The FERC issued a certificate of public convenience and necessity to UGI Sunbury, LLC (Sunbury) to construct and operate its Sunbury Pipeline Project.¹⁹⁸ In its certificate application, Sunbury submitted the Rate Schedule FT service agreement executed with the project’s foundation shipper as a non-conforming agreement.¹⁹⁹ Among other non-conforming provisions, the agreement included minimum delivery pressure commitments by Sunbury to the foundation shipper and provided remedies for the foundation shipper in the event that Sunbury fails to meet the commitments.²⁰⁰ The FERC “interpret[ed] this provision as not impacting other shipper’s charges or credits.”²⁰¹ Further, the FERC found “that the non-conforming provisions identified by Sunbury are permissible since they do not present a risk of undue discrimination, do not adversely affect the operational conditions of providing service to other shippers, and do not result in any shipper receiving a different quality of service.”²⁰²

L. *Rate Cases*

1. *El Paso Natural Gas Co., L.L.C.*, 152 F.E.R.C. ¶ 61,039 (2015).

The FERC issued Opinion No. 517-A,²⁰³ addressing requests for rehearing and clarification of, and compliance with, its May 4, 2012 order, Opinion No. 517, which addressed El Paso Natural Gas Company, L.L.C.’s (El Paso) June 2008 general NGA section 4 rate filing.²⁰⁴ On rehearing, the FERC generally upheld its prior decision, but granted limited rehearing with respect to an issue relating to El Paso’s capital structure.²⁰⁵ The FERC also required El Paso to provide refunds consistent with its rulings.²⁰⁶

In Opinion No. 517-A, the FERC responded to requests for rehearing and clarification with respect to four issues.²⁰⁷ First, the FERC generally denied El Paso’s request for rehearing of its decision requiring an adjustment to El Paso’s capital structure for ratemaking purposes to eliminate: (1) a \$615 million balance

196. 154 F.E.R.C. ¶ 61,220, at P 36.

197. *Id.*

198. *UGI Sunbury, LLC*, 155 F.E.R.C. ¶ 61,115 (2016).

199. *Id.* at P 7.

200. *Id.* at P 71, n.69.

201. *Id.* at P 71, n.70.

202. *Id.* at P 73.

203. *El Paso Nat. Gas Co., L.L.C.*, 152 F.E.R.C. ¶ 61,039 (2015).

204. *El Paso Nat. Gas Co., L.L.C.*, 139 F.E.R.C. ¶ 61,095 (2012).

205. 152 F.E.R.C. ¶ 61,039, at P 2.

206. *Id.* at P 303.

207. *Id.* at P 179.

in its cash management account, which the FERC deemed a loan from El Paso to its parent company, El Paso Corp.; and (2) \$145 million in undistributed earnings held by a subsidiary, but granted limited rehearing to recognize a \$50 million debt issuance by El Paso in 2007 that funded part of its loan to El Paso Corp.²⁰⁸ The FERC affirmed its conclusion that the amounts should be excluded from El Paso's capital structure "because the funds used for such purposes are not available for investment in jurisdictional activities."²⁰⁹ Second, the FERC affirmed its rejection of El Paso's of El Paso's request to roll into its rates an additional \$25.7 million for its Line 1903, an oil pipeline that El Paso had acquired and converted to jurisdictional transportation service, except for a segment of the pipeline in California.²¹⁰ The FERC concluded that El Paso had acquired the California segment "for future use or investment, without perhaps a clear intention of what to do with the facilities, and on terms agreeable to it[.]" and that El Paso had failed to support an alternative method of valuing the facilities other than the per-mile cost-valuation methodology accepted when the FERC approved El Paso's acquisition of the facilities.²¹¹

Third, the FERC affirmed its rejection of El Paso's proposal to establish peak/off-peak rates by setting the maximum rate for short-term firm service, park and loan service, and "authorized overrun service equal to 250 percent of the maximum reservation component of the recourse long-term firm service rate, plus the applicable commodity component."²¹² The FERC noted that El Paso's proposed peak rates would apply on any day of the year and would not be offset by lower off-peak rates, and thus the proposal was inconsistent with Order No. 637's dual goals of promoting allocative efficiency while protecting customers from monopoly power.²¹³ Finally, the FERC rejected multiple requests for rehearing concerning its interpretation of article 11.2 of El Paso's 1996 Settlement in Docket No. RP95-363-000, holding that the rates established for certain shippers by that provision remain just and reasonable, that El Paso may not reallocate to other shippers any shortfalls resulting from the rates being lower than El Paso's recourse rates, and that the conditions triggering a further rate reduction under that provision had not been met.²¹⁴ In particular, the FERC held that parties seeking to terminate article 11.2 had failed to meet their burden to show that the public interest requires modification of the rates established by that provision.²¹⁵

208. *Id.* at P 26.

209. *Id.* at P 27.

210. 152 F.E.R.C. ¶ 61,039, at P 148.

211. *Id.* at P 178.

212. *Id.* at P 181.

213. Order No. 637, *Regulation of Short-Term Nat. Gas Transp. Servs. and Regulation of Interstate Nat. Gas Transp. Servs.*, F.E.R.C. STATS. & REGS. ¶ 31,091, *clarified*, Order No. 637-A, F.E.R.C. STATS. & REGS. ¶ 31,099, *reh'g denied*, Order No. 637-B, 92 F.E.R.C. ¶ 61,062 (2000), *aff'd in part and remanded in part sub nom.* Interstate Nat. Gas Ass'n of Am. v. FERC, 285 F.3d 18 (D.C. Cir. 2002), *order on remand*, 101 F.E.R.C. ¶ 61,127 (2002), *order on reh'g*, 106 F.E.R.C. ¶ 61,088 (2004), *aff'd sub nom.* Am. Gas Ass'n v. FERC, 428 F.3d 255 (D.C. Cir. 2005); 152 F.E.R.C. ¶ 61,039, at P 194.

214. 152 F.E.R.C. ¶ 61,039, at P 202.

215. *Id.* at P 241.

2. *El Paso Natural Gas Co.*, 154 F.E.R.C. ¶ 61,120 (2016).

The FERC issued Opinion No. 528-A, which addressed requests for rehearing and clarification of, and compliance with, its October 17, 2013 order, Opinion No. 528, which addressed El Paso Natural Gas Company's (El Paso) September 2010 general NGA section 4 rate filing.²¹⁶ On rehearing, the FERC generally upheld its prior decision, but granted rehearing with respect to its decision to require El Paso to allocate discount adjustment costs within the zone in which the discount was granted.²¹⁷ Opinion No. 528-A also adopted the presiding Administrative Law Judge's (ALJ) initial decision on remand with respect to the appropriate methodology to ensure that El Paso's rates are consistent with article 11.2(b) of El Paso's 1996 Settlement.²¹⁸

In Opinion No. 528-A, the FERC affirmed its decision to require El Paso to use its existing mainline and storage depreciation rates as being the only rates proposed and adequately supported by El Paso in the record.²¹⁹ The FERC also affirmed its decision to adopt a lower depreciation rate for El Paso's Willcox Lateral.²²⁰ With respect to negative salvage, the FERC upheld its decision to reject El Paso's five-year study as being insufficient for a long-term salvage analysis.²²¹ The FERC also affirmed its decision to require El Paso to remove from its rates costs associated with two compressor stations that were abandoned after the test period.²²² The FERC rejected requests for rehearing of various aspects of its decision approving El Paso's zone-of-delivery cost allocation method.²²³ However, the FERC granted El Paso's request for rehearing to permit El Paso to use discount-adjusted volumes in its dekatherm-mileage study for purposes of allocating costs among rate zones, finding that requiring El Paso to allocate discount adjustment costs within the zone in which the discount was granted would produce an anomalous result due to the disproportionate level of discounts El Paso was required to offer in certain zones.²²⁴ The FERC also affirmed its decision that El Paso should be able to use a full discount adjustment in designing its rates.²²⁵

The FERC denied rehearing with respect to its determination regarding the composition of the proxy group used for determining El Paso's rate of return on equity (ROE).²²⁶ The FERC also upheld its rejection of the discounted cash flow (DCF) analysis proffered by El Paso because it calculated growth rates for master limited partnerships in a manner inconsistent with the FERC's two-stage DCF methodology, and affirmed its decision that El Paso's financial and business risk did not warrant granting it an ROE above the median ROE determined by the

216. *El Paso Nat. Gas Co.*, 154 F.E.R.C. ¶ 61,120 (2016); *El Paso Nat. Gas Co.*, 145 F.E.R.C. ¶ 61,040 (2013).

217. 154 F.E.R.C. ¶ 61,120, at P 1.

218. *El Paso Nat. Gas Co.*, 148 F.E.R.C. ¶ 63,014 (2014); 154 F.E.R.C. ¶ 61,120, at P 2.

219. 154 F.E.R.C. ¶ 61,120, at P 25.

220. *Id.* at P 30.

221. *Id.* at P 38.

222. *Id.* at P 50.

223. *Id.* at PP 78, 86, 120, 125.

224. 154 F.E.R.C. ¶ 61,120, at P 118.

225. *Id.* at P 141.

226. *Id.* at P 232.

proxy group analysis.²²⁷ Finally, the FERC affirmed the presiding ALJ's initial decision on remand determining that the appropriate methodology for insuring that shippers whose rates are protected under article 11.2(b) of the 1996 Settlement.²²⁸

3. *Transcontinental Gas Pipe Line Corp.*, 154 F.E.R.C. ¶ 61,211 (2016).

The FERC issued an order on remand from the decision of the United States Court of Appeals for the District of Columbia Circuit in *BNP Paribas Energy Trading GP v. FERC*.²²⁹ In that appeal, the court vacated and remanded the FERC's decision to accept a proposal by Transcontinental Gas Pipe Line Corporation (Transco) to charge BNP Paribas Energy Trading GP (Paribas) and South Jersey Resources Group, LLC (South Jersey), who had assumed capacity through permanent capacity releases by other shippers, a new incremental rate for storage services at the Washington Storage Field that was higher than the rate paid by Transco's historic shippers.²³⁰ The higher incremental rate was designed to recover the cost of new base gas purchased by Transco in order to replace base gas that had been repurchased by the shippers who released their capacity to Paribas and South Jersey.²³¹ The court found that the FERC had failed to explain how its decision properly reflected cost causation, and in particular, "how or why or in what sense the historical [shippers] did not share proportionately in the benefits provided by the new base gas."²³²

On remand, the FERC determined that Transco had not justified the proposal to allocate to Paribas and South Jersey all of the costs of the new base gas, and that it should continue to design its rates for the Washington Storage Field services on a fully rolled-in basis.²³³ The FERC noted that "ordinarily when a shipper terminates its contract and departs the system, the pipeline's capacity to provide service is unaffected and it need not incur any new costs in order to continue to serve remaining customers and new customers who contract for service on the turned back capacity."²³⁴ In this case, however, the shippers who released capacity to Paribas and South Jersey had exercised a contractual right to purchase their share of base gas upon termination of their contracts, which reduced Transco's ability to withdraw gas from storage and required Transco to purchase additional base gas.²³⁵ The FERC concluded that rolling in the costs associated with Transco's purchases of base gas to serve Paribas and South Jersey "benefits the historic shippers by leading to lower rates than if the replacement shippers had not taken over the capacity of the departing historic shippers."²³⁶ The FERC also determined that

227. *Id.* at PP 284, 302.

228. *Id.* at P 427.

229. *Transcon. Gas Pipe Line Corp.*, 154 F.E.R.C. ¶ 61,211 (2016); *BNP Paribas Energy Trading GP v. FERC*, 743 F.3d 264 (D.C. Cir. 2014).

230. *Id.* at 270.

231. 154 F.E.R.C. ¶ 61,211, at P 15.

232. 743 F.3d at 266.

233. 154 F.E.R.C. ¶ 61,211, at P 51.

234. *Id.* at P 52.

235. *Id.*

236. *Id.* at P 90.

it would be impractical to attempt to factor in the opportunity costs of non-jurisdictional shippers in order to justify Transco's incremental rate proposal, and that there was no precedent for such an approach in determining the jurisdictional rates for a public utility.²³⁷

4. *Transwestern Pipeline Company, LLC*, 153 F.E.R.C. ¶ 61,039 (2015).

The FERC approved Transwestern Pipeline Company, LLC's (Transwestern) June 22, 2015 filing of a Stipulation and Agreement to resolve all issues related to its general NGA section 4 rate case filed in Docket No. RP15-23-000.²³⁸ The FERC noted that the settlement sets forth procedures for resolving issues relating to maximum Btu content in the gas stream, new peaking services, flow control, and capacity release, and also provides for Transwestern to roll the costs of certain expansion facilities into its cost of service.²³⁹ The FERC further noted that the settlement includes a moratorium until October 1, 2019 for Transwestern's next general NGA section 4 rate case, and requires Transwestern to file a new general rate case on or before July 1, 2022.²⁴⁰ The FERC approved the uncontested settlement as fair and reasonable and in the public interest.²⁴¹

5. *Florida Gas Transmission Co., LLC*, 153 F.E.R.C. ¶ 61,279 (2015).

The FERC approved Florida Gas Transmission Company, LLC's (FGT) September 11, 2015 filing of a Stipulation and Agreement to resolve all issues related to its general NGA section 4 rate case filed in Docket No. RP15-101-000.²⁴² The FERC explained that the settlement establishes Phase I rates to be effective on the settlement's effective date and to remain in effect for thirty-six months, and then provides for FGT to file Phase II rates to become effective thirty-six months following the settlement's effective date and to remain in effect until superseded by the effectiveness of rates in FGT's next general NGA section 4 rate filing.²⁴³ The FERC further noted that the settlement requires FGT to file a general NGA section 4 rate case five years from the settlement's effective date, contains a moratorium preventing FGT from filing a general NGA section 4 rate case prior to five years from the settlement's effective date, and sets limitations on the circumstances under which settling parties may institute or support a complaint against FGT pursuant to NGA section 5 during the term of the settlement.²⁴⁴ The FERC approved the uncontested settlement as fair and reasonable and in the public interest.²⁴⁵

6. *Gulf South Pipeline Co., LP*, 153 F.E.R.C. ¶ 61,326 (2015).

The FERC approved Gulf South Pipeline Company, LP's (Gulf South) September 25, 2015 filing of a Stipulation and Agreement to resolve nearly all issues

237. *Id.* at PP 107-08.

238. *Transwestern Pipeline Co., LLC*, 153 F.E.R.C. ¶ 61,039 at P 1 (2015).

239. *Id.* at PP 6-7.

240. *Id.* at PP 8-9.

241. *Id.* at P 2.

242. *Fla. Gas Transmission Co., LLC*, 153 F.E.R.C. ¶ 61,279 at P 2 (2015).

243. *Id.* at P 4.

244. *Id.* at PP 10-11.

245. *Id.* at P 16.

related to its general NGA section 4 rate case filed in Docket No. RP15-65-000.²⁴⁶ The FERC explained that the settlement establishes rates based upon a postage-stamp rate design applicable to all of Gulf South's system, with the exception of its Lake Charles System, its Destin lease, the Petal Storage Field, and the Petal Storage Pipeline.²⁴⁷ In addition, the FERC noted that the settlement establishes rolled-in rate treatment for certain Gulf South expansion facilities.²⁴⁸ The FERC also noted that the settlement provides for a moratorium pursuant to which neither Gulf South nor any customer will make filings under NGA sections 4 or 5 with respect to revising the settlement rates or re-proposing substantive tariff revisions to be effective before May 1, 2023, except as specifically permitted by the settlement.²⁴⁹ The FERC also explained that the settlement does not resolve issues relating to segmentation and pathing on Gulf South's system, and these issues remain subject to the hearing process.²⁵⁰ The FERC approved the uncontested settlement as fair and reasonable and in the public interest.²⁵¹

7. *Maritimes & Northeast Pipeline, L.L.C.*, 154 F.E.R.C. ¶ 61,182 (2016).

The FERC approved Maritimes & Northeast Pipeline, L.L.C.'s (Maritimes) February 17, 2016 filing of a Stipulation and Agreement to resolve all issues related to its general NGA section 4 rate case filed in Docket No. RP15-1026-000.²⁵² The FERC noted that the settlement reduces Maritimes' rates for all services to a level below those effective prior to Maritimes' rate filing.²⁵³ The FERC also noted that the settlement establishes a moratorium period during which the settlement rates would remain in effect until at least November 1, 2019, and the settlement requires Maritimes to submit a new general NGA section 4 rate filing by July 1, 2020.²⁵⁴ The FERC also granted interlocutory appeals by Maritimes and Trial Staff of an order by the presiding Administrative Law Judge granting two parties leave to intervene after a settlement in principle had been reached, although the settlement had not yet been filed with the FERC.²⁵⁵ The FERC reaffirmed a prior holding that it applies the strictest possible scrutiny to a motion for late intervention in such circumstances and determined that granting the late intervention at such a late stage "would seriously disrupt the proceeding, place unwarranted burdens on the active parties, and prejudice the interests of the settling parties[.]" as well as undermine the FERC's policy of encouraging settlements.²⁵⁶ The FERC approved the uncontested settlement as fair and reasonable and in the public interest.²⁵⁷

246. *Gulf S. Pipeline Co., LLC*, 153 F.E.R.C. ¶ 61,326 at P 14 (2015).

247. *Id.* at P 4.

248. *Id.* at P 7.

249. *Id.* at P 8.

250. *Id.* at P 17.

251. 153 F.E.R.C. ¶ 61,326, at P 14.

252. *Mars. & Ne. Pipeline, L.L.C.*, 154 F.E.R.C. ¶ 61,182 at P 2 (2016).

253. *Id.* at P 25.

254. *Id.* at P 26.

255. *Id.* at P 32.

256. *Id.* (citing *Black Marlin Pipeline Co.*, 67 F.E.R.C. ¶ 61,205 (1994)); *Id.* at PP 37-38.

257. 154 F.E.R.C. ¶ 61,182, at P 40.

8. *Tennessee Gas Pipeline Co., L.L.C.*, 152 F.E.R.C. ¶ 61,009 (2015).

The FERC accepted Tennessee Gas Pipeline Company, L.L.C.'s (Tennessee) May 15, 2015, Stipulation and Agreement, filed in lieu of filing a general NGA section 4 rate case as would otherwise have been required by Tennessee's existing 2011 rate settlement.²⁵⁸ The FERC determined that the settlement would initiate new rates, to be effective November 1, 2015, which would provide an immediate 3% reduction from Tennessee's currently effective rates, as well as at least one further 2% reduction effective November 1, 2018.²⁵⁹ The FERC approved the uncontested settlement as fair and reasonable and in the public interest, and permitted it to become effective on November 1, 2015.²⁶⁰

9. *Granite State Gas Transmission, Inc.*, 152 F.E.R.C. ¶ 61,096 (2015).

The FERC accepted Granite State Gas Transmission, Inc.'s (Granite State) June 11, 2015 filing of a Second Amended Stipulation and Agreement (Second Amended Settlement), filed in lieu of filing a general NGA section 4 rate case as would otherwise have been required by Granite State's existing 2010 rate settlement, as it was amended in 2011.²⁶¹ The FERC determined that the Second Amended Settlement would provide a reduction in rates by \$0.0080 per dekatherm on a 100% load factor basis to be effective August 1, 2015.²⁶² The FERC also noted that the Second Amended Settlement would update three major capital projects whose costs Granite State is permitted to recover pursuant to the existing settlement.²⁶³ The FERC approved the uncontested Second Amended Settlement as fair and reasonable and in the public interest, and permitted it to become effective on August 1, 2015.²⁶⁴

10. *National Fuel Gas Supply Corp.*, 153 F.E.R.C. ¶ 61,170 (2015).

The FERC accepted National Fuel Gas Supply Corporation's (National Fuel) September 29, 2015 filing of a Supplemental Stipulation and Agreement, filed in lieu of filing a general NGA section 4 rate case as would otherwise have been required by National Fuel's existing 2012 rate settlement.²⁶⁵ The FERC determined that the settlement would initiate new rates, to be effective November 1, 2015, which would provide an immediate 2% reduction from National Fuel's currently effective rates, as well as a further 2% reduction effective November 1, 2016.²⁶⁶ The FERC noted that the settlement provides for National Fuel to implement a Pipeline Safety and Greenhouse Gas Cost Adjustment Mechanism for the recovery of costs associated with new legislation and regulatory requirements issued after August 14, 2015.²⁶⁷ The FERC approved the uncontested settlement as

258. *Tenn. Gas Pipeline Co., L.L.C.*, 152 F.E.R.C. ¶ 61,009 at P 1 (2015).

259. *Id.* at P 3.

260. *Id.* at PP 1, 23.

261. *Granite State Gas Transmission, Inc.*, 152 F.E.R.C. ¶ 61,096 at P 1 (2015).

262. *Id.* at P 7.

263. *Id.* at P 6.

264. *Id.* at PP 8, 17.

265. *Nat'l Fuel Gas Supply Corp.*, 153 F.E.R.C. ¶ 61,170 at P 1, n.2 (2015).

266. *Id.* at P 2.

267. *Id.*

fair and reasonable and in the public interest, and permitted it to become effective on November 1, 2015.²⁶⁸

11. *Sabine Pipe Line LLC*, 153 F.E.R.C. ¶ 61,123 (2015) and 155 F.E.R.C. ¶ 61,142 (2016).

The FERC set Sabine Pipe Line LLC's (Sabine) general NGA section 4 rate case for hearing on October 30, 2015.²⁶⁹ The proposed rates were accepted and suspended "to be effective April 1, 2016, subject to refund and the outcome of a hearing."²⁷⁰ The FERC also accepted, effective November 1, 2015, proposed changes to Sabine's tariff to permit it to reserve capacity for future expansion projects, to revise its penalty provisions, to revise the limitation of liability provision, and to revise its reservation charge crediting provisions.²⁷¹ Acting pursuant to NGA section 5, the FERC also directed "Sabine either to file tariff records to make its *force majeure* definition consistent with FERC policy or explain why it should not be required to do so."²⁷²

The FERC subsequently accepted Sabine's March 16, 2016 filing of a Stipulation and Agreement to resolve all issues in the rate case.²⁷³ The FERC found that the settlement provides for a five-year moratorium on rate change filings and commits Sabine to file a new rate case no later than eight years from the effective date of the settlement.²⁷⁴ The FERC approved the uncontested settlement as fair and reasonable and in the public interest.²⁷⁵

12. *Tallgrass Interstate Gas Transmission, LLC*, 153 F.E.R.C. ¶ 61,258 (2015).

The FERC set Tallgrass Interstate Gas Transmission, LLC's (Tallgrass) general NGA section 4 rate case for hearing on November 30, 2015.²⁷⁶ The proposed rates were accepted and suspended "to be effective May 1, 2016, subject to refund and the outcome of a hearing."²⁷⁷ The FERC noted that among the issues to be examined at the hearing were Tallgrass' proposals regarding rolled-in rates, its fuel tracker, postage-stamp rate design, and non-electric flow measurement.²⁷⁸ The FERC also set for hearing Tallgrass' proposed mechanism for recovering capital expenditures to modernize system infrastructure, but ordered Tallgrass to revise its proposal to make its proposed surcharge consistent with straight fixed variable rate design.²⁷⁹ The FERC also accepted, effective December 1, 2015, Tallgrass' reservation charge crediting and *force majeure* provisions, but required

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

269. *Sabine Pipe Line LLC*, 153 F.E.R.C. ¶ 61,123 at P 1 (2015).

270. *Id.* at P 1.

271. *Id.* at PP 1, 6, 10-11, 14.

272. *Id.* at PP 1, 20.

273. *Sabine Pipe Line LLC*, 155 F.E.R.C. ¶ 61,142 at P 1 (2016).

274. *Id.* at P 6.

275. *Id.* at P 9.

276. *Tallgrass Interstate Gas Transmission, LLC*, 153 F.E.R.C. ¶ 61,258 at P 1 (2015).

277. *Id.* at P 1.

278. *Id.* at P 13.

279. *Id.* at PP 20, 22.

Tallgrass to modify its proposal to reflect that it would not impose curtailment for certain routine events and modify its outage safe harbor provision.²⁸⁰

13. *ANR Pipeline Co.*, 154 F.E.R.C. ¶ 61,146 (2016) and 155 F.E.R.C. ¶ 61,217 (2016).

The FERC set ANR Pipeline Company's (ANR) general NGA section 4 rate case for hearing on February 29, 2016.²⁸¹ The proposed rates were accepted and suspended to be effective August 1, 2016, subject to refund and the outcome of a hearing. The rate case will explore ANR's proposal to restate its base rates for the first time since 1997, when its last general NGA section 4 rate case was resolved by settlement.²⁸² The rate case also will explore ANR's proposal to roll into its system-wide cost of service costs associated with seven expansion projects.²⁸³ The FERC rejected as "a procedurally null alternative" tariff records reflecting ANR's proposal to change from its existing seven-zone rate design to a four-zone rate design, which tariff records were proposed to become effective prospectively following a FERC order approving ANR's proposal.²⁸⁴ The FERC subsequently granted rehearing and stated that ANR's four-zone rate design proposal would be among the issues set for hearing in the rate case.²⁸⁵

M. Rate Investigations

The FERC resumed its *sua sponte* pursuit of investigations, under NGA section 5, into the justness and reasonableness of the rates charged by specific interstate natural gas pipelines.

1. *Columbia Gulf Transmission, LLC*, 154 F.E.R.C. ¶ 61,027 (2016) and 154 F.E.R.C. ¶ 61,275 (2016).

In *Columbia Gulf Transmission, LLC*, the FERC determined that Columbia Gulf appeared to be "substantially over-recovering its cost of service" based on the cost and revenue information provided by Columbia Gulf in its 2013 and 2014 FERC Form No. 2 submissions.²⁸⁶ The FERC initiated an investigation into the justness and reasonableness of Columbia Gulf's rates.²⁸⁷ The FERC subsequently denied Columbia Gulf's challenge to the FERC's legal authority to order submission of a cost and revenue study.²⁸⁸ The FERC also rejected Columbia Gulf's claim that the FERC had improperly relied upon stale data in determining to institute the section 5 investigation, stating that "the procedures we have established in this proceeding will provide Columbia Gulf a full opportunity to provide any

280. *Id.* at PP 24-25.

281. *ANR Pipeline Co.*, 154 F.E.R.C. ¶ 61,146 at P 1 (2016).

282. *ANR Pipeline Co.*, 82 F.E.R.C. ¶ 61,145 (1998).

283. 154 F.E.R.C. ¶ 61,146, at P 14.

284. *Id.* at P 15.

285. *ANR Pipeline Co.*, 155 F.E.R.C. ¶ 61,217 at P 13 (2016).

286. *Columbia Gulf Transmission, LLC*, 154 F.E.R.C. ¶ 61,027 at PP 1, 7-8 (2016).

287. *Id.* at P 9.

288. *Columbia Gulf Transmission, LLC*, 154 F.E.R.C. ¶ 61,275 at P 2 (2016).

information relevant to its assertion that the information provided in its 2013 and 2014 Form 2s no longer reflects its current circumstances.”²⁸⁹

2. *Empire Pipeline, Inc.*, 154 F.E.R.C. ¶ 61,029 (2016) and 154 F.E.R.C. ¶ 61,274 (2016).

In *Empire Pipeline, Inc.*, the FERC determined that Empire appeared to be “substantially over-recovering its cost of service” based on the cost and revenue information provided by Empire in its 2013 and 2014 FERC Form No. 2 submissions.²⁹⁰ The FERC initiated an investigation into the justness and reasonableness of Empire’s rates.²⁹¹ The FERC subsequently denied Empire’s challenge to the FERC’s legal authority to order submission of a cost and revenue study.²⁹²

3. *Iroquois Gas Transmission System, L.P.*, 154 F.E.R.C. ¶ 61,028 (2016).

In *Iroquois Gas Transmission System, L.P.*, the FERC determined that Iroquois appeared to be “substantially over-recovering its cost of service” based on the cost and revenue information provided by Iroquois in its 2013 and 2014 FERC Form No. 2 submissions.²⁹³ The FERC initiated an investigation into the justness and reasonableness of Iroquois’s rates.²⁹⁴

4. *Tuscarora Gas Transmission Co.*, 154 F.E.R.C. ¶ 61,030 (2016) and 154 F.E.R.C. ¶ 61,273 (2016).

In *Tuscarora Gas Transmission Co.*, the FERC determined that Tuscarora appeared to be “substantially over-recovering its cost of service” based on the cost and revenue information provided by Tuscarora in its 2013 and 2014 FERC Form No. 2 submissions.²⁹⁵ The FERC initiated an investigation into the justness and reasonableness of Tuscarora’s rates.²⁹⁶ The FERC subsequently denied Tuscarora’s challenge to the FERC’s legal authority to order submission of a cost and revenue study.²⁹⁷ The FERC also granted clarification that the six-month cutoff date for data to be included in the cost and revenue study did not preclude Tuscarora from providing additional cost and revenue data for changes occurring after that date, “where it can be demonstrated that projections based solely on data for the period before June 30, 2016 will be seriously in error” and where the presiding administrative law judge modifies the procedural schedule to adequately account for the use and consideration of such data.”²⁹⁸

289. *Id.* at P 21.

290. *Empire Pipeline, Inc.*, 154 F.E.R.C. ¶ 61,029 at PP 1, 6-7 (2016).

291. *Id.* at PP 1, 8.

292. *Empire Pipeline, Inc.*, 154 F.E.R.C. ¶ 61,274 at P 2 (2016).

293. *Iroquois Gas Transmission System, L.P.*, 154 F.E.R.C. ¶ 61,028 at PP 1, 6-7 (2016).

294. *Id.* at P 8.

295. *Tuscarora Gas Transmission Co.*, 154 F.E.R.C. ¶ 61,030 at PP 1, 6-7 (2016).

296. *Id.* at P 8.

297. *Tuscarora Gas Transmission Co.*, 154 F.E.R.C. ¶ 61,273 at P 2 (2016).

298. *Id.* at P 18.

N. Scheduling

1. Order No. 587-W, *Standards for Business Practices of Interstate Natural Gas Pipelines; Coordination of the Scheduling Process of Interstate Natural Gas Pipelines and Public Utilities*, 80 Fed. Reg. 67,302 (Nov. 2, 2015), F.E.R.C. Stats. & Regs. ¶ 31,373; 153 F.E.R.C. ¶ 61,061 (2015), on reh'g, Order No. 587-X, 154 F.E.R.C. ¶ 61,207 (2016).

The FERC amended its regulations (18 CFR Part 284) to incorporate seven business practice standards applicable to interstate natural gas pipelines.²⁹⁹ The FERC also revised the information filed in interstate natural gas pipelines' Index of Customers to reflect the use of the pipelines' proprietary point codes used to identify receipt and delivery locations and related conforming changes in other posting regulations.³⁰⁰ These updated business practice standards contain and supplement the revisions to the North American Energy Standards Board (NAESB) scheduling standards accepted by the Commission in Order No. 809 as part of the FERC's efforts to harmonize gas-electric scheduling coordination, and are required to be implemented along with the regulations adopted in Order No. 809, i.e., a shared implementation date with Order No. 809 of April 1, 2016.³⁰¹ In Order No. 587-X, FERC granted rehearing of Order No. 587-W and revised 18 C.F.R. § 284.13(b)(2)(iv) regarding the posting of receipt and delivery points for interruptible transportation.³⁰²

2. Order No. 809, *Coordination of the Scheduling Processes of Interstate Natural Gas Pipelines and Public Utilities*, Final Rule, 80 FR 23197 (Apr. 24, 2015), F.E.R.C. Stats. & Regs. ¶ 31,368, 151 F.E.R.C. ¶ 61,049 (2015).

In light of increasing reliance on natural gas for electric generation and a need for both electric generators and pipelines to better coordinate supply and demand on very cold or very hot days, the FERC took further steps attempting to improve coordination of wholesale natural gas and electricity market scheduling.³⁰³ The FERC revised the Commission's regulations relating to the scheduling of transportation service on interstate natural gas pipelines to better coordinate the scheduling practices of the wholesale natural gas and electric industries, as well as to provide additional scheduling flexibility to interstate shippers.³⁰⁴ Order No. 809 also incorporated by reference into the Commission's regulations certain modified standards developed by the North American Energy Standards Board (NAESB) that revised the standard nomination timeline for interstate natural gas pipelines, including expanding the number of intraday nomination cycles from the current

299. Order No. 587-W, *Standards for Bus. Practices of Interstate Nat. Gas Pipelines; Coordination of the Scheduling Process of Interstate Nat. Gas Pipelines and Pub. Utils.*, 153 F.E.R.C. ¶ 61,061 at P 1 (2015) (to be codified at 18 C.F.R. pts. 157, 260, 284).

300. *Id.* at PP 2, 20.

301. *Id.* at PP 2, 3, 4, 8, 41-42.

302. Order No. 587-0X, *Standards for Bus. Practices of Interstate Nat. Gas Pipelines*, 154 F.E.R.C. ¶ 61,207 at PP 1, 5-6 (2016) (to be codified at 18 C.F.R. pt. 284).

303. Order No. 809, *Coordination of the Scheduling Processes of Interstate Nat. Gas Pipelines and Pub. Utils.*, 151 F.E.R.C. ¶ 61,049 at P 1 (2015) (to be codified at 18 C.F.R. pt. 284).

304. *Id.* at PP 1, 13, 23-24.

two to three.³⁰⁵ Order No. 809 established an implementation date of April 1, 2016.³⁰⁶ In light of the transition from two to three intraday nomination cycles, the FERC also clarified timing and interpretations of recall rights under certain existing capacity release contracts.³⁰⁷

More specifically, the FERC's Final Rule declined to adopt the NOPR proposal to move the existing capacity release start of the gas day to 4 a.m. CCT, concluding that, while certain efficiencies could be achieved through a better alignment of the natural gas and electric operating days, the record did not justify changing the start time for the nationwide natural gas day, while further noting there are also regional efforts continue to address the misalignment between the gas day and the regional electric days.³⁰⁸ The core elements of Order No. 809 include: changing the nationwide Timely Nomination Cycle nomination deadline for scheduling; adding an additional third intraday scheduling opportunity during the natural gas operating day; and providing additional contracting flexibility to firm natural gas transportation customers through the use of multi-party transportation contracts.³⁰⁹ The FERC also decided that pipelines will not be required to provide multi-party service contracts for interruptible transportation.³¹⁰

The FERC further ruled for retaining and against revising the "No-Bump Rule," which provides interruptible shippers preference access to firm capacity.³¹¹ The no-bump rule states that a shipper that is currently flowing gas cannot lose its capacity because another shipper with a higher priority, e.g., firm transportation, elects to increase its receipt of gas.³¹² Certain participants argued that the No-Bump Rule precludes firm shippers from using their firm capacity rights to meet their peak electric demands but the FERC opted to maintain the No-Bump Rule in the last intraday cycle on the grounds it provided stability in the nomination process, especially for interruptible shippers.³¹³

O. Termination

1. *Columbia Gas Transmission, LLC*, 153 F.E.R.C. ¶ 61,146 (2015).

Columbia Gas Transmission, LLC (*Columbia*) held an open season to solicit interest in its East Side Expansion, resulting in four non-conforming and negotiated rate agreements.³¹⁴ *Columbia* filed tariff records reflecting those agreements, including two that contained provisions allowing the shipper to terminate their

305. *Id.* at P 23.

306. *Id.* at P 168.

307. *Id.* at P 13, 16, 128, 139.

308. 151 F.E.R.C. ¶ 61,049, at PP 62, 64, 68.

309. *Id.* at PP 1, 23, 108, 121-123, 145.

310. *Id.* at PP 1, 23, 93, 104, 107, 155. Order No. 809 essentially incorporates the results of a stakeholder process held by NAESB in 2014, and a comparison of the NAESB nomination timeline and the revised NAESB nomination timeline/ scheduling deadlines set out in the Appendix to Order No. 809. *Id.*

311. *Id.* at PP 24, 104-106.

312. 151 F.E.R.C. ¶ 61,049, at P 73.

313. *Id.* at P 148.

314. *Columbia Gas Transmission, LLC*, 153 F.E.R.C. ¶ 61,146 at P 2 (2015).

agreements early.³¹⁵ Columbia contended that FERC has approved such early termination provisions in anchor shipper contracts when necessary in order to obtain capital for an expansion.³¹⁶ The Commission has previously held that a contract provision giving a shipper the option to terminate or reduce its contract demand before the expiration of its contract is a valuable right, since it can enable the shipper to avoid liability for future reservation charges.³¹⁷ Because of that value, the right must be afforded to all other similarly situated firm shippers pursuant to a generally applicable provision in the pipeline's tariff, or, alternatively – in cases involving an anchor shipper for an expansion – the provision may be permissible if offered to anchor shippers in the open season for the expansion.³¹⁸ Since Columbia's tariff did not state that it has any generally applicable tariff provision offering an early termination option of the type included in the two agreements, the Commission required Columbia to either: (1) remove the early termination or otherwise revise the agreements to include contract term provisions consistent with the open season notice; or (2) provide such rights to all its customers under its generally applicable tariff.³¹⁹

II. INFRASTRUCTURE

A. Pipelines

1. Judicial Opinions

a. Court of Appeals

i. *Sierra Club and Galveston Baykeeper v. F.E.R.C.*, No. 14-1275 (D.C. Cir. June 28, 2016).

The D.C. Circuit decided two related cases on June 28, 2016 involving FERC LNG project siting approvals, one concerning an export terminal on Quintana Island, Texas, proposed by Freeport LNG Development L.P. (Freeport), and the other in Cameron Parish, Louisiana proposed by Sabine Pass LNG, L.L.C. (Sabine Pass).³²⁰ The cases were decided on substantive grounds, with the court disposing of the threshold jurisdictional questions that the FERC presented.³²¹ The *Freeport* decision concluded that challengers, Galveston Baykeeper and the Sierra Club, had standing under Article III because a local member had alleged construction noise impacts at her home proximate to the Freeport LNG facility.³²² Despite the FERC's contention, the Sierra Club's challenge was not mooted by two subsequently-issued Department of Energy "informational reports" about the facility –

315. *Id.* at P 1, 18.

316. *Id.* at P 18.

317. *Id.* at P 19.

318. *Id.*

319. 153 F.E.R.C. ¶ 61,146, at P 20.

320. *Sierra Club v. FERC*, 827 F.3d 36 (D.C. Cir. 2016); *Sierra Club v. FERC*, 827 F.3d 59 (D.C. Cir. 2016).

321. 827 F.3d at 43; 827 F.3d at 62.

322. 827 F.3d at 44.

the petitioners “argument. . . that the Commission bungled its NEPA review by failing to consider . . . specific indirect and cumulative effects” had survived.³²³ Focused solely on “whether the Commission discharged its NEPA duty” in approving the siting and construction of the Freeport facilities, the D.C. Circuit panel reached the merits of the case.³²⁴ The court concluded that “none of the [plaintiff’s] challenges can survive [the] deferential standard of review” afforded FERC in NEPA cases, since the alleged indirect increases in domestic natural gas production and coal use were, even if true, the result of the Department of Energy’s export sales approval and not a result of the FERC’s siting and construction approval.³²⁵ Also, the environmental groups’ claims that “the Commission should have undertaken a nationwide analysis” to consider the cumulative effects of several pending LNG export terminal proposals drew “the NEPA circle too wide for the Commission.”³²⁶ The FERC was only obligated to consider impacts from actions “in the same geographic area as the project under review.”³²⁷

ii. *Sierra Club v. F.E.R.C.*, 827 F.3d 59 (D.C. Cir. 2016).

In the related *Sabine Pass* case, the D.C. Circuit reached largely the same conclusions using a similar analysis. Although Sierra Club had standing to challenge FERC’s decisions, “its challenges to the Commission’s orders fail on the merits, largely for the reasons stated in the companion case” about the Freeport facility.³²⁸ The Sierra Club challenge also failed to exhaust administrative remedies, since in its motion for rehearing at the FERC, the Sierra Club failed to “put the Commission on notice that [it was] challenging the Commission’s cumulative impacts analysis as it pertained to projects other than the Sabine Pass.”³²⁹

iii. *Gunpowder Riverkeeper v. F.E.R.C.*, 807 F.3d 267 (D.C. Cir. 2015).

In 2014, a local Maryland environmental organization concerned about preserving and protecting the Gunpowder River watershed area near Chesapeake Bay petitioned the D.C. Circuit to challenge the FERC’s issuance of a natural gas pipeline certificate to Columbia Gas Transmission, L.L.C.³³⁰ to extend a pipeline in Maryland, provided that it received the requisite federal and state environmental permits.³³¹ Because section 7 authorization includes the right of eminent domain, Gunpowder Riverkeeper had standing on behalf of members affected by the exercise of that right.³³² In addition, Gunpowder’s claims under the NEPA and the CWA are germane to the undisputed purposes of the organization, as the goal of

323. *Id.* at 45.

324. *Id.* at 40, 46, 51.

325. *Id.* at 46.

326. *Id.* at 50.

327. 827 F.3d at 50.

328. 827 F.3d at 62.

329. *Id.* at 70.

330. *Gunpowder Riverkeeper v. FERC*, 807 F.3d 267, 270 (D.C. Cir. 2015).

331. *Id.* at 270-71.

332. *Id.* at 272.

both statutes is to prevent degradation of the natural environment.³³³ The subsequent issuance of the CWA permits did not moot the petition, because the CWA permit did not affect the NEPA questions and thus, through the validity of the certificate, the eminent domain questions presented by the petition. However, the court found although the “the property interests of neighboring landowners arguably fall within the zone of interests the NGA protects,” the zone of interests the NGA protects does not encompass injuries arising out of violations of other statutes, such as the CWA or the NEPA, and the zone of interests protected by the NEPA and the CWA does not extend to economic interests in property when petitioner failed to allege injury to its environmental interests.³³⁴

By not particularly alleging environmental harm under the NEPA or the CWA, nor substantively presenting themselves as “aggrieved” within the zone of interests protected by the NGA, the petition failed “for want of a legislatively conferred cause of action.”³³⁵ Although she agreed with the disposition of the case because the NEPA and CWA allegations were deficient, Judge Judith Rogers dissented from the majority’s zone of interests analysis, arguing that petitioners properly asserted a cause of action under the environmental statutes.³³⁶

b. Federal District Court

Although not direct reviews of FERC orders, two important cases were filed in federal District Court in 2015-2016 challenging the FERC’s siting authority for interstate natural gas pipelines.

i. *Delaware Riverkeeper Network v. FERC*, D.D.C. No. 16-cv-00416 (D.D.C. filed Mar. 2, 2016).

After presenting several disputes to the FERC and in the Court of Appeals, in March 2016 Delaware Riverkeeper Network (Delaware Riverkeeper) filed a complaint for declaratory and injunctive relief against the FERC in the U.S. District Court for the District of Columbia.³³⁷ The complaint alleged that the FERC’s pipeline review and approval process was “infected by structural bias” in violation of the organization’s due process rights.³³⁸ Delaware Riverkeeper claimed that the FERC’s “funding mechanism” of assessing regulatory fees on operating pipelines “creates a perverse incentive structure for the Commission to be biased in favor of the pipeline companies that it regulates,” especially with respect to authorizing the construction of more pipelines.³³⁹ This funding mechanism, the organization alleged, “compels the Commission to be a business partner with, rather than a dispassionate regulator of, the industry it is tasked with overseeing.”³⁴⁰ The FERC moved to dismiss the complaint in May, arguing that Delaware Riverkeeper “does

333. *Id.* at 272.

334. *Id.* at 273-74.

335. 807 F.3d at 270, 274-75.

336. *Id.* at 275, 279 (Rogers, J., dissenting).

337. Complaint for Declaratory and Injunctive Relief at 1, *Del. Riverkeeper Network v. FERC*, No. 16-cv-00416 (D.D.C. Mar. 2, 2016).

338. *Id.* at 2.

339. *Id.*

340. *Id.* at 7.

little more than raise the unsubstantiated specter of future agency indifference” to its claims, and accordingly the organization lacked standing and failed to state a claim upon which relief can be granted.³⁴¹ Substantively, the agency argued that Delaware Riverkeeper’s argument is “based on a fundamental misunderstanding of how the Commission is funded.”³⁴² Instead of getting more revenue in proportion to the number of pipelines it approves, “increasing the number of pipelines only changes the *number* of pipelines that *divide* the Commission’s expenses.³⁴³ In other words, it does not increase the pie – it only changes how the pie is divided.”³⁴⁴ A ruling on the Commission’s motion to dismiss is expected later this summer.

ii. *Town of Dedham v. FERC*, No. 15-12352-GAO, 2015 WL 4274884 (D. Mass. July 15, 2015).

Algonquin Gas Transmission L.L.C. received the FERC’s authorization to build a pipeline through four northeastern states in March 2015.³⁴⁵ The agency granted a rehearing request brought by the Town of Dedham, Massachusetts in early April, given that extenuating issues affecting the town – through which the pipeline was expected to travel – may have required further consideration.³⁴⁶ Despite granting rehearing, the FERC also granted Algonquin authority to proceed with construction through Dedham in June.³⁴⁷ As a result, and to preserve the meaningful judicial review of the FERC’s order, the Town quickly filed suit in federal District Court in Massachusetts to enjoin construction.³⁴⁸ However, the District Court denied the Town’s motion for a preliminary injunction as it failed to show that the plaintiffs had a reasonable likelihood of success on the merits.³⁴⁹ The court concluded that “under the relevant portion of the NGA [15 U.S.C. § 717r(b)], the courts of appeal are given exclusive jurisdiction to review FERC decisions,” and “exclusive means exclusive.”³⁵⁰ Because the Town made its case under a different code section that was “simply an enforcement provision, not an open-ended grant of jurisdiction to the district courts,” their motion had to be denied.³⁵¹ *Town of Dedham* affirmed that the only statutory routes to review of FERC pipeline permitting certificates (the Natural Gas Act and the All Writs Act) both lead to the Court of Appeals, and not to District Court.³⁵²

341. Defendants’ Statement in Support of Motion to Dismiss Plaintiffs’ Complaint for Lack of Subject Matter Jurisdiction and Failure to State a Claim at 1, *Del. Riverkeeper Network v. F.E.R.C.*, No. 16-cv-00416 (D.D.C. May 3, 2016).

342. *Id.* at 2.

343. *Id.* at 3.

344. *Id.* (emphasis added).

345. *Town of Dedham v. FERC*, No. 15-12352-GAO, 2015 WL 4274884, at *1 (D. Mass. July 15, 2015).

346. *Id.*

347. *Id.*

348. *Id.*

349. *Id.* at *1-2.

350. *Town of Dedham*, 2015 WL 4274884, at *1.

351. *Id.* at *2.

352. *See id.*

c. FERC Cases

i. *Jordan Cove Energy Project, L.P.*, 154 F.E.R.C. ¶ 61,190 (2016).

In March 2016, the FERC denied the joint proposals of Pacific Connector L.P. and Jordan Cove L.P. to build complementary pipeline and LNG export terminal projects in Oregon.³⁵³ Pacific Connector proposed in 2013 to build a \$1.74 billion, 232-mile long, thirty-six-inch diameter natural gas pipeline in Oregon (Pacific Connector Pipeline), to run between Klamath County and the Jordan Cove LNG terminal (Jordan Cove).³⁵⁴ Jordan Cove proposed to site, construct, and operate an LNG export terminal in southwestern Oregon near Coos Bay, using the gas brought to it by the PCP.³⁵⁵ These proposed, interdependent projects were estimated to enable the production of up to 6.8 million metric tons per annum (MMTPA) of LNG,³⁵⁶ if both could be sited and built.³⁵⁷ The FERC denied both proposals.

Pacific Connector had admitted “that it does not have a single confirmed customer and has only obtained 4.7% of the right-of-way easement acreage” as of 2015, deemed to be insufficient evidence of project demand.³⁵⁸ Analyzing the project’s merits under its Certificate Policy Statement, the FERC found that “the generalized allegations of need proffered by Pacific Connector do not outweigh the potential for adverse impact on landowners and communities.”³⁵⁹ Under the Certificate Policy Statement “the strength of the benefit showing” evidenced by project demand must “be proportional to the applicant’s proposed exercise of eminent domain procedures,” a standard that was not met given there was “little or no evidence of need” for the pipeline.³⁶⁰ The FERC concluded that although it could condition a certificate to protect against environmental impacts and against the commencement of construction until Pacific Connector successfully executed contracts for an acceptable level of service, “the right to eminent domain is inherent in a certificate issued under NGA section 7.”³⁶¹ The FERC found that the record does not support a finding that the public benefits of the Pacific Connector Pipeline outweigh the adverse effects on landowners, and thus, denied the request for certificate authority to construct and operate the pipeline and the related transportation authorization.³⁶² Because the record did not support a finding that the Jordan Cove LNG Terminal could operate absent the Pacific Connector Pipeline, the FERC found that authorizing its construction would be inconsistent with the public interest.³⁶³

353. *Jordan Cove Energy Project, L.P.*, 154 F.E.R.C. ¶ 61,190 at PP 1-3 (2016).

354. *Id.* at PP 1-2, 10, 11.

355. *Id.* at PP 2, 8.

356. *Id.* at P 6.

357. *Id.* at P 13.

358. 154 F.E.R.C. ¶ 61,190, at PP 25, 39, 41.

359. *Id.* at P 41.

360. *Id.* at P 38-39.

361. *Id.* at P 41.

362. *Id.* at P 41, 42.

363. 154 F.E.R.C. ¶ 61,190, at P 44.

The FERC did, however, deny the proposals without prejudice to a new application, enabling the sponsors to resubmit if “the companies show a market need for these services in the future.”³⁶⁴

ii. *Tennessee Gas Pipeline, L.L.C.*, 153 F.E.R.C. ¶ 61,215 (2015).

On remand from the D.C. Circuit in the case *Delaware Riverkeeper v. F.E.R.C.* (2015), the FERC determined that a supplemental environmental analysis developed by its staff showed that environmental “impacts from the Northeast Upgrade Project and Tennessee Gas Pipeline, L.L.C.’s (Tennessee) three other [pipeline] projects are not significant” either individually or cumulatively under NEPA.³⁶⁵ Tennessee’s four projects, proposed from 2009 to 2011, involved pipeline loop segments, modifications, and upgrades to its pipeline network in Pennsylvania and New Jersey.³⁶⁶ The D.C. Circuit determined that the four projects together “constituted a complete upgrade of almost 200 miles of continuous pipeline.”³⁶⁷ As such, the Commission was directed to consider the cumulative impacts of the four projects as a whole, rather than as four separate segments.³⁶⁸ On remand, the FERC concluded that even when considered as a whole, “none of the resource impacts” from the projects “escalated to a significant level or required additional mitigation.”³⁶⁹ Because 84% percent of the pipeline loops were to be collocated with existing pipelines, because the impacts would be limited in geographic range and timeframe, and because mitigation measures had already been committed to and implemented by the project sponsors, the supplemental analysis determined that the issues raised on appeal in the D.C. Circuit had been addressed.³⁷⁰ No additional mitigation was required.³⁷¹ Compared to “new, green-field pipelines,” the four Tennessee projects did not have a significant impact on environmental resources under either an additive or cumulative analysis.³⁷²

iii. *Columbia Gas Transmission, L.L.C.*, 153 F.E.R.C. ¶ 61,064 (2015).

The FERC denied requests for rehearing and stay of its certificate authorization for Columbia Gas Transmission, LLC’s (Columbia) East Side Expansion Project, after an unsuccessful challenge of the project in the Third Circuit earlier in 2015.³⁷³ The proposed system expansion consisted of 9.5 miles of twenty-six-inch diameter pipe in Pennsylvania, 9.6 miles of twenty-inch diameter pipe in New

364. *Id.* at P 48.

365. *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304 (D.C. Cir. 2014); *Tenn. Gas Pipeline, L.L.C.*, 153 F.E.R.C. ¶ 61,215 at P 1 (2015).

366. 153 F.E.R.C. ¶ 61,215, at P 8.

367. *Id.*

368. *Id.* at P 12.

369. *Id.* at P 23.

370. *Id.* at PP 2, 23, 28.

371. 153 F.E.R.C. ¶ 61,215, at P 32.

372. *Id.* at P 29.

373. *Columbia Gas Transmission, L.L.C.*, 153 F.E.R.C. ¶ 61,064 at P 1 (2015); *In re Clean Air Council*, No. 15-2940 (3d Cir. Dec. 8, 2015) (order denying mandamus relief).

Jersey, and new compressors and other facilities upgrades in Pennsylvania, New York, and Maryland.³⁷⁴ Because the capacity of the project was “fully subscribed under long-term contracts with five shippers” and because “the pipeline loops will be collocated with the existing pipeline for approximately 84 percent of the project,” the FERC determined that “with the adopted mitigation measures, the project [approval] would not constitute a major federal action significantly affecting the human environment.”³⁷⁵ The FERC also rejected intervenor Clean Air Council’s request for a stay because that group made “no showing that [project] circumstances will result in irreparable harm” especially given Columbia’s updated project plans to use conventional boring technology (instead of more invasive trenching techniques) to cross Beaver Creek in Pennsylvania.³⁷⁶ The FERC also rejected Clean Air Council’s argument that the Commission must consider the effects of induced natural gas production as an environmental impact of a specific pipeline project.³⁷⁷ The FERC concluded that without more specific information as to the provenance of the transported gas, “the impacts of natural gas production are not reasonably foreseeable” and are “so nebulous that we cannot forecast their likely effects” in an environmental analysis.³⁷⁸ The FERC also declined to reconsider the use of a half-mile radius for analyzing cumulative impacts, finding that the challenged environmental assessment “took precisely the approach the [Council on Environmental Quality] guidance advises.”³⁷⁹ Finally, the FERC concluded that despite intervenor objections “a programmatic EIS is not required to evaluate the regional development of a resource by private industry if the development is not part of, or responsive to, a federal plan or program in that region.”³⁸⁰

iv. *Constitution Pipeline Company, L.L.C.*, 154 F.E.R.C. ¶ 61,046 (2016).

On January 28, 2016, the FERC denied requests for rehearing and approved variances for Constitution Pipeline Company, LLC’s (Constitutions) proposal to construct and operate a 125-mile long, thirty-inch diameter pipeline from Susquehanna County, Pennsylvania to Iroquois Gas’s facility in Schoharie County, New York.³⁸¹ One intervenor, Stop the Pipeline, petitioned for rehearing after being denied mandamus relief in the Second Circuit.³⁸² The FERC affirmed its previous order in large part because the pipeline’s “strong showing of public benefit” supported granting its certificate.³⁸³ “No market study or other additional evidence is

374. 153 F.E.R.C. ¶ 61,064, at P 2.

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

376. *Id.* at PP 8-9.

377. *Id.* at P 30.

378. *Id.* at PP 19-20.

379. 153 F.E.R.C. ¶ 61,064, at P 39.

380. *Id.* at P 58.

381. *Constitution Pipeline Co., L.L.C.*, 154 F.E.R.C. ¶ 61,046 at P 1 (2016).

382. *Id.* at P 9; *In re Stop the Pipeline*, No. 15-926 (2d Cir. Apr. 21, 2015) (order denying relief).

383. 154 F.E.R.C. ¶ 61,046, at P 19.

necessary where, as here, market need is demonstrated by contracts for 100 percent of the project's capacity," a policy affirmed twice by the D.C. Circuit.³⁸⁴ Additional claims that public participation was insufficient, that the Commission's environmental findings and stipulated conditions were legally impermissible, and that the environmental studies were inadequate or unlawful, were all denied.³⁸⁵

B. Storage Projects

1. *East Cheyenne Gas Storage, LLC*, 155 F.E.R.C. ¶ 61,236 (2016).

East Cheyenne Gas Storage LLC (East Cheyenne) filed an application seeking authorization to further amend its certificate by expanding the certificated boundaries of the East Cheyenne Gas Storage Project reservoirs in the West Peetz and Lewis Creek fields located in Logan County, Colorado.³⁸⁶ East Cheyenne's proposal would increase the certificated acreage of the storage field by 2,793 acres, to a total of 8,882 acres.³⁸⁷ Based on its geologic interpretation of the project reservoirs, East Cheyenne stated that the current certificated boundary does not accurately enclose the area required for storage operations.³⁸⁸ Specifically, East Cheyenne asserted that full development of the reservoirs to the maximum certificated capacities will result in natural gas presence extending beyond certain of the certificated reservoir boundaries, thereby requiring an expansion of reservoir boundaries to protect the integrity of the project.³⁸⁹

The Commission found that most of the proposed boundary expansion was supported by the geological and engineering data provided by East Cheyenne, and that the proposed boundary expansion was necessary for East Cheyenne to fully develop and maintain the integrity of its authorized storage facility and the services it provides to its customers.³⁹⁰ Additionally, the Commission found that since East Cheyenne provides all of its storage and hub services at market-based rates, existing customers will not be required to subsidize new facilities.³⁹¹

2. *National Fuel Gas Supply Corporation*, 153 F.E.R.C. ¶ 61,301 (2015).

National Fuel Gas Supply Corporation (National Fuel) filed an application seeking authorization to convert Well 7451 from observation to withdrawal-only status, and to expand the reservoir and buffer boundaries of its Beech Hill, East Independence, and West Independence storage fields (collectively, Beech Hill Complex or Storage Complex), all located in Allegany and Steuben Counties, New York.³⁹² The Commission issued National Fuel a certificate authorizing a

384. *Id.* at P 21.

385. *Id.* at PP 30, 53, 67, 77. *See generally id.* at PP 78-184.

386. *E. Cheyenne Gas Storage, LLC*, 155 F.E.R.C. ¶ 61,236 at P 1 (2016).

387. *Id.* at P 6.

388. *Id.*

389. *Id.*

390. *Id.* at P 14.

391. 155 F.E.R.C. ¶ 61,236, at P 14.

392. *Nat'l Fuel Gas Supply Co.*, 153 F.E.R.C. ¶ 61,301 at P 1 (2015).

portion of the proposed expansion area but denied the request to convert Well 7451 from observation to withdrawal-only status.³⁹³

Specifically, the Commission authorized the expansion of the National Fuel's Beech Hill, Beech Hill Annex, West Independence, and East Independence certificated reservoir and buffer boundaries to include the Oriskany Sandstone reservoir, the Onondaga Limestone cap rock, and the Helderberg Limestone base rock in Allegany and Steuben Counties, New York.³⁹⁴ However, the Commission denied the request to convert Well 7451, noting it would not indefinitely continue to authorize further expansions of the Beech Hill Complex to areas where storage gas has migrated and stating that National Fuel must effectively manage its storage fields in a manner that prevents migration of storage gas beyond certificated boundaries.³⁹⁵ The Commission required National Fuel to file within six months a comprehensive and specific storage gas containment and management plan detailing how it will effectively mitigate any flow of storage gas from the Beech Hill Field to the Shongo pool, as well as additional assessment and mitigation efforts designed to prevent the flow of any storage gas from the Beech Hill Storage Complex in general, including details of how National Fuel intends to recover storage gas from Shongo pool without inducing further migration from the Beech Hill Field.³⁹⁶

3. *Floridian Natural Gas Storage Company, LLC*, 152 F.E.R.C. ¶ 61,041 (2015).

Floridian Natural Gas Storage Company (Floridian) filed an application to amend its certificate to construct and operate a liquefied natural gas (LNG) storage facility near Indiantown in Martin County, Florida.³⁹⁷ First authorized to construct and operate its project in 2008, Floridian sought to modify the previously authorized Phase 1 facilities by substituting a 1 billion cubic feet (Bcf) single containment LNG storage tank for the previously authorized 4 Bcf full-containment tank and reducing the associated Phase 1 vaporization capacity.³⁹⁸ The Commission granted the amendment, noting that the findings in the 2008 certificate order were not affected by Floridian's proposed facility modifications.³⁹⁹

393. *Id.*

394. *Id.* at ordering paragraph (A).

395. *Id.* at PP 68-71.

396. *Id.* at P 72.

397. *Floridian Nat. Gas Storage Co., LLC*, 152 F.E.R.C. ¶ 61,041 at P 1 (2015).

398. *Id.* at P 1, n. 1.

399. *Id.* at PP 11, 13.

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