

REPORT OF THE NATURAL GAS COMMITTEE

This report summarizes policy developments and legal decisions that occurred at the Federal Energy Regulatory Commission (FERC or the Commission), the Pipeline and Hazardous Materials Safety Administration (PHMSA), and the United States Courts of Appeals in natural gas regulation from July 1, 2017, to June 30, 2018.*

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* The Natural Gas Committee is grateful to the following individuals for their contributions to this report: Lawrence Acker, Monique Watson, Emily Mallen, Joseph R. Hicks, Ammaar Joya, Natalie Karas, Jerrod L. Harrison, Randall S. Rich, Robert Ballentine, John P. Perkins, III, Joseph B. Williams, Janna Chesno, George Flugard, and Kevin Frank.

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I. RULEMAKING ACTIONS

A. *Revised Policy Statement on Treatment of Income Taxes*

In 2016, SFPP, L.P. (SFPP) and several shippers that transported petroleum products over SFPP's pipelines (Shippers) petitioned the U.S. Court of Appeals for the District of Columbia to review three FERC orders related to cost-of-service tariffs on oil pipelines.¹ In *United Airlines*, Shippers argued that the FERC's discounted cash flow (DCF) rate of return methodology provided master limited partnership (MLP) pipeline investors a return on equity (ROE) sufficient to pay their

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

taxes, and that giving MLP-owned pipelines an income tax allowance in addition to the pre-investor-tax rate of return constitutes “double recovery” of income taxes.² Although the court acknowledged that, under its prior decision in *ExxonMobil Oil Corp. v. FERC*, it may be reasonable for the FERC to grant a tax allowance to partnership pipelines, the court held that the Commission failed to demonstrate that there is no double recovery of taxes for partnerships.³ The court vacated the FERC’s orders with respect to this issue, and remanded to the Commission to consider “mechanisms for which the Commission can demonstrate that there is no double recovery.”⁴

On remand, the Commission issued a Notice of Inquiry (NOI) seeking comments on how to address any double recovery that might result from the combination of its current income tax allowance and rate of return policies.⁵ The FERC “received 24 comments and 19 reply comments from customer, pipeline, and electric utility interests.”⁶ The FERC issued a Revised Policy Statement concluding that an impermissible double recovery does result from granting a MLP pipeline both an income tax allowance and a ROE pursuant to the DCF methodology.⁷ Accordingly, the FERC stated that it “will no longer permit MLPs to recover an income tax allowance” in their cost of service.⁸ Additionally, the Commission issued a Notice of Proposed Rulemaking to address the effects of the Revised Policy Statement on the rates of interstate natural gas pipelines organized as MLPs.⁹

Although parties raised numerous arguments why MLPs must continue recovering an income tax allowance to ensure reasonable returns for their investors, the FERC found none of them persuasive.¹⁰ The Commission concluded that even in the absence of an income tax allowance, MLP pipelines would continue to recover their costs and a reasonable return for investors.¹¹ Finally, the Commission emphasized that “the post-*United Airlines*’ policy changes . . . will be reflected in initial oil and gas pipeline cost-of-service rates and cost-of-service rate changes on a going-forward basis under existing ratemaking policies.”¹²

2. *Id.* at 127.

3. *ExxonMobil Oil Corp. v. FERC*, 487 F.3d 945, 953 (D.C. Cir. 2007) (“FERC has reasonably explained why income taxes paid on partnership income are properly allocated to the regulated entity for ratemaking purposes, and the shipper petitioners have offered no compelling reason to second-guess the agency’s policy choices.”); *United Airlines*, 827 F.3d at 136.

4. *United Airlines*, 827 F.3d at 137.

5. Notice of Inquiry, *Inquiry Regarding the Commission’s Policy for Recovery of Income Taxes*, 157 F.E.R.C. ¶ 61,210 (2016).

6. *Revised Policy Statement on Treatment of Income Taxes*, 162 F.E.R.C. ¶ 61,227 at P 7 (2018).

7. *Id.* at P 45.

8. *Id.* at P 2.

9. Notice of Proposed Rulemaking, *Interstate and Intrastate Natural Gas Pipelines; Rate Changes Relating to Federal Income Tax Rate*, 162 F.E.R.C. ¶ 61,226 (2018).

10. *See generally* 162 F.E.R.C. ¶ 61,227 (2018).

11. *Id.* at P 44.

12. *Id.* at P 47.

B. Notice of Proposed Rulemaking, Rate Changes Relating to the Federal Income Tax Rate - Interstate and Intrastate Natural Gas Pipelines; Rate Changes Relating to Federal Income Tax Rate

The FERC issued a Notice of Proposed Rulemaking that proposes a process to determine whether interstate natural gas pipelines' rates require adjustment to reflect the federal corporate income tax rate reduction from 35 percent to 21 percent pursuant to the Tax Cuts and Jobs Act, and the FERC's elimination of an income tax allowance for MLPs in its Revised Policy Statement on Treatment of Income Taxes.¹³ The Commission's stated goal is to ensure that the benefits of the federal corporate income tax reduction and elimination of the MLP income tax allowance flow through to customers to the extent that pipelines would otherwise over-recover their cost of service without a rate reduction.¹⁴ The Commission is requiring interstate natural gas pipelines to (1) make a one-time informational filing to evaluate the impact of the tax change and Revised Policy Statement on pipeline rates ("Form 501-G"); and (2) choose one of four voluntary options that address the effect of the 2017 Tax Cut and Jobs Act and Revised Policy Statement, including: (a) reduce rates by the percentage reduction in cost of service resulting from the 2017 Tax Act and the Revised Policy Statement; (b) commit to filing either a prepackaged uncontested settlement or general Natural Gas Act (NGA) section 4 rate case by December 31, 2018; (c) file a statement explaining why an adjustment to rates is not needed; or (d) take no action at all.¹⁵

C. Notice of Inquiry, Process for Certification of New Natural Gas Transportation Facilities

On April 19, 2018, the FERC issued a notice of inquiry (NOI) seeking stakeholder perspectives to assess whether, and if so, how, it should revise existing policies regarding the FERC's review and authorization of interstate natural gas transportation facilities under section 7 of the Natural Gas Act (NGA).¹⁶ That law declares "the business of transporting . . . gas for ultimate distribution to the public is affected with a public interest."¹⁷ The standard for approval of any interstate natural gas pipeline project is that it is required by "public convenience and necessity," which is determined by the FERC.¹⁸ Approval by the FERC confers on the pipeline eminent domain authority. Therefore, how the FERC interprets public convenience and necessity is significant.¹⁹

13. See generally 162 F.E.R.C. ¶ 61,226 (2018); Act of Dec. 22, 2017, Pub. L. No. 115-97, 131 Stat. 2054 § 13001 (2017); 162 F.E.R.C. ¶ 61,227 (2018).

14. 162 F.E.R.C. ¶ 61,226 at P 20 (2018).

15. *Id.* at P 3.

16. See generally Notice of Inquiry, *Process for Certification of New Natural Gas Transportation Facilities*, 163 F.E.R.C. ¶ 61,042 (2018).

17. *Id.* at P 5 (citing 15 U.S.C. § 717(a) (2012)).

18. See generally 163 F.E.R.C. ¶ 61,042 (2018).

19. *Id.*

The FERC adopted its current policy for assessing public need in September 1999 in “Certification of New Interstate Natural Gas Pipeline Facilities – Statement of Policy” (Docket No. PL99-3-000) (Policy Statement).²⁰ The NOI noted significant changes since the Policy Statement was issued, including: revolutionary changes in technology to produce natural gas, leading to new areas of gas production and changes in pipeline flows; long-term precedent agreements; the more prevalent use of natural gas as a fuel source for electric generation; increased concerns with project approvals from landowners and affected communities; and increased concerns over the evaluation of pipeline impacts on the environment, including greenhouse gas emissions.²¹

The NOI poses a series of questions on the transparency, timing, and predictability of the certification process in four categories: (1) potential adjustments to the Commission’s determination of need, specifically with respect to the use of precedent agreements; (2) the exercise of eminent domain and landowner interests, including ways to minimize impacts on landowners and accounting for landowner interests; (3) the FERC’s consideration of environmental impacts, including the interplay between the NGA and the National Environmental Policy Act (NEPA) with an emphasis on reviews of upstream and downstream greenhouse gas emissions; and (4) improvements to the efficiency of the FERC’s review process, including stakeholder participation.²² Comments on the NOI were due July 25, 2018.²³

II. RATES, TERMS, AND CONDITIONS OF SERVICE

A. *Abandonment*

1. Tres Palacios Gas Storage L.L.C.

The FERC granted in part and denied in part the request of Tres Palacios Gas Storage L.L.C. (“Tres Palacios”) to abandon 7.41 billion cubic feet of natural gas storage capacity at three of its salt dome caverns located in Colorado and Texas.²⁴ Tres Palacios filed the application in April to reduce its certificated capacity in response to new volume verification studies.²⁵ The Commission found that such action “was not an amendment to its original proposal,” and [therefore, did] not require an additional notice and comment period.²⁶ The FERC stated that although “a storage provider is not required to present evidence of structural changes to its storage facility in order to request authorization to change the certificated working

20. See generally *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 F.E.R.C. ¶ 61,227 (1999).

21. 163 F.E.R.C. ¶ 61,042 at P 2 (2018).

22. *Id.* at P 51.

23. *Id.* at P 61.

24. *Tres Palacios Gas Storage L.L.C.*, 160 F.E.R.C. ¶ 61,107 at P 1 (2017).

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

26. *Id.* at P 15.

gas capacity,” it must show “that doing so would not adversely impact the structural integrity of its storage facility.”²⁷ The Commission found that Tres Palacios had “submitted sufficient information for the Commission to evaluate its proposal for Cavern 3” but that it “failed to meet its burden” for Caverns 1 and 2.²⁸

2. Kinetica Deepwater Express, L.L.C.

The FERC denied a request for rehearing of its order authorizing Kinetica Deepwater Express, L.L.C. (“Kinetica Deepwater”) to abandon by sale certain pipeline facilities located on and off the shore in Louisiana, Louisiana state waters, and federal waters in the Gulf of Mexico.²⁹ Among other arguments, the protestors alleged that the Order was “inconsistent with the Commission’s determination in *Northern Natural Gas Co.*, where the Commission . . . rejected the applicants’ argument that the producer/shippers’ general rejection of negotiated rate terms demonstrated” a need for abandonment and further found the appropriate forum in such a situation was “a section 4 rate case.”³⁰ The Commission reconsidered the *MOPS* approach in light of the fact that it “may be very inefficient and potentially costly” and “might require continuous section 4 proceedings.”³¹ The Commission referred to allegations that “Kinetica Deepwater shut down service on the Grand Chenier System prior to issuance of the September Order” to Commission staff, though it did not consider it a factor in reconsidering the abandonment authorization.³²

3. High Island Offshore System, L.L.C.

The FERC denied a request to rehear its authorization of High Island Offshore System, L.L.C.’s (HIOS) request to abandon offshore facilities in the Gulf of Mexico which would then be used to supply a deep-water port export facility for liquefied natural gas (LNG) planned by Delfin LNG.³³ Protestors argued that granting abandonment would deviate from *Northern Natural Gas Co.*, where the Commission “previously rejected a pipeline’s attempt to abandon its jurisdictional facilities and certificate services based on diminished throughput, and instead directed the pipeline company to file a section 4 case as an initial step so that the cost of operating the pipeline from diminished throughput would be reflected in rates.”³⁴ The Commission found that “the approach set forth in *MOPS* is not appropriate where, as here, production and therefore the facilities’ throughput can only be expected to continue declining and necessitate continuous section 4 rate case proceedings.”³⁵ “The determination of whether an abandonment is permitted by the ‘present or future public convenience or necessity’ is a case-specific inquiry

27. *Id.* at P 48.

28. *Id.*

29. *Kinetica Deepwater Express, L.L.C.*, 160 F.E.R.C. ¶ 61,129 (2017).

30. *Northern Nat. Gas Co.*, 135 F.E.R.C. ¶ 61,048, *reh’g denied*; 137 F.E.R.C. ¶ 61,091 (2011) (*MOPS*); 160 F.E.R.C. ¶ 61,129 at P 7 (citing 135 F.E.R.C. ¶ 61,048 at P 43) (internal quotations omitted).

31. 160 F.E.R.C. ¶ 61,129 at P 10 (2017).

32. *Id.* at P 12.

33. *High Island Offshore Sys., L.L.C.*, 163 F.E.R.C. ¶ 61,040 at P 1 (2018).

34. 135 F.E.R.C. ¶ 61,048 (2011); 137 F.E.R.C. ¶ 61,091 (2011); 163 F.E.R.C. ¶ 61,040 at P 4.

35. 163 F.E.R.C. ¶ 61,040 at P 8.

that weighs varying criteria depending upon the particular circumstances of each specific abandonment proposal.”³⁶ The Commission therefore “continue[d] to find that the approach taken in MOPS with respect to interruptible shippers is not satisfactory where, as here, it has been demonstrated that the facilities abandoned have a very low utilization rate.”³⁷

4. Peregrine Oil & Gas II, L.L.C. v. Texas Eastern Transmission, L.P.

The FERC denied a request for rehearing and declined to clarify its holding that a “temporary outage does not constitute an abandonment under Section 7 of the NGA.”³⁸ When setting the complaint for a hearing on other matters, the Commission had stated that it “agree[d] with Texas Eastern that the temporary outage of its Line 41-A does not amount to an abandonment of service on the line within the meaning of NGA section 7.”³⁹ Complainants alleged the Commission’s statement was ambiguous and that “Texas Eastern never intended to repair the Line 41-A system and only did so when ‘captive producers agreed to pay secret, unlawful charges.’”⁴⁰ In denying the request, the Commission ruled that while the “alleged facts might be relevant to Peregrine’s surviving claims” they still only “show[ed] the existence of a temporary, unintentional outage that Texas Eastern eventually resolved, and therefore did not constitute an abandonment.”⁴¹

5. Questar Southern Trails Pipeline Co. & Navajo Tribal Utility Authority

The FERC granted Questar Southern Trails Pipeline Company (“Questar Southern Trails”) authority to abandon all of its jurisdictional facilities in Arizona, California, New Mexico, and Utah in part by sale to the Navajo Tribal Utility Authority (NTUA) and in part by abandonment-in-place.⁴² NTUA, a Navajo Nation enterprise, “owns and operates natural gas distribution systems that provide service to approximately 7,900 customers at several discrete locations throughout the 27,000 square-mile Navajo Nation.”⁴³ Before the planned sale, NTUA’s distribution system was “generally not contiguous with each other, and instead [was] spread out over the Navajo Nation.”⁴⁴ NTUA planned to incorporate approximately 268 miles of the interstate pipeline abandoned by Questar Southern Trails into its existing system in order to maintain service to its customers.⁴⁵ Questar Southern Trails stated its only firm shipper was NTUA and that other shippers had

36. *Id.* at P 10 (quoting 160 F.E.R.C. ¶ 61,129, at P 7; citing also 15 U.S.C.A § 717f(b)).

37. *Id.* at P 18.

38. *Peregrine Oil & Gas II, L.L.C. v. Texas E. Transmission, L.P.*, 163 F.E.R.C. ¶ 61,121 at P 3 (2018).

39. *Peregrine Oil & Gas II, L.L.C. v. Texas E. Transmission, L.P.*, 161 F.E.R.C. ¶ 61,109 at P 22 (2017) (citing *Panhandle E. Pipe Line Co.*, 62 F.E.R.C. ¶ 61,222, at p. 62,533 (1993); citing also *Transcontinental Gas Pipe Line Corp.*, 68 F.E.R.C. ¶ 61,228, at pp. 62,080, 62,082 (1994)).

40. 163 F.E.R.C. ¶ 61,121 at P 9 (quoting the Complaint at P 3).

41. *Id.* at P 18.

42. *See generally Questar S. Trails Pipeline Co.*, 163 F.E.R.C. ¶ 62,086 (2018).

43. *Id.* at P 1.

44. *Id.*

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

transportation alternatives so a rate increase could not sustain its current operations.⁴⁶ The Commission found that because no protests had been filed and “a rate case proceeding could not obviate the need for a more permanent solution” that “the abandonment of the Questar Southern Trails Facilities and its certificated services is required by the public convenience or necessity.”⁴⁷

B. Capacity Release

1. NEXUS Gas Transmission, L.L.C.

The FERC granted in part and rejected in part proposals by NEXUS Gas Transmission, L.L.C. (“NEXUS”) to revise certain sections of its *pro forma* FERC Gas Tariff.⁴⁸ NEXUS sought to modify the nomination and capacity release deadlines to one hour before the corresponding standard deadlines set forth in North American Energy Standards Board Wholesale Gas Quadrant (WGQ) Standard 1.3.2.⁴⁹ NEXUS wanted to process and transmit the information on customer nominations to pipeline operators from whom it leases capacity prior to the deadlines to “minimize the likelihood that NEXUS’ shippers would experience unintended Elapsed-Prorated-Scheduled Quantity (EPSQ)-related confirmation and/or scheduling reductions.”⁵⁰ NEXUS also proposed to modify its capacity release tariff provisions to correspond with its proposed nomination timelines.⁵¹ The FERC found that as the lessee of the leased capacity, NEXUS should not be required to provide the lessor pipelines with any nominations-related information before the deadline because the lessor pipelines no longer have rights to that capacity.⁵² Accordingly, the FERC rejected the proposed modified timelines for tariff nomination and capacity release.⁵³

2. Natural Gas Pipeline Company of America, L.L.C.

The FERC granted, subject to conditions, authorizations requested by Natural Gas Pipeline Company of America, L.L.C. (“Natural”) to construct and operate a new compressor station, a lateral pipeline, and to abandon two compressor units.⁵⁴ Natural also requested that the FERC pre-approve non-conforming provisions regarding creditworthiness and temporary capacity release in its precedent negotiated rate agreements with Rice Drilling B L.L.C. and Corpus Christi Liquefaction, L.L.C. (“project shippers”).⁵⁵

The FERC noted that “Natural propose[d] that any replacement shippers acquiring released capacity from a project shipper be subject to the same negotiated

46. *Id.* at P 5.

47. 163 F.E.R.C. ¶ 62,086 at P 5.

48. *NEXUS Gas Transmission, L.L.C.*, 163 F.E.R.C. ¶ 61,074 (2018).

49. *Id.* at PP 3-7.

50. *Id.* at P 7.

51. *Id.* at PP 7-8.

52. *Id.* at P 10.

53. 163 F.E.R.C. ¶ 61,074 at P 10.

54. *Natural Gas Pipeline Co. of Am., L.L.C.*, 161 F.E.R.C. ¶ 61,149 at P 3 (2017).

55. *Id.* at PP 4, 25.

fuel rate as the project shipper.”⁵⁶ Natural stated that this non-conforming provision was necessary to keep it whole and to prevent its existing shippers from subsidizing the project through a replacement shipper that could pay a lower tariff fuel rate than the negotiated fuel rate.⁵⁷ The FERC, finding the material deviation permissible, explained that the provision did not present a risk of undue discrimination, affect the operational conditions of providing service, or result in any customer receiving a different quality of service.⁵⁸

3. Texas Gas Transmission, L.L.C.

The FERC approved, subject to revisions not pertinent to this discussion, a comprehensive contractual restructuring package (“Restructuring Package”) between SWN Energy Services Company, L.L.C. (“Southwestern”) and Texas Gas Transmission, L.L.C. (“Texas Gas”).⁵⁹ The Restructuring Package, submitted by Texas Gas, included a Master Agreement together with a series of firm transportation agreements and associated negotiated rate agreements.⁶⁰ The Commission generally approved the Restructuring Package subject to the revision of two provisions of the Master Agreement.⁶¹ Included in the Master Agreement were several negotiated volumetric contracts between Texas Gas and Southwestern that contained a negotiated Volumetric Commodity Charge (VCC), which Texas Gas viewed as an indispensable element of the Restructuring Package, on gas transported through competitor pipelines.⁶²

Fayetteville Express Pipeline L.L.C. (Fayetteville), a competitor to Texas Gas, filed a protest arguing that the VCC for gas transported on a non-Texas Gas pipeline was anti-competitive.⁶³ Fayetteville argued that the VCC violated FERC capacity release regulations and highlighted its uncertain impacts on replacement customers and in the evaluation of a negotiated rate bid.⁶⁴ The protest further argued, in the event of an assignment of Southwestern’s assets, the Master Agreement required the replacement shipper to assume the VCC, constituting an unlawful tying arrangement and improper restriction on capacity release.⁶⁵ The FERC disagreed with the protests, finding that inclusion of the VCC in the negotiated rate agreement was permissible under the Commission’s negotiated rate policy and consistent with the Commission’s capacity release policies.⁶⁶

56. *Id.* at P 28.

57. *Id.*

58. *Id.* at PP 28-29.

59. *Texas Gas Transmission, L.L.C.*, 161 F.E.R.C. ¶ 61,121 at P 1 (2017) [hereinafter *Texas Gas Transmission*].

60. *Id.*

61. *Id.* at P 12.

62. *Id.* at PP 13, 16.

63. *Id.* at PP 14, 19.

64. *Texas Gas Transmission*, *supra* note 59, at P 15.

65. *Id.*

66. *Id.* at PP 24-26.

4. Midcontinent Express Pipeline L.L.C.

The FERC approved and lifted the suspension of proposed tariff records, without condition, to effectuate updates and corrections by Midcontinent Express Pipeline L.L.C. (MEP) to its *pro forma* service agreements.⁶⁷ MEP proposed eliminating language in the capacity release provisions of its tariff which had allowed a shipper's capacity to be assigned to a successor affiliate without prior written consent without changing provisions that allowed MEP to assign its rights to its corporate parent.⁶⁸ Shippers protested MEP's proposal, arguing that "eliminate[ing] the shipper's right to assign to affiliates without also eliminating MEP's right to assign to affiliates is discriminatory."⁶⁹

MEP answered that its proposal does not eliminate a shipper's ability to assign a service agreement to an affiliate, because that right is established elsewhere in the tariff but the change clarifies that an affiliate assignee will be subject to the same creditworthiness standards.⁷⁰ "The Commission [found] that MEP's proposal to remove the referenced language from its *pro forma* tariff agreements [was] just and reasonable," and was consistent with the Commission's capacity release policies.⁷¹ Moreover, the Commission noted that the proposed revision is also consistent with MEP's GT&C, which requires written consent to assign any right or obligation of a service agreement, and that "consent shall not be unreasonably withheld."⁷²

a. Capacity Release Letter Orders

1. Temporary Waivers for Corporate Restructuring

In light of their non-controversial nature, some requests were handled by the issuance of letter orders. There is little reason to recount the particular facts when the FERC grants a temporary waiver of its capacity release regulations to allow for the transfer, permanent release, and assignment of firm pipeline transportation service agreements in connection with corporate restructuring.⁷³ In those instances, temporary waivers of the Commission's regulations including the prohibition against tying arrangements, the maximum rate ceiling, bidding provisions, prohibitions against buy-sell arrangements, and the shipper-must-have-title policy were approved.⁷⁴ Extensions of time to previously granted waivers were approved

67. See generally *Midcontinent Express Pipeline L.L.C.*, 161 F.E.R.C. ¶ 61,275 (2017).

68. *Id.* at P 2.

69. *Id.* at P 3.

70. *Id.* at P 6.

71. *Id.* at P 9 (citing Order No. 636, *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, F.E.R.C. STATS. & REGS. ¶ 30,939, *order on reh'g*; Order No. 636-A, F.E.R.C. STATS. & REGS. ¶ 30,950, *order on reh'g*; Order No. 636-B, 61 F.E.R.C. ¶ 61,272 (1992), *order on reh'g*, 62 F.E.R.C. ¶ 61,007 (1993)).

72. 161 F.E.R.C. ¶ 61275 at P 7, n. 9.

73. 18 C.F.R. § 284.8 (2017).

74. *NJR Energy Servs. Co.*, 160 F.E.R.C. ¶ 61,032 (2017); *XTO Energy Inc.*, 160 F.E.R.C. ¶ 61,120 (2017); *Florida Pub. Utils. Co.*, 160 F.E.R.C. ¶ 61,143 (2017); *ConocoPhillips Co.*, 161 F.E.R.C. ¶ 61,113 (2017); *BKV Chelsea, L.L.C.*, 161 F.E.R.C. ¶ 61,201 (2017); *BNP Paribas Energy Trading*, 161 F.E.R.C. ¶ 61,233 (2017); *Dogwood Energy, L.L.C.*, 161 F.E.R.C. ¶ 61,239 (2017); *Cargill, Inc.*, 160 F.E.R.C. ¶ 62,077 (2017); *Enterprise*

for parties that had not yet completed their transactions but had acted diligently.⁷⁵ The Commission also granted limited waivers of its capacity release regulations to allow shippers to correct errors made in a pre-arranged capacity release transaction.⁷⁶

C. Cost Trackers

1. National Fuel Gas Supply Corp.

The FERC accepted National Fuel Gas Supply Corporation's ("National Fuel") proposal to, among other changes, establish a new, fourth incremental fuel retainage charge for contracts using the Northern Access 2015 Project facilities, and to make conforming changes to section 41 of the General Terms and Conditions ("GT&C") of its tariff to reflect the incremental fuel retainage charge.⁷⁷ In a related order in Docket No. CP14-100-002, the FERC clarified that National Fuel must amend section 41 of its GT&C to ensure that National Fuel's system-wide fuel rates do not include any fuel or lost and unaccounted for gas costs associated with the Northern Access 2015 Project, thereby protecting National Fuel's customers from subsidizing that project.⁷⁸ The FERC also directed that National Fuel amend section 41 so that all future fuel tracker filings include a fuel analysis showing the impact of the Northern Access 2015 Project on its system, finding that these requirements will help ensure that National Fuel's fuel tracker filings are consistent with the directive that it not include any costs associated with the leased capacity in its system-wide rates.⁷⁹ The FERC conditioned its acceptance of the proposed revisions to GT&C section 41 on the outcome of the further proceedings in Docket No. CP14-100-002 concerning the initial rates for the Northern Access 2015 Project, but found that the specific retainage percentages National Fuel filed in this proceeding are just and reasonable.⁸⁰

Prods. Operating L.L.C., 161 F.E.R.C. ¶ 61,273 (2017); *Energy Corp. of Am.*, 161 F.E.R.C. ¶ 61,279 (2017); *Chesapeake Energy Mktg., L.L.C.*, 162 F.E.R.C. ¶ 61,113 (2018); *Enstor Energy Servs., L.L.C.*, 162 F.E.R.C. ¶ 61,170 (2018); *Pivotal Util. Holdings, Inc.*, 162 F.E.R.C. ¶ 61,286 (2018); *Chesapeake Energy Mktg., L.L.C.*, 162 F.E.R.C. ¶ 61,277 (2018); *Pivotal Util. Holdings, Inc.*, 162 F.E.R.C. ¶ 61,285 (2018); *Chief Oil & Gas Co.*, 162 F.E.R.C. ¶ 61,284 (2018); *ENGIE S.A.*, 162 F.E.R.C. ¶ 61,289 (2018); *RRI Energy Servs., L.L.C.*, 163 F.E.R.C. ¶ 61,107 (2018); *NRG Canal L.L.C.*, 163 F.E.R.C. ¶ 61,142 (2018); *CNX Gas Co.*, 163 F.E.R.C. ¶ 61,143 (2018); *Dogwood Energy L.L.C.*, 163 F.E.R.C. ¶ 61,156 (2018); *LLOG Bluewater Holdings, L.L.C.*, 163 F.E.R.C. ¶ 61,171 (2018); *Columbia Gulf Transmission, L.L.C.*, 163 F.E.R.C. ¶ 61,186 (2018); *Mitsubishi Corp.*, 163 F.E.R.C. ¶ 61,193 (2018); *BP Canada Energy Mktg. Corp.*, 163 F.E.R.C. ¶ 61,199 (2018); *Pioneer Nat. Res. USA, Inc.*, 163 F.E.R.C. ¶ 61,215 (2018); *Columbia Gas Transmission, L.L.C.*, 163 F.E.R.C. ¶ 61,185 (2018).

75. *Noble Energy, Inc.*, 161 F.E.R.C. ¶ 61,127 (2017); *XTO Energy Inc.*, 162 F.E.R.C. ¶ 61,095 (2018).

76. *Iroquois Gas Transmission Sys., L.P.*, 161 F.E.R.C. ¶ 61,146 (2017); *Southern Star Cent. Gas Pipeline, Inc.*, 162 F.E.R.C. ¶ 61,151 (2018).

77. *National Fuel Gas Supply Corp.*, 161 F.E.R.C. ¶ 61,213 (2017).

78. *Id.* at P 27.

79. *Id.*

80. *Id.* at P 29.

2. High Island Offshore System, L.L.C.

The FERC granted High Island Offshore System, L.L.C.'s (HIOS) request for waiver to allow the current Company Use percentage of zero to remain in effect, in place of the methodology set forth in Section 28.3 of the General Terms and Conditions (GT&C) of its tariff.⁸¹ GT&C Section 28.3 includes a projection of required fuel and lost and unaccounted-for-gas (LAUF) for the recovery period divided by projected receipt quantities during the recovery period, and adjusted to reflect a true-up of experience from the prior recovery period.⁸² The FERC noted that "HIOS propose[d] to maintain the currently effective Company Use percentage of zero as a matter of administrative convenience for its shippers."⁸³ Protesters asserted that HIOS "should provide an explanation for the large natural gas loss in December 2017 . . . [and noted] that LAUF tracker mechanisms present some concern in that they provide inadequate incentives to pipelines to minimize LAUF."⁸⁴ The FERC granted the continued waiver to allow the currently effective Company Use percentage of zero to remain in effect, but noted that any support and justification for future fuel retention rates should be part of the company's original filing and not filed subsequently after protests have been made.⁸⁵

D. Discount Adjustments for Negotiated Rate Agreements

1. El Paso Natural Gas Co.

The FERC addressed several discount adjustment issues in an order on rehearing in El Paso's most recent rate case.⁸⁶ In earlier orders in the rate proceeding, Opinion Nos. 528 and 528-A, the FERC affirmed that El Paso was entitled to a full discount adjustment, which would shift the cost of unsubscribed capacity to its customers, finding that the discounts offered by the pipeline were fully justified to meet competition and thus the pipeline had satisfied the burden to demonstrate that such an adjustment is just and reasonable under the FERC's Selective Discounting Policy.⁸⁷ Two shippers argued on rehearing that the significant cost increases on parts of El Paso's system justified shifting some of the cost to the pipeline and that the FERC's method for cost sharing was "narrow, outdated, and [would] not lead to promoting infrastructure or protecting captive shippers."⁸⁸ The FERC dismissed several of the shippers' arguments that it found had already been addressed in a previous rehearing order.⁸⁹ However, in the most recent order on rehearing in the proceeding, the FERC approved El Paso's proposal to use discount-adjusted billing determinant factors to allocate costs among its discrete rate

81. *High Island Offshore Sys., L.L.C.*, 162 F.E.R.C. ¶ 61,288 (2018).

82. *Id.* at P 2.

83. *Id.* at P 3.

84. *Id.* at P 7.

85. *Id.* at P 11.

86. Opinion No. 528-B, *El Paso Natural Gas Co.*, 163 F.E.R.C. ¶ 61,079 (2018).

87. Opinion No. 528, *El Paso Natural Gas Co.*, 145 F.E.R.C. ¶ 61,040 at PP 388-395 (2013), *order on remand*, 148 F.E.R.C. ¶ 63,014 (2014), *order on rehearing*, Opinion No. 528-A, 154 F.E.R.C. ¶ 61,120 (2016).

88. 163 F.E.R.C. ¶ 61,079 at P 127.

89. *Id.* at P 17.

zones, but the order did not change the FERC's position with respect to cost-sharing.⁹⁰ The FERC addressed and rejected shippers' arguments that the change in zonal cost allocation required a re-examination of cost-sharing.⁹¹

First, the FERC found that the use of discount-adjusted billing determinants resulted in a reasonable outcome without resorting to the extraordinary step of requiring El Paso to absorb some of the costs, which would produce rates that would not recover the pipeline's cost of service.⁹² The FERC found that the rates produced for the California zone were only modestly above the rates for the Arizona and Nevada zones and that this result was consistent with cost causation principles, given the modest difference in the cost to serve shippers in those distinct zones.⁹³ Second, the FERC noted that El Paso's aggressive capacity marketing efforts justified a discount adjustment, distinguishing the situation from previous cases in which the FERC was concerned that a pipeline proposing a significant rate increase had not sufficiently attempted to market its capacity.⁹⁴ The FERC rejected the shippers' argument that the magnitude of the rate increases in specific zones justified a less than full discount adjustment, noting that there is no bright-line test for determining when a rate increase is so significant as to require the pipeline to under-recover its costs.⁹⁵ Neither did the FERC accept shippers' contention that cumulative rate increases to certain shippers over successive rate cases justified cost-sharing.⁹⁶ The FERC observed that under its Selective Discounting Policy, parties are permitted to attempt to show, on a case by case basis, that a discount adjustment is inequitable or causes an undue hardship to shippers, but found that the shippers in the El Paso proceeding had failed to do so.⁹⁷ The FERC found that "[a] simple recitation that rates have gone up over the last few rate cases and that the alleged main reason for the rate increases are the discounts El Paso has provided is not enough to show that the rates are unjust and unreasonable."⁹⁸ Finally, the FERC further found that the shippers had failed to support their argument that a decision not to require risk-sharing by El Paso would hinder the FERC's goal of promoting natural gas infrastructure.⁹⁹

Separately, the FERC affirmed its previous determination that El Paso's rate proposal would have impermissibly shifted costs of certain discounted capacity to shippers that were otherwise protected from such cost increases under Article 11.2(b) of a 1996 settlement in a prior rate case.¹⁰⁰ The FERC found that billing determinants used in the pipeline's proposed recourse rates were lower than the threshold level specified in the 1996 settlement and thus would have resulted in

90. *Id.* at P 106.

91. *Id.* at PP 107-109.

92. *Id.* at P 130.

93. 163 F.E.R.C. ¶ 61, 079 at P 109.

94. *Id.* at P 33.

95. *Id.* at P 134.

96. *Id.* at P 135.

97. *Id.*

98. 163 F.E.R.C. ¶ 61, 079 at P 135 (citing 145 F.E.R.C. ¶ 61,040 at P 391).

99. *Id.* at P 136.

100. *Id.* at PP 49-52.

higher rates for shippers protected under Article 11.2(b), contrary to the requirements of the 1996 settlement.¹⁰¹ The FERC noted that the pipeline failed to demonstrate that it had absorbed the portion of the discount adjustment attributable to the Article 11.2(b) shippers, as it had agreed in that settlement.¹⁰²

E. Fuel

1. Viking Gas Transmission Company

The FERC granted Viking Gas Transmission Company (“Viking”) a waiver of the pipeline’s tariff permitting an interim adjustment to Viking’s fuel and loss retention percentages (FLRP) and to assess a 0.00 percent FLRP for Rate Schedules FT-A, IT and AOT in order to address an unanticipated and significant over-collection of fuel due to operating conditions.¹⁰³

2. Tennessee Gas Pipeline Company, L.L.C.

Acting on rehearing of a 2016 certificate order, the FERC denied Tennessee Gas Pipeline Company, L.L.C.’s (“Tennessee”) proposal to charge system fuel for its Broad Run Expansion Project.¹⁰⁴ The FERC found that including the project’s fuel costs in Tennessee’s general system fuel rates could result in existing customers subsidizing the expansion project.¹⁰⁵ The FERC’s ruling is “without prejudice to Tennessee proposing to roll the project’s fuel costs into its general system fuel rate in a [future] general or limited NGA section 4 filing.”¹⁰⁶

3. Paiute Pipeline Company

In a certificate order granting authorization for an expansion project, the FERC accepted Paiute Pipeline Company’s (“Paiute”) proposal to assess system-wide fuel retention to its expansion shippers.¹⁰⁷ Based on a fuel study by the pipeline, the FERC determined that “Paiute has demonstrated that the proposed expansion project’s capacity will not have an adverse impact on existing shippers’ fuel retention and is consistent with the Commission’s policy that existing shippers not subsidize new customers on the system.”¹⁰⁸

4. Nautilus Pipeline Company, L.L.C.

The FERC required Nautilus Pipeline Company, L.L.C. to “revise its tariff to provide that only gas lost in the ordinary course of business will be included in its gas loss tracking mechanism.”¹⁰⁹

101. *Id.* at P 52.

102. *Id.* at PP 49-51.

103. *Viking Gas Transmission Co.*, 163 F.E.R.C. ¶ 61,217 at P 6 (2018).

104. *Tennessee Gas Pipeline Co.*, 156 F.E.R.C. ¶ 61,157 (2016).

105. *Tennessee Gas Pipeline Co.*, 163 F.E.R.C. ¶ 61,190 at P 75 (2018).

106. *Id.*

107. *Paiute Pipeline Co.*, 163 F.E.R.C. ¶ 62,096 at P 24 (2018).

108. *Id.* at P 23.

109. *Nautilus Pipeline Co.*, 163 F.E.R.C. ¶ 61,026 at P 19 (2018).

5. Rockies Express Pipeline LLC

The FERC accepted Rockies Express Pipeline, L.L.C.'s ("REX") proposal "to post monthly fuel reimbursement projections on its electronic bulletin board web site and unilaterally implement surcharges each month that will true-up the prior month's charges."¹¹⁰ The FERC's acceptance is subject to REX filing modified tariff sheets "to include a requirement for annual reimbursement reports", to be submitted under Section 4 of the Natural Gas Act, "fully detailing the operation of its fuel reimbursement mechanism for the past 12-month period."¹¹¹ The reports must satisfy the reporting requirements of section 154.403(d) of the FERC's regulations.¹¹²

6. ANR Pipeline Company

The FERC accepted ANR Pipeline Company's ("ANR") periodic fuel tracker filing, but suggested that the pipeline to work with its shippers to minimize large over- and under-recovery of fuel in the future.¹¹³ The FERC reminded ANR justification for its proposed fuel rates "should be part of the company's original filing and not filed subsequently" only after parties have filed protests.¹¹⁴ The FERC stated that answers to protests cannot serve as a substitute for a pipeline to provide information that should have accompanied its filing in the first place.¹¹⁵

7. Ruby Pipeline L.L.C.

The FERC granted Ruby Pipeline L.L.C.'s ("Ruby") request for a waiver to defer the past under-collection of fuel quantities in order to avoid over-collecting in the upcoming quarter.¹¹⁶ Ruby explained "that the net of the Current and Prior Period Fuel Retention Percentages produces a Total Fuel Retention Percentage of 0.00 percent for the period these percentages are in effect."¹¹⁷

8. Kinetica Energy Express, LLC

The FERC accepted Kinetica Energy Express, L.L.C.'s ("Kinetica") proposal to replace references to "Compressor Fuel" with references to "Domestic Use," which the pipeline's tariff defines as "the quantity of [natural g]as required for operations and other Transporter uses required for the operation of the pipeline."¹¹⁸ The FERC found that Kinetica's definition of "Domestic Use" is consistent with the FERC's policy permitting pipelines to recover through fuel tracking mecha-

110. *Rockies Express Pipeline L.L.C.*, 163 F.E.R.C. ¶ 61,011 at P 9 (2018).

111. 15 U.S.C. § 717c; 163 F.E.R.C. ¶ 61,011 at P 10.

112. 18 C.F.R. § 154.403 (2018); 163 F.E.R.C. ¶ 61,011 at P 10.

113. *ANR Pipeline Co.*, 162 F.E.R.C. ¶ 61,294 at P 14 (2018).

114. *Id.* at P 15.

115. *Id.*

116. *Ruby Pipeline L.L.C.*, 161 F.E.R.C. ¶ 61,303 (2017).

117. *Id.* at P 5.

118. *Kinetica Energy Express, L.L.C.*, 160 F.E.R.C. ¶ 61,019 at P 53 (2017) (Kinetica informed the FERC that it does not operate compression on its pipeline).

nisms the cost of natural gas the pipeline consumes in order to operate the pipeline.¹¹⁹ The FERC concluded that whether any particular use satisfies the definition should be addressed if Kinetica “seeks to recover natural gas used for that purpose in a fuel tracking filing.”¹²⁰

F. Gas Quality

1. Texas Gas Transmission, L.L.C.

The FERC rejected Texas Gas Transmission, L.L.C.’s (“Texas Gas”) transportation service agreement with Southwestern Public Service Company (“Southwestern”) because it includes a waiver of certain gas quality specifications of the pipeline’s tariff, constitutes a substantial risk of undue discrimination, and provides Southwestern with a valuable gas quality blending arrangement that is not available to other shippers on Texas Gas’ Fayetteville Lateral.¹²¹ The FERC directed Texas Gas “to either remove the provision [from the transportation service agreement] or to revise its Tariff so the gas quality blending arrangement is available to all [Fayetteville] Lateral shippers.”¹²²

2. Southern Star Central Gas Pipeline, Inc.

The FERC approved substitute revised tariff language resulting from an agreement between Southern Star Central Pipeline, Inc. (“Southern Star”) and parties that protested a gas quality tariff filing that proposed to allow Southern Star to add “gas quality specifications or different gas quality limits to ensure that gas” on certain pipeline segments is interchangeable and acceptable for delivery into downstream interconnecting pipelines.¹²³ The revised tariff provision limits the tariff authority allowing Southern Star to post a gas quality change only to the oxygen specification “on only three line segments on Southern Star’s system where oxygen levels are an issue.”¹²⁴

G. Incremental Pricing

1. Gulf South Pipeline Company, L.P.

In an order issued May 17, 2018, the FERC found Gulf South Pipeline Company, LP (“Gulf South”) had not supported its proposal to provide recourse Westlake Expansion Project service

on what is essentially an ‘incremental plus’ basis, that is, shippers contracting at recourse rates for firm service with primary rights downstream of the Westlake Compressor Station who also wanted primary rights within Lake Charles Zone upstream

119. *Id.*

120. *Id.*

121. *Texas Gas Transmission*, *supra* note 59, at PP 30, 32.

122. *Id.* at P 32.

123. *Southern Star Cent. Gas Pipeline, Inc.*, 162 F.E.R.C. ¶ 61,070 at P 3 (2018) (suspending the original tariff records and establishing a technical conference).

124. *Southern Star Cent. Gas Pipeline, Inc.*, 163 F.E.R.C. ¶ 61,060 at P 4 (2018).

of the station would have to pay incremental Westlake Expansion Rates plus the existing Lake Charles Zone Rates.¹²⁵

The Commission determined that because Gulf South's existing Lake Charles Zone facilities were integrated with the Westlake Expansion Project, "the project is more similar to many of the integrated incremental projects the Commission certifies that create system capacity by the addition of compression and/or pipeline looping than it is to a lateral extension project."¹²⁶

The Commission explained that for integrated expansions, "the Commission has rejected proposals to establish recourse rates under which shippers would be charged an incremental rate for using capacity created by the incremental facilities in addition to the generally-applicable system rate for transportation using existing facilities within the same zone."¹²⁷ Therefore, it concluded that "a recourse rate shipper that is paying the incremental Westlake Expansion Project rate is entitled to use secondary receipt and delivery points in the Lake Charles Zone without paying the existing Lake Charles Zone rates."¹²⁸ The Commission also rejected Gulf South's proposal to base its incremental rates on a depreciation rate of 2.86 percent because "the project is not a stand-alone lateral" rather the Commission found it was "an integrated expansion of Gulf South's existing Lake Charles Zone facilities."¹²⁹ The Commission explained that its policy for integrated expansion project "is to use the pipeline's last stated and approved depreciation rate."¹³⁰ Finally, the Commission denied Gulf South's proposal to charge the maximum incremental daily transportation rate in addition to its system incremental transportation rates for any volume transported under Rate Schedule ITS utilizing the project capacity.¹³¹

2. Dominion Energy Cove Point LNG, L.P.

The Commission directed Dominion Energy Cove Point LNG, LP ("Cove Point") to calculate its initial recourse rates for its Eastern Market Access project consistent with the Tax Cuts and Jobs Act of 2017.¹³² The Commission reasoned that the Tax Act's reduction of the federal corporate income tax rate from 35 percent to 21 percent impacted Cove Point LNG's proposed cost of service and the resulting initial incremental recourse rate for the project.¹³³ The Commission concluded, however, that it did not believe "the changes will alter the Commission's approval of an incremental rate as the initial recourse rate for the project" because

Cove Point LNG's proposed recourse incremental 100 percent load factor rate is significantly higher than the currently applicable 100 percent load factor Rate Schedule FTS rate, it appears that changing the cost of service to reflect the currently applicable

125. *Gulf South Pipeline Co., L.P.*, 163 F.E.R.C. ¶ 61,124 at P 21 (2018).

126. *Id.*

127. *Id.* at P 22.

128. *Id.*

129. *Id.* at P 23.

130. 163 F.E.R.C. ¶ 61,124 at P 22; *see also Wyoming Interstate Co.*, 119 F.E.R.C. ¶ 61,251 at P 22 (2007).

131. *Id.* at P 26.

132. Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, § 13001, 131 Stat. 2054, 2096 (2017).

133. *Dominion Energy Cove Point LNG, L.P.*, 162 F.E.R.C. ¶ 61,056 at P 23 (2018).

federal corporate income tax rate will not render the incremental rate lower than the existing system rate.¹³⁴

Accordingly, the Commission approved the “proposed incremental reservation and usage charges as initial recourse charges for the project, subject to Cove Point LNG revising those charges” to reflect the 2018 federal corporate tax rate.¹³⁵

3. Texas Eastern Transmission, L.P.

The Commission issued a certificate of public convenience and necessity to Texas Eastern Transmission, LP (“Texas Eastern”) on December 21, 2016 that authorized the construction and operation of three distinct projects.¹³⁶ Texas Eastern proposed to establish separate incremental recourse rates consisting of: “(1) a reservation charge based on the incremental fixed costs associated with each project; (2) a usage charge based on the non-fuel variable costs associated with each project; and (3) an Applicable Shrinkage Adjustment (ASA) charge designed to recover fuel usage, and lost and unaccounted fuel for each project.”¹³⁷ The FERC noted that “[i]n the December 2016 Order, the Commission evaluated each component of Texas Eastern’s proposed incremental recourse rates for each project and directed Texas Eastern to charge the ‘greater of’ the incremental or generally-applicable charge for each rate component.”¹³⁸ Further, “[t]he Commission also approved Texas Eastern’s proposed incremental ASA charges for the Access South and Adair Southwest Projects, but required that Texas Eastern use the “greater of” the proposed ASA charge or the generally-applicable ASA seasonal percentages for the Lebanon Extension Project.”¹³⁹

The Commission granted Texas Eastern’s rehearing request and approved “Texas Eastern’s proposed incremental rates as consistent with the Certificate Policy Statement and Commission regulations.”¹⁴⁰ The Commission found that “[i]n general, if a proposed initial rate for an expansion project is greater than the generally-applicable system charge, the Commission has approved the pipeline’s proposed initial rates because the pipeline can support the project without relying on subsidization from its existing customers.”¹⁴¹ The Commission concluded that “Texas Eastern’s proposed incremental recourse rates for each project are designed to recover the full cost of the respective incremental project,” and that “approval of Texas Eastern’s proposed incremental rates will not cause an adverse effect on existing shipper’s rates.”¹⁴²

134. *Id.* at PP 23-24.

135. *Id.* at P 24.

136. *Texas E. Transmission, L.P.*, 161 F.E.R.C. ¶ 61,226 (2017).

137. *Id.* at P 4.

138. *Id.* at PP 5.

139. *Id.*

140. *Id.* at P 17.

141. 161 F.E.R.C. ¶ 61,226 at P 13.

142. *Id.* at PP 14-15.

4. Eastern Shore Natural Gas Co.

“On December 30, 2016, Eastern Shore Natural Gas Company (Eastern Shore) filed an application under section 7(c) of the Natural Gas Act (NGA)¹⁴³ and Part 157 of the Commission’s regulations for authorization to construct [its 2017 Expansion Project.]”¹⁴⁴ Eastern Shore contended that the “revenues generated under its existing tariff rates would be insufficient to recover the 2017 Expansion Project’s annual cost of service,” therefore, the pipeline proposed to “charge incremental recourse reservation rates designed to recover the incremental cost of service associated with the project.”¹⁴⁵ The Commission “approve[d] Eastern Shore’s proposed incremental reservation charges as the initial recourse charges for firm service using the project capacity.”¹⁴⁶

5. Transcontinental Gas Pipe Line Corp.

The Commission denied rehearing claiming that the costs of replacement base gas should solely be allocated to replacement shippers.¹⁴⁷ The Commission found that Transcontinental Gas Pipe Line Corp. (“Transco”) was “proposing an incremental rate design for a set of services that were formerly priced on a rolled-in basis,” and, “[a]s such, the incremental rate proposal needs to be supported and examined in the context of the Commission’s incremental rate policies.”¹⁴⁸ The Commission explained that its “clearest and most comprehensive statement of these policies is in the 1999 Certificate Policy Statement.”¹⁴⁹ The Commission also reaffirmed that “the speculative nature of non-jurisdictional customers’ opportunity costs renders their use inappropriate in the determination of a jurisdictional pipeline’s rates.”¹⁵⁰ In short, the Commission concluded “that Transco ha[d] not satisfied its burden under NGA section 4 to show that its proposal to charge incremental rates to replacement shippers, including all costs associated with base gas purchases necessary to serve them, is just and reasonable.”¹⁵¹

6. Mountain Valley Pipeline, L.L.C.

The Commission accepted Mountain Valley Pipeline, L.L.C.’s (“Mountain Valley”) initial rates and found they generally reflected current Commission policy, except for Mountain Valley’s proposed return on equity (“ROE”).¹⁵² Mountain Valley developed its proposed initial rates based on a capital structure of 40 percent debt and 60 percent equity, with a debt cost of 6 percent and a ROE of 14

143. 15 U.S.C. § 717f(c) (2012).

144. 18 C.F.R. pt. 157 (2005); *Eastern Shore Nat. Gas Co.*, 161 F.E.R.C. ¶ 61,014 at P 1 (2017).

145. *Id.* at P 18.

146. *Id.* at P 19.

147. *Transcontinental Gas Pipe Line Corp.*, 161 F.E.R.C. ¶ 61,012 at P 21 (2017).

148. *Id.* at P 35.

149. *Id.*; *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 F.E.R.C. ¶ 61,227 (1999) (1999 Certificate Policy Statement), *clarified*, 90 F.E.R.C. ¶ 61,128 (1999 Certificate Policy Statement Rehearing Order), *further clarified*, 92 F.E.R.C. ¶ 61,094 (2000).

150. 161 F.E.R.C. ¶ 61,012 at P 91.

151. *Id.* at P 102.

152. *Mountain Valley Pipeline, L.L.C.*, 161 F.E.R.C. ¶ 61,043 at P 78 (2017).

percent.¹⁵³ The Commission determined that “Mountain Valley’s combined return on equity and capital structure proposal [did] not reflect current Commission policy.”¹⁵⁴ “For new pipelines, the Commission has approved an ROE of 14 percent, but only where the equity component of the capitalization is no more than 50 percent.”¹⁵⁵ The Commission explained that it has found that “imputing a capitalization containing such a large equity ratio is more costly to ratepayers, because equity financing is typically more costly than debt financing and the interest incurred on debt is tax deductible.”¹⁵⁶ Consequently, the Commission required Mountain Valley to “design its cost-based rates on a capital structure that included at least 50 percent debt.”¹⁵⁷

H. Jurisdiction

1. City of Clarksville v. FERC

The U.S. Court of Appeals for the District of Columbia Circuit vacated a FERC order exercising jurisdiction over the city of Clarksville, Tennessee, regarding sales of natural gas by it to the city of Guthrie, Kentucky.¹⁵⁸ Clarksville transported the gas within Tennessee to a meter about twenty feet south of the Kentucky border, where Guthrie received it and transported it across the border.¹⁵⁹ The FERC had previously found it had jurisdiction under the Natural Gas Act (“NGA”), reasoning that extending the municipal exemption to interstate sales would create a regulatory gap and that municipalities were historically considered “persons” under cognate provisions of the Federal Power Act (“FPA”).¹⁶⁰ As a preliminary matter, the D.C. Circuit found that the controversy was ripe, and Clarksville had standing even though only minimal data retention requirements had been imposed.¹⁶¹ The D.C. Circuit found the FERC’s interpretation to be impermissible under the *Chevron* two-step framework.¹⁶² The Court resolved the question on *Chevron*’s first step, finding the statutory language at issue “is clear and unambiguous—a municipality is *not* a natural gas company or a person.”¹⁶³ The Court also found that the “FERC has held as much for over 50 years.”¹⁶⁴ While not deciding the issue, the Court expressed suspicion of arguments that a regulatory gap would be created because states regulate local governments.¹⁶⁵ And

153. *Id.* at P 79.

154. *Id.* at P 80.

155. *Id.*

156. *Id.* (citing *Florida Southeast Connection*, 154 F.E.R.C. ¶ 61,080 at P 117 (2016)).

157. 161 F.E.R.C. ¶ 61,043 at P 84.

158. *City of Clarksville v. FERC*, 888 F.3d 477, 478 (D.C. Cir. 2018).

159. *Id.* at 480.

160. *City of Clarksville, Tenn.*, 155 F.E.R.C. ¶ 61,184 (2016); *see also Report of the Natural Gas Committee*, 37:2 ENERGY L.J. 16 (2016).

161. *City of Clarksville*, 888 F.3d at 481-82.

162. *Id.* at 482 (citing *Chevron U.S.A. Inc. v. Nat. Res. Defense Council, Inc.*, 467 U.S. 837 (1984)).

163. *Id.* at 483 (emphasis in original).

164. *Id.*

165. *Id.* at 484.

finally, the D.C. Circuit rejected arguments that exempting Clarksville would narrow the scope of NGA jurisdiction, because unlike other cases, the municipality had not acquiesced and the subject facilities were all located in Tennessee.¹⁶⁶

2. Kinetica Deepwater Express, L.L.C.

The FERC disclaimed jurisdiction over previously-jurisdictional gathering facilities which had been transferred before a jurisdictional contract expired.¹⁶⁷ The Commission also declined to exercise jurisdiction over the contract dispute.¹⁶⁸ In June of 2012, the FERC approved a request by ANR Pipeline Co. to abandon and transfer certain pipeline facilities to its subsidiary, TC Offshore L.L.C. (“TC Offshore”), and granted TC Offshore a “certificate to acquire and operate the jurisdictional transmission facilities.”¹⁶⁹ Under this arrangement, TC Offshore conducted non-jurisdictional gathering in connection with jurisdictional transmission, therefore, the Commission held “it would have jurisdiction over TC Offshore’s gathering rates.”¹⁷⁰

Subsequently, in March 2016, TC Offshore was acquired by Kinetica Partners, L.L.C. and renamed Kinetica Deepwater Express, LLC (“Kinetica Deepwater”), which then transferred the non-jurisdictional gathering assets and facilities to a non-jurisdictional affiliate, Kinetica Midstream.¹⁷¹ However, Kinetica Deepwater did not remove references to gathering in its updated tariff.¹⁷² Certain shippers protested that tariff on the grounds that Kinetica was obligated to explain the impact of the filing on those gathering contracts offered “‘in connection with’ its jurisdictional transportation service.”¹⁷³ In May of that year, the FERC conditionally accepted the tariff changes and disclaimed authority to either reject or condition the transfer of the non-jurisdictional assets to Kinetica Midstream.¹⁷⁴ The Commission ordered Kinetica Deepwater to subsequently remove any references to gathering from its tariff.¹⁷⁵

The present order came out of the shippers’ rehearing request.¹⁷⁶ In the previous pleading, the shippers argued that the Commission had “‘in connection with’ jurisdiction over the gathering services.”¹⁷⁷ They argued that the original contracts are binding “unless modified in a manner consistent with the *Mobile Sierra* doctrine.”¹⁷⁸ And finally, the shippers argued that “Kinetica Deepwater cannot be permitted to unilaterally breach and modify its existing contracts” so as to let the

166. *City of Clarksville*, 888 F.3d at 485-86.

167. *Kinetica Deepwater Express, L.L.C.*, 161 F.E.R.C. ¶ 61,019 (2017).

168. *Id.* at P 31.

169. *Id.* at P 3 (citing *ANR Pipeline Co.*, 139 F.E.R.C. ¶ 61,238, *order on reh’g*, 140 F.E.R.C. ¶ 61,260 (2012)), *order on reh’g*, 143 F.E.R.C. ¶ 61,225 (2013), *order on voluntary remand*, 155 F.E.R.C. ¶ 61,183 (2016).

170. 161 F.E.R.C. ¶ 61,019 at P 3.

171. *Id.* at P 4.

172. *Id.*

173. *Id.* at P 5.

174. *Id.* at P 6 (citing *Kinetica Deepwater Express, L.L.C.*, 155 F.E.R.C. ¶ 61,209 at P 10 (2016)).

175. 161 F.E.R.C. ¶ 61,019 at P 6.

176. *Id.* at P 2.

177. *Id.* at P 7.

178. *Id.* (citing *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956)).

May Order fail by allowing the pipeline to shirk these responsibilities.¹⁷⁹ The Commission found “that Kinetica Deepwater may currently be in breach of certain contractual obligations concerning gathering service under three contracts”, but that it nevertheless lacked the jurisdiction to require Kinetica to provide those services, leaving aggrieved parties to “pursue a monetary remedy in a court of law.”¹⁸⁰ The FERC also applied the three part test from *Arkansas Louisiana Gas Co. v. Hall* and declined to exercise jurisdiction over the contract because (1) the FERC did “not possess special expertise beyond that of a state court in this matter;” (2) there was “no need for uniformity of interpretation;” and (3) the contract claim did “not implicate the Commission’s regulatory responsibilities.”¹⁸¹

3. Valley Crossing Pipeline, L.L.C.

The FERC authorized the construction and operation of cross-border facility in Texas.¹⁸² As part of the approval, the Commission rejected arguments that certain upstream portions of the system were “subject to the Commission’s NGA section 7(c) jurisdiction because the pipeline will transport gas in interstate commerce as soon as it is placed in service.”¹⁸³ The export status of the upstream facilities was not seriously discussed because “[w]hen a company constructs a pipeline to import or export volumes of natural gas, only a small segment of the pipeline close to the border is deemed to be the import or export facility” under the Commission’s jurisdiction.¹⁸⁴ The Commission found the “mere existence of a physical interconnection with an interstate pipeline is not sufficient to bring an intrastate pipeline under the Commission’s jurisdiction, since being capable of receiving interstate gas is not the same as actually receiving it.”¹⁸⁵ This was not changed by a proposal submitted to the Commission by Valley Crossing Pipeline’s interstate affiliate to eventually connect to the line, since the “alleged ‘coordinated plan’ does not make the Valley Crossing Pipeline jurisdictional” and future interstate transportation would be jurisdictional if and when it occurred.¹⁸⁶

4. Total Gas & Power North America, Inc. v. FERC

The Fifth Circuit affirmed, on ripeness grounds, a District Court’s dismissal of a natural gas marketer’s declaratory action against the Commission, alleging that the FERC did not have jurisdiction to adjudicate market manipulation violations or impose civil fines.¹⁸⁷ At issue was how significantly the EPA Act of 2005 had “enhanced FERC’s enforcement powers.”¹⁸⁸ Previously, the FERC had been

179. *Id.* at P 8.

180. 161 F.E.R.C. ¶ 61,019 at P 21.

181. *Id.* at P 30-31 (citing *Arkansas Louisiana Gas Co. v. Hall*, 7 F.E.R.C. ¶ 61,175, at p. 61,322, *reh’g denied*, 8 F.E.R.C. ¶ 61,031 (1979)).

182. *Valley Crossing Pipeline, L.L.C.*, 161 F.E.R.C. ¶ 61,084 (2017).

183. *Id.* at P 16.

184. *Id.* at P 18.

185. *Id.* at P 19.

186. *Id.* at P 26.

187. *Total Gas & Power N. Am., Inc. v. FERC*, 859 F.3d 325 (5th Cir. 2017).

188. *Id.* at 328.

“limited to seeking injunctive relief and criminal penalties against violators in federal district court.”¹⁸⁹ The FERC was currently in the process of adjudicating an enforcement proceeding pursuant to an Order to Show Cause.¹⁹⁰ While the court found it was unclear whether the Commission could impose a fine, it sustained the dismissal, holding “any challenge to [the] FERC’s authority to adjudicate NGA violations and impose a civil penalty must await a final determination of a violation and imposition of a penalty by [the] FERC.”¹⁹¹

I. Market-Based Rates

1. Arlington Storage Co., L.L.C.

The FERC granted market-based rate authority for firm wheeling transportation service to Arlington Storage Company, L.L.C. for certain natural gas storage and pipeline facilities that store and wheel natural gas in interstate commerce.¹⁹² The Arlington system consists of two non-contiguous pipelines with an aggregate length of approximately 50 miles located in Steuben, Schuyler and Chemung Counties in New York State, with interconnections with Tennessee Gas Pipeline Company (“Tennessee”), Millennium Pipeline Company, L.L.C. (“Millennium”), and Dominion Energy Transmission, Inc. (“Dominion”).¹⁹³ Arlington already provided storage and hub services at its facilities.¹⁹⁴ The FERC explained that its “main concern in granting a pipeline the use of market-based rates for transportation is the presence that the pipeline has in the relevant marketplace.”¹⁹⁵ In accordance with the *Alternative Rate Policy Statement*, the FERC assessed Arlington’s ability to exercise market power with respect to its relevant geographic and product markets, its market share, and its market concentration.¹⁹⁶ The FERC identified the Mid-Atlantic Production Area as the relevant geographic market.¹⁹⁷ It used a “bingo card” analysis that identified all possible interconnections for pipelines attached to a hub and determined that shippers in the Mid-Atlantic Production Area would “not be dependent on Arlington” due to available alternative paths.¹⁹⁸ The FERC also agreed with Arlington’s conclusion that it had a market share of 11.10 percent of receipt capacity and 12.79 percent of delivery capacity, as well as a Herfindahl-Hirschman Index (“HHI”) level for receipt capacity of

189. *Id.*

190. See Order to Show Cause and Notice of Proposed Penalty, *Total Gas & Power N. Am., Inc.*, 155 F.E.R.C. ¶ 61,105 (2016) (the proceeding is currently ongoing at Docket No. IN12-17-000).

191. *Total Gas & Power N. Am., Inc.*, 859 F.3d at 339.

192. *Arlington Storage Co., L.L.C.*, 163 F.E.R.C. ¶ 61,077 at P 21 (2018).

193. *Id.* at P 2.

194. *Id.* at P 3.

195. *Id.* at P 9.

196. Statement of Policy and Request for Comments, *Alternatives to Traditional Cost-of-Service Rate-making for Nat. Gas Pipelines*, 74 F.E.R.C. ¶ 61,076, *reh’g denied*, 75 F.E.R.C. ¶ 61,024 (1996), *petitions for review denied and dismissed sub nom*; Burlington Res. Oil & Gas Co. v. FERC, 172 F.3d 918 (D.C. Cir. 1998) (*Alternative Rate Policy Statement*), *criteria modified*, *Rate Regulation of Certain Nat. Gas Storage Facilities* (Order No. 678), F.E.R.C. Stats. & Regs. ¶ 31,220 (2006), *order on clarification and reh’g* (Order No. 678-A), 117 F.E.R.C. ¶ 61,190 (2006).

197. 163 F.E.R.C. ¶ 61,077 at P 21.

198. *Id.* at P 16.

1,542 and the HHI for delivery capacity of 1,240 indicating low market share and low market concentration.¹⁹⁹ The FERC directed Arlington to notify it if future changes in circumstances “significantly affect[ed] Arlington’s present market power status.”²⁰⁰

2. Jefferson Island Storage & Hub, L.L.C., Golden Trial Storage, Inc.

The FERC reaffirmed earlier findings that two affiliated natural gas storage providers, Jefferson Island Storage & Hub, L.L.C. (“Jefferson Island”) and Golden Triangle Storage, Inc. (“Golden Triangle”), were authorized to continue charging market-based rates for firm and interruptible storage services and for interruptible wheeling and ancillary services after the affiliates notified the FERC of a change in circumstances that might affect their market power statuses, as required by the FERC regulations.²⁰¹ Jefferson Island owns an intrastate natural gas storage and pipeline header system in Iberia and Vermilion Parishes, Louisiana where it provides regulated interstate service under section 311 of the Natural Gas Policy Act (“NGPA”) while Golden Tringle provides service under the Natural Gas Act (“NGA”) using its interstate natural gas storage and pipeline header system in Jefferson and Orange Counties, Texas.²⁰² The circumstantial change prompting the filing was the anticipated acquisition of their parent company, Southern Company Gas, acquiring a 50 percent interest in Southern Natural Gas Company, L.L.C., which owns and operates natural gas facilities including a 50 percent ownership of Bear Creek Gas Storage, L.L.C., located in Bienville Parish, Louisiana, and full ownership of the Muldon Gas Storage Facility in Monroe County, Mississippi.²⁰³ The FERC found that the facilities continued to meet its tests for low market share and low market concentration.²⁰⁴

3. Worsham-Steed Gas Storage, L.L.C.

On February 27, 2018, the FERC accepted an updated market-power study filed by Worsham-Steed Gas Storage, L.L.C. (Worsham-Steed), a storage services and storage-hub related services provider located in Hood County, Texas, providing firm and interruptible storage services at market-based rates pursuant to section 311 of the National Gas Policy Act (NGPA).²⁰⁵ The FERC also granted Worsham-Steed’s request for waiver of the requirement to update its market power

199. *Id.* at P 7.

200. *Id.* at P 22.

201. *Golden Triangle Storage, Inc.*, 152 F.E.R.C. ¶ 61,158 at PP 1-2 (2015) (*Golden Triangle*); *Equitable Storage Co.*, 75 F.E.R.C. ¶ 61,081 (1996); *Jefferson Island Storage & Hub, L.L.C.*, Docket No. PR08-9-000 (Apr. 17, 2008) (delegated letter order); 18 C.F.R. § 284.504(b) (2017) (“A storage service provider granted the authority to charge market-based rates under § 284.503 is required to notify the Commission within 10 days of acquiring knowledge of significant changes occurring in its market power status.”).

202. *Jefferson Island Storage & Hub, L.L.C., Golden Triangle Storage, Inc.*, 163 F.E.R.C. ¶ 61,049 at P 2 (2018).

203. *Id.* at P 3.

204. *Id.* at P 16.

205. *Worsham-Steed Gas Storage, L.L.C.*, 162 F.E.R.C. ¶ 61,169 (2018).

assessment every five years.²⁰⁶ Worsham-Steed had argued that the requirement was not necessary to ensure that it could not exercise market power given the requirement that it notify the FERC of any change in circumstances that would affect its market power status.²⁰⁷

4. East Cheyenne Gas Storage, L.L.C.

The FERC issued an order reaffirming East Cheyenne Gas Storage, L.L.C.'s (East Cheyenne) market-based rate authority in light of East Cheyenne's application under section 7(c) of the Natural Gas Act to amend its certificate of public convenience and necessity to construct the East Cheyenne Gas Storage Project, which increased its working gas capacity.²⁰⁸ East Cheyenne had submitted an updated market power study in support of this finding.²⁰⁹ The FERC found that East Cheyenne lacked market power as the proposed storage facilities would be in a highly competitive production areas with numerous storage and hub service alternatives.²¹⁰ The FERC also determined that the project would "provide valuable infrastructure facilities for growing Rockies gas production."²¹¹

J. New Services

The FERC approved several new rate schedules in various rate and certificate proceedings in 2017 and 2018. The FERC approved a new interruptible pooling and wheeling service ("Rate Schedule PAWS") proposed by Tallgrass Interstate Gas Transmission.²¹² The service allows shippers to engage in aggregation of supply and related transactions at market hubs.²¹³ Wheeling customers would be charged a rate equivalent to the pipeline's interruptible service charge, including fuel and lost and unaccounted for ("LAUF") gas, while pooling customers would not be subject to additional charges, fuel, or LAUF.²¹⁴ Another pipeline, Arlington Storage, also proposed, and the FERC approved, a firm wheeling service offered at market-based rates.²¹⁵

206. *Worsham-Steed Gas Storage, L.P.*, 119 F.E.R.C. ¶ 61,128 (2007) (Worsham-Steed Gas Storage, L.P. has since changed its name to Worsham-Steed Gas Storage, L.L.C. *Worsham-Steed Gas Storage, L.P., Notice of Name Change to Worsham-Steed Gas Storage, L.L.C.*, Docket Nos. PR08-23-000 and PR10-46-000 (July 28, 2010)).

207. 162 F.E.R.C. ¶ 61,169 at P 6.

208. *East Cheyenne Gas Storage, L.L.C.*, 163 F.E.R.C. ¶ 62,038 (2018).

209. *Id.* at P 5.

210. *Id.*

211. *East Cheyenne Gas Storage, L.L.C.*, 132 F.E.R.C. ¶ 61,097 at P 44 (2018).

212. *Tallgrass Interstate Gas Transmission, L.L.C.*, 161 F.E.R.C. ¶ 61,092 (2017); *see also Tallgrass Interstate Gas Transmission, L.L.C.*, 159 F.E.R.C. ¶ 62,344 (2017) (accepting and suspending the rate schedule while the FERC was without a quorum).

213. *Id.*

214. 161 F.E.R.C. ¶ 61,092 at P 3.

215. 163 F.E.R.C. ¶ 61,077 at P 1.

The FERC accepted a new enhanced firm transportation (“EFT”) rate schedule proposed by Equitrans.²¹⁶ The new service allows “additional firm hourly flexibility for customers, along with the ability to negotiate receipt and/or delivery pressures.”²¹⁷ Under the rate schedule, customers can “flow a maximum hourly quantity of 1/16th of the customer’s maximum daily quantity (MDQ) at primary points and 1/24th of their MDQ at secondary points.”²¹⁸ The reservation rate for Rate Schedule EFT are designed to be 1.5 times Equitrans’ charge under the pipeline’s existing Rate Schedule STS-1.²¹⁹ A similar service offered by Gulf South was also approved by the FERC in 2017.²²⁰

The FERC approved a new firm peaking (FP) service proposed by Dominion Energy Questar Pipeline,²²¹ which would allow firm shippers under the pipeline’s existing Rate Schedule T-1 to receive enhanced deliverability at designated points up to a specified level during certain pre-defined times of the day.²²² Rates for the service are derived from the rate charged under the pipeline’s existing Rate Schedule T-1.²²³

The FERC also approved a new firm daily balancing service (“Rate Schedule FDBS”) offered by Wyoming Interstate Company (WIC).²²⁴ The service, offered only to shippers on WIC’s Medicine Bow Lateral, will allow the pipeline to use a portion of unsubscribed capacity “to retain (bank) gas quantities on its system at a designated point up to the maximum balancing amount” detailed in a shipper’s agreement.²²⁵ WIC would also “deliver[] (draw[]) gas quantities at the designated point”.²²⁶ Both banking and drawing would occur automatically when variations exist between a shipper’s “daily scheduled quantity and the daily flowing gas quantity” at a specified point.²²⁷ The service does not include secondary point flexibility and rates are established at 1.33 times the firm rate for service on the Medicine Bow Lateral.²²⁸

Gas Transmission Northwest proposed to implement new firm and interruptible hourly services under Rate Schedules FHS and IHS.²²⁹ The rate schedules would allow shippers to receive service at rates of flow that exceed uniform hourly flows.²³⁰ Under Rate Schedule FHS, shippers will be able to negotiate hourly flow rates between 1/4 to 1/24 of the shipper’s MDQ over a specified number of hours

216. *Equitrans, L.P.*, 161 F.E.R.C. ¶ 61,181 at P 9 (2017); *see also Equitrans, L.P.*, 160 F.E.R.C. ¶ 62,124 (2017) (accepting and suspending the rate schedule while the FERC was without a quorum).

217. 160 F.E.R.C. ¶ 62,124.

218. *Id.*

219. 161 F.E.R.C. ¶ 61,181 at P 2; *see also* 160 F.E.R.C ¶ 62,124.

220. *Gulf South Pipeline Co.*, 161 F.E.R.C. ¶ 61,032 at P 1 (2017).

221. *Dominion Energy Questar Pipeline, L.L.C.*, Docket No. RP17-900-000 (2017).

222. *Id.*

223. *Id.*

224. *Wyoming Interstate Co.*, 161 F.E.R.C. ¶ 61,242 at P 1, 12 (2017).

225. *Id.* at P 2.

226. *Id.*

227. *Id.*

228. *Id.* at P 3.

229. *Gas Transmission Northwest L.L.C.*, 161 F.E.R.C. ¶ 61,305 at P 1 (2017).

230. *Id.*

during the day.²³¹ Rates for the service are derived from the pipeline's currently effective Rate Schedule FTS-1 reservation rate components.²³² Similarly, the pipeline would provide hourly flexibility on an interruptible basis under Rate Schedule IHS, charging a rate derived from the 100 percent load factor of the rate that an FHS shipper selecting 1/10 hourly flow flexibility would be charged.²³³ The FERC had rejected an earlier proposal that would have allowed Rate Schedule FHS shippers to bump interruptible shippers during the last nomination cycle of the Gas Day (ID-3), on the grounds that it violated the FERC's "no bump" rule during ID-3.²³⁴

New services were also approved in proceedings certifying new facilities. Texas Eastern established a new firm and interruptible lateral-only service for transportation on its Bayway Lateral, as part of the certificate proceeding approving those facilities.²³⁵ In the certificate proceeding for its new East-West Project, Florida Gas proposed to provide firm transportation service on the East-West Project under a new Rate Schedule FTS-WD-2.²³⁶ The service is similar to that provided under the pipeline's existing Rate Schedule FTS-WD, except that capacity contracted under Rate Schedule FTS-WD-2 must have primary receipt points east of the primary delivery points; whereas Rate Schedule FTS-WD does not contain such a restriction on the direction of a shipper's primary flow path.²³⁷

K. Open Seasons

1. Mountain Valley Pipeline, LLC and Equitrans, L.P.

On October 13, 2017, the FERC issued a Certificate of Public Convenience and Necessity (Certificate Order) to Mountain Valley Pipeline, LLC for authorization to construct and operate its proposed Mountain Valley Pipeline Project in West Virginia and Virginia ("MVP Project").²³⁸ The Commission rejected arguments by commenters that "the precedent agreements are not a result of the open season process."²³⁹ The commenters asserted that because Mountain Valley extended its open season five times "along with the fact that the project is subscribed by only affiliates – suggest[s] that the market does not support the project."²⁴⁰ The Commission explained that its open season process is used "to provide the project sponsor with valuable information about market interest that it can utilize to properly design and size its project" and that its "policy does not limit the number of open seasons a project sponsor can hold."²⁴¹ The Commission concluded, therefore, "that the MVP Project will make reliable natural gas service available

231. *Id.* at P 2.

232. *Id.*

233. *Id.* at P 3.

234. *Gas Transmission Northwest L.L.C.*, 161 F.E.R.C. ¶ 61,124 at P 5 (2017).

235. *Texas Eastern Transmission, L.P.*, 160 F.E.R.C. ¶ 62,001 (2017).

236. *Florida Gas Transmission Co., L.L.C.*, 163 F.E.R.C. ¶ 61,017 at P 1 (2018).

237. *Id.* at P 20.

238. 161 F.E.R.C. ¶ 61,043 at P 310 (2017).

239. *Id.* at P 54.

240. *Id.*

241. *Id.*

to end use customers and the market.”²⁴² “Precedent agreements signed by multiple shippers for 100 percent of the project’s capacity adequately demonstrate the project is needed.”²⁴³

L. Pressure Commitments

1. Kinder Morgan Louisiana Pipeline, L.L.C.

The Commission, subject to the conditions described in its order, granted Kinder Morgan Louisiana Pipeline, L.L.C.’s (Kinder Morgan) requested certification and abandonment authorizations to expand facilities at an existing meter station, the Sabine Pass Expansion Project, and to construct and operate system modifications required to provide firm transportation service between existing pipeline interconnects in Louisiana to a new delivery point at an existing LNG export facility located near Sabine Pass.²⁴⁴ A proposed firm transportation service agreement between Kinder Morgan and the operator of the LNG export facility deviated from the pro forma firm transportation service agreement contained in Kinder Morgan’s tariff.²⁴⁵

In particular, the GT&C of Kinder Morgan’s tariff provided that gas will be delivered to Kinder Morgan at the receipt points at the prevailing pressure in Kinder Morgan’s system, but also provides for Kinder Morgan and a shipper to agree, pursuant to a fill-in-the-blank section of Kinder Morgan’s form of service agreement, upon a different minimum delivery pressure at receipt points on Kinder Morgan’s system.²⁴⁶ But Kinder Morgan’s precedent agreement with the operator of the LNG export facility specified minimum pressure requirements and the consequences of failing to meet the minimum pressure requirements.²⁴⁷

The Commission found the minimum pressure provision represented a permissible non-conforming provision.²⁴⁸ Because Kinder Morgan’s tariff specifically provided for negotiation of a minimum pressure requirement, the Commission found the precedent agreement to be consistent with Kinder Morgan’s tariff allowing for negotiated minimum pressures and, because all of Kinder Morgan’s shippers have the right to negotiate these minimum pressure requirements, the Commission also found the provision to be not unduly discriminatory.²⁴⁹

242. *Id.* at P 55.

243. 161 F.E.R.C. ¶ 61,043 at P 55.

244. *Kinder Morgan Louisiana Pipeline, L.L.C.*, 161 F.E.R.C. ¶ 61,205 at PP 1-2 (2017).

245. *Id.* at P 29.

246. *Id.* at P 29(1).

247. *Id.*

248. *Id.* at P 31.

249. 161 F.E.R.C. ¶ 61,205 at P 31.

M. Rate Cases

1. Cameron Interstate Pipeline, L.L.C.

The FERC approved a limited rate change for Cameron Interstate Pipeline, L.L.C. (CIP).²⁵⁰ Prior to this case, CIP sought and received the FERC's permission to construct expansion facilities for a new natural gas pipeline.²⁵¹ At the time of the case, CIP had not yet built all of the expansion facilities and had therefore not incurred the full cost.²⁵² CIP voluntarily sought to reduce its rates to reflect this reality.²⁵³ The Commission approved CIP's request subject to conditions.²⁵⁴

2. Dominion Cove Point LNG, L.P.

The FERC approved an offer of settlement with Dominion Cove Point LNG, L.P. (Dominion Cove Point).²⁵⁵ The settlement established the details and timing of a cost sharing mechanism with certain customers and shippers and contained an obligation to file a limited section 4 rate case to implement the settlement rates.²⁵⁶ Dominion Cove Point was also required to file a section 4 general rate case with rates effective August 1, 2020.²⁵⁷ Prior to filing the section 4 general rate case, Dominion Cove Point was required to make adjustments to the settlement rates to account for any changes in United States tax law, changes in the FERC's tax policy, and cost changes.²⁵⁸ The settlement was unopposed and was approved by the Commission.²⁵⁹

3. Eastern Shore Natural Gas Company

The FERC approved an offer of settlement with Eastern Shore Natural Gas Company (Eastern Shore).²⁶⁰ The settlement contained a rate moratorium for three years from the effective date, with the condition that Eastern Shore would file a limited section 4 rate case if federal income tax rates were to change.²⁶¹ The settlement was unopposed and was approved by the Commission.²⁶²

4. Granite State Gas Transmission, Inc.

The FERC granted Granite State Gas Transmission, Inc.'s (Granite State) petition for approval of a stipulation and settlement agreement in lieu of a general section 4 rate case.²⁶³ Granite State contended that the need to file a new section

250. *Cameron Interstate Pipeline, L.L.C.*, 160 F.E.R.C. ¶ 61,009 at P 11(a) (2017).

251. *Id.* at PP 4-9.

252. *Id.* at PP 7-8.

253. *Id.* at PP 7-8, n. 15.

254. 160 F.E.R.C. ¶ 61,009 at P 11.

255. *Dominion Cove Point LNG, L.P.*, 161 F.E.R.C. ¶ 61,221 at P 20 (2017).

256. *Id.* at P 9.

257. *Id.* at P 15.

258. *Id.*

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

260. *Eastern Shore Nat. Gas Co.*, 162 F.E.R.C. ¶ 61,183 at P 5 (2018).

261. *Id.* at 3.

262. *Id.* at PP 1, 5.

263. *Granite State Gas Transmission, Inc.*, 163 F.E.R.C. ¶ 61,224 at P 1 (2018).

4 rate case, as required by a settlement approved in 2010, was obviated by a settlement reached in 2015.²⁶⁴ Granite State further noted that the settlement at issue in this case accounted for changes in federal income tax law and Granite State's increased costs and would result in lower rates.²⁶⁵ The settlement was unopposed and was approved by the Commission.²⁶⁶

5. Great Lakes Gas Transmission Limited Partnership

The FERC approved Great Lakes Gas Transmission Limited Partnership's (Great Lakes) stipulation and agreement of settlement for its March 31, 2017 general rate case filing.²⁶⁷ The settlement was a black box settlement and established, *inter alia*, base transportation rates, accounting practices for changes in income tax rates, and accounting practices for changes in Commission policy related to income tax allowances on master limited partnerships or pass through entities.²⁶⁸ The settlement was unopposed and was approved by the Commission.²⁶⁹

6. MoGas Pipeline L.L.C.

The FERC accepted and suspended MoGas Pipeline LLC's (MoGas) tariff record to implement a general rate case.²⁷⁰ MoGas proposed to increase its transportation rates due to increased costs and to make general changes to its capital structure.²⁷¹ Multiple parties filed protests to the tariff record, taking issue with the rate increases and the cost allocations.²⁷² The Commission found a hearing was necessary due to the complexity of the issues and because of material issues of fact in dispute.²⁷³ The Commission encouraged the parties to come to a settlement on their own, and accepted and suspended the tariff record for five months, subject to refund and the outcome of the hearing.²⁷⁴

7. Northern Border Pipeline Company

The FERC approved Northern Border Pipeline Company's (Northern Border) petition for approval of a stipulation and settlement agreement.²⁷⁵ The approval of the settlement obviated the need for Northern Border to file a section 4 general rate case.²⁷⁶ The Commission found that the settlement was "essentially a negotiated agreement filed in lieu of a rate case," and approved it without modification.²⁷⁷

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

265. *Id.* at P 3.

266. *Id.* at PP 4, 9.

267. *Great Lakes Gas Transmission L.P.*, 162 F.E.R.C. ¶ 61,152 at P 8 (2018).

268. *Id.* at P 3.

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

270. *MoGas Pipeline L.L.C.*, 163 F.E.R.C. ¶ 61,223 at P 1 (2018).

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

272. *Id.* at PP 7-11.

273. *Id.* at P 12.

274. *Id.* at PP 1, 13.

275. *Northern Border Pipeline Co.*, 162 F.E.R.C. ¶ 61,157 at P 1 (2018).

276. *Id.*

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

8. Southern Natural Gas Company, L.L.C.

The FERC approved Southern Natural Gas Company, L.L.C.'s (Southern) petition for approval of a stipulation and settlement agreement in lieu of section 4 rate case.²⁷⁸ The settlement represented the resolution of a number of issues that ultimately obviated the need to file a section 4 general rate case.²⁷⁹ It provided for a moratorium on settled matters and the parties agreed that the new rates took into account the new, lower corporate tax rate.²⁸⁰ The Commission approved the settlement, noting that the settlement represented a reduction in Southern's rates and provided rate stability until August of 2021.²⁸¹

N. Rate Investigations

1. Dominion Energy Overthrust Pipeline, L.L.C.

The FERC opened a section 5 investigation into whether Dominion Energy Overthrust Pipeline, L.L.C.'s (Dominion Overthrust) rates were unjust and unreasonable.²⁸² At the same time it issued this opinion, the FERC also issued a revised policy statement in response to the United States Court of Appeals for the District of Columbia's decision in *United Airlines, Inc. v. FERC*.²⁸³ The policy statement noted that a double recovery occurred when a master limited partnership was granted an income tax allowance and a discounted tax flow return on equity.²⁸⁴ Under the new policy statement, limited partnership were not permitted to recover an income tax allowance in their cost of service.²⁸⁵

Based upon Dominion Overthrust's recent filings, the Commission believed that Dominion Overthrust's level of earnings substantially exceed its cost of service resulting in its rates being unjust and unreasonable.²⁸⁶ The Commission calculated Dominion Overthrust's return on equity both before its new guidance issued following *United Airlines* and after.²⁸⁷ It noted that the return on equity values would be higher under the new guidance than they would be under the old guidance.²⁸⁸ Dominion Overthrust was given 75 days to file a full cost and revenue study.²⁸⁹

278. *Southern Nat. Gas Co.*, 163 F.E.R.C. ¶ 61,161 at P 1 (2018).

279. *Id.* at PP 1-2.

280. *Id.* at PP 4, 8.

281. *Id.* at PP 14-15.

282. *Dominion Energy Overthrust Pipeline, L.L.C.*, 162 F.E.R.C. ¶ 61,218 at P 1 (2018).

283. *United Airlines*, 827 F.3d 122; 162 F.E.R.C. ¶ 61,218 at P 7; *see also* 162 F.E.R.C. ¶ 61,227 (2018).

284. 162 F.E.R.C. ¶ 61,218 at P 7.

285. *Id.*

286. *Id.* at P 8.

287. *Id.* at PP 5-7.

288. *Id.* at P 8.

289. 162 F.E.R.C. ¶ 61,218 at P 1.

2. Midwestern Gas Transmission Company

The FERC opened a section 5 investigation into whether Midwestern Gas Transmission Company's (Midwestern) rates were unreasonable and unjust.²⁹⁰ The Commission noted that the President signed the Tax Cuts and Jobs Act into law, lowering the federal corporate tax rate to 21 percent.²⁹¹ It then calculated Midwestern's return on equity rate for the previous two years based upon the new corporate tax rate.²⁹² Based upon this, the Commission determined that Midwestern's rates may have allowed it to recover revenue substantially in excess of its cost of service and thus were potentially unjust and unreasonable.²⁹³ The Commission directed Midwestern to file a full cost and revenue study within 75 days.²⁹⁴

3. Natural Gas Pipeline Company of America L.L.C.

The FERC approved, subject to modification, a stipulation and settlement agreement filed by Natural Gas Pipeline Company of America L.L.C. (NG Pipeline).²⁹⁵ The settlement was filed in response to a section 5 investigation into NG Pipeline's rates and provided for a gradual reduction in transportation in storage rates.²⁹⁶ The settlement employed the *Mobile-Sierra* "public interest" standard of review for modifications proposed by non-settling parties.²⁹⁷ The Commission found this standard to be too rigorous and approved the settlement subject to the use of the less rigorous application of the statutory "public interest" standard of review.²⁹⁸

4. Wyoming Interstate Company, L.L.C.

The FERC approved a settlement agreement filed by Wyoming Interstate Company, L.L.C. (WIC) in response to a section 5 investigation into WIC's rates.²⁹⁹ The settlement was unopposed, set WIC's base rates, and provided a moratorium on WIC filing section 4 general rate cases.³⁰⁰ The Commission approved the settlement.³⁰¹

290. *Midwestern Gas Transmission Co.*, 162 F.E.R.C. ¶ 61,219 at P 1 (2018).

291. *Id.* at P 7.

292. *Id.*

293. *Id.* at P 8.

294. *Id.* at P 9.

295. *Natural Gas Pipeline Co. of Am. L.L.C.*, 162 F.E.R.C. ¶ 61,009 at P 1 (2018).

296. *Id.* at PP 2, 10.

297. *Id.* at P 25.

298. *Id.* at PP 26-29.

299. *Wyoming Interstate Co., L.L.C.*, 161 F.E.R.C. ¶ 61,223 at PP 1, 12 (2017).

300. *Id.* at PP 2, 4, 6.

301. *Id.* at P 12.

O. Reservation Charge Credits

1. Atlantic Coast Pipeline, L.L.C.

Atlantic Coast Pipeline, L.L.C. (Atlantic) proposed to include a provision in its tariff exempting it from providing reservation charge credits “in the event deliveries are interrupted due to an upstream or downstream operator.”³⁰² The Commission explained that it allows pipelines to include exemptions in their tariffs excusing pipelines from providing reservation charge credits when deliveries are interrupted due to actions over which the pipeline has no control.³⁰³ The Commission permits these tariff exemptions in situations like the one Atlantic proposed, as long as pipelines specify that these exemptions are only allowed when the failure to perform is caused entirely by the action of others and not controllable by the pipeline.³⁰⁴ The FERC accepted the proposed tariff language regarding reservation charge credits.³⁰⁵

2. American Midstream (AlaTenn), L.L.C.

American Midstream, L.L.C. (AlaTenn) proposed to provide partial reservation charge credits during *force majeure* events using the “Safe Harbor” method, which involves providing full reservation charge credits after a delivery failure lasts more than ten consecutive days.³⁰⁶ AlaTenn also proposed that the reservation charge credit quantity be based on each shipper’s primary firm nominations, as well as whether shippers were given advance notice of the outage.³⁰⁷ If AlaTenn did not post notice of the outage before scheduling the quantities, credits would be “based on the shipper’s scheduled quantity for that day.”³⁰⁸ If AlaTenn did provide advance notice, credits would “be based on the shipper’s usage during the preceding seven days.”³⁰⁹ The FERC accepted AlaTenn’s proposal to use the “Safe Harbor” method for reservation charge credits during *force majeure* events.³¹⁰

AlaTenn proposed a list of ten exemptions, “whereby interruptions to service would not result in reservation charge credits.”³¹¹ The Commission generally accepted AlaTenn’s proposed exemptions to its rule to provide full reservation charge credits for non-*force majeure* outages of firm service, with the exception of two exemptions it found unreasonable.³¹² Proposed exemption (i) would exempt “AlaTenn from its reservation charge crediting obligation if” backhaul service is interrupted as a result of “insufficient offsetting forward-haul service.”³¹³

302. *Atlantic Coast Pipeline, LLC*, 161 F.E.R.C. ¶ 61,042 at PP 178-79 (2017).

303. *Id.* at P 180.

304. *Id.*

305. *Id.*

306. *American Midstream (AlaTenn), L.L.C.*, 161 F.E.R.C. ¶ 61,125 at P 3 (2017) [hereinafter *American Midstream*].

307. *Id.* at P 4.

308. *Id.*

309. *Id.*

310. *Id.* at P 15.

311. *American Midstream*, *supra* note 306, at P 5.

312. *Id.* at P 10.

313. *Id.* at P 11.

The Commission directed “AlaTenn to remove this provision” because primary firm service via backhaul must be subject to reservation charge crediting on the same basis as other similarly situated firm shippers.³¹⁴ Proposed exemption (vii) would exempt “AlaTenn from its reservation charge crediting obligation if service is interrupted solely because of the conduct or operations of an upstream . . . or of a downstream [o]perator . . . or because of a failure of supply or . . . transportation service” which affects the firm’s obligation.³¹⁵ The Commission required AlaTenn to revise the exemption “to clarify that the interrupting party is ‘not controlled’ by AlaTenn,” because such an exemption is reasonable only if “the outage is solely due to the conduct not controlled by the pipeline.”³¹⁶

3. PennEast Pipeline Co.

PennEast Pipeline Company, LLC (PennEast) proposed an exemption to the rule of providing “full reservation charge credits to shippers during non-force majeure events and partial reservation [charge] credits during force majeure events.”³¹⁷ The exemption would allow the pipeline to be excused if the customer “is provided service pursuant to a negotiated rate agreement executed after November 1, 2017,” or any accompanying successor agreement, and “such agreement does not explicitly require reservation charge credits.”³¹⁸ The Commission found it unreasonable to deny reservation charge credits to shippers who may have been unaware of PennEast’s future contracting requirement, and directed PennEast to revise the language to apply only to contracts entered into *after* the tariff’s effective date.³¹⁹

4. Equitrans, L.P.

Equitrans, L.P. (Equitrans) proposed to amend its tariff to provide an exemption for reservation charge credit obligations when it is unable to provide service to a primary firm shipper because the shipper did not submit a scheduling nomination in the Timely Nomination Cycle.³²⁰ After experiencing a dispute with a customer on this exact issue, Equitrans argued “that it should not be required to provide reservation charge credits for applying to the scheduling priorities in its tariff.”³²¹

The FERC approved Equitrans’s proposal to add a clause to its tariff providing an exemption from reservation charge crediting when a customer makes an untimely nomination for service and Equitrans is “unable to schedule such service due to previously scheduled secondary firm or interruptible service which may not be bumped.”³²²

314. *Id.* at P 12.

315. *Id.* at P 13.

316. *American Midstream*, *supra* note 306, at P 14.

317. *PennEast Pipeline Co.*, 162 F.E.R.C. ¶ 61,053 at P 90 (2018).

318. *Id.* at P 91.

319. *Id.* at P 92.

320. *Equitrans, L.P.*, 163 F.E.R.C. ¶ 61,222 at P 7 (2018).

321. *Id.* at P 2.

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

5. Saltville Gas Storage Company, L.L.C.

A group of customers (Saltville Customers) of Saltville Gas Storage Company, L.L.C. (Saltville) submitted a protest in a tariff proceeding before the Commission, requesting “that the Commission require Saltville to incorporate” reservation charge credit provisions into its tariff, consistent with Commission policy.³²³

The FERC found “Saltville’s lack of reservation charge crediting provisions” in its tariff to be inconsistent with the “Commission’s policy . . . [on] reservation charge credits for both non-*force majeure* and *force majeure* outages,” and required Saltville to change its existing tariff accordingly or “explain why its tariff should not be modified [to be] consistent with the Commission[’s] policy” within thirty (30) days of the order.³²⁴ Saltville submitted a compliance filing with tariff revisions on June 25, 2018.³²⁵ The Saltville Customers have since protested the compliance filing, which is still pending before the FERC.

P. Scheduling

1. Atlantic Coast Pipeline, L.L.C.

Atlantic Coast Pipeline, L.L.C. (Atlantic) proposed to schedule customers nominating within their maximum daily contract quantity at a primary point before customers nominating firm service outside of their capacity path entitlement.³²⁶ The Commission explained that “imbalance quantities for makeup or payback should not be given a higher scheduling priority than any firm service quantities,” and that “firm service with secondary scheduling rights is still firm service, and therefore, should have scheduling priority directly following primary firm service.”³²⁷ The FERC required Atlantic to revise its proposed scheduling provision “by moving the scheduling priority of firm primary point imbalances after scheduling priority of customers nominating firm service at points outside of their capacity path entitlements.”³²⁸

2. Gas Transmission Northwest L.L.C.

Gas Transmission Northwest L.L.C. (GTN) proposed to modify its tariff provision on the Intraday 3 Nomination Cycle to provide there be no bumping during the cycle except that a shipper “. . . nominating for service pursuant to Rate Schedule FHS shall bump any interruptible nominations during the Intraday 3 Nomination Cycle.”³²⁹ The FERC rejected GTN’s proposal to modify its tariff to provide exceptions to the “No-Bump Rule” under which firm shipper cannot

323. *Saltville Gas Storage Company, L.L.C.*, 163 F.E.R.C. ¶ 61,140 at P 3 (2018).

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

325. Combined Notice of Filings, *Natural Gas Pipeline Rate and Refund Report*, 83 Fed. Reg. 31,388 (2018).

326. 161 F.E.R.C. ¶ 61,042 at P 152.

327. *Id.*

328. *Id.*

329. 161 F.E.R.C. ¶ 61,124 at P 20.

“bump nominated and scheduled interruptible service during the last standard intraday nomination cycle of the Gas Day.”³³⁰ The Commission explained that its long-standing policy of retaining the no-bump rule in the third nomination cycle had been recently affirmed in *Texas Gas Transmission, L.L.C.* and Order No. 809, where it declined to modify or eliminate the rule.³³¹ The Commission explained that allowing bumping during the first two nomination cycles, but not the third and last cycle, represented a reasonable balance of end-of-day stability and bumping flexibility for the shifting needs of some firm shippers.³³²

3. Kinetica Energy Express, L.L.C.

Kinetica Energy Express, L.L.C. (Kinetica) proposed that displacement deliveries, whether firm or interruptible, should have a lower scheduling priority than firm deliveries outside the primary path and interruptible and overrun deliveries because displacement deliveries “call upon capacity and points where gas cannot physically flow or be anticipated . . . and where shippers have other primary and secondary alternatives.”³³³ In response to shippers’ concerns, Kinetica proposed to modify its scheduling priorities to clarify that deliveries by displacement would not receive the lowest priority for scheduling and curtailment.³³⁴ In a technical conference on the matter, the shippers and Kinetica agreed to eliminate references to “displacement” from the Kinetica tariff and, instead, to clarify that Kinetica “will not be required to provide any transportation service it is not actually able to provide.”³³⁵ The FERC accepted Kinetica’s proposed changes to its scheduling priorities as agreed during the technical conference and directed Kinetica to incorporate the changes in its compliance filing.³³⁶

4. PennEast Pipeline Co.

PennEast Pipeline Company, L.L.C. (PennEast) proposed tariff language that would place authorized overrun quantities higher in its listed scheduling priority order, ahead of interruptible service.³³⁷ The FERC found the proposed prioritization of authorized overrun quantities to be inconsistent with Commission policy requiring authorized overrun to have the same priority as interruptible service and directed PennEast to delete the provision.³³⁸

330. *Id.* at P 22.

331. *Id.* at P 21 (citing *Texas Gas Transmission, L.L.C.*, 154 F.E.R.C. ¶ 61,032 at P 25 (2016); *see also Texas Gas Transmission, L.L.C.*, 150 F.E.R.C. ¶ 61,236 at P 19 (2015); *see also* 161 F.E.R.C. ¶ 61,124 at P 21 (citing Order No. 809, *Coordination of the Scheduling Processes of Interstate Natural Gas Pipelines and Public Utilities*, F.E.R.C. STATS. & REGS. ¶ 31,368 80 Fed. Reg. 23,197 (2015)).

332. 161 F.E.R.C. ¶ 61,124 at P 21.

333. 161 F.E.R.C. ¶ 61,019 at P 46.

334. *Id.* at P 2.

335. *Id.* at P 49.

336. *Id.*

337. 162 F.E.R.C. ¶ 61,053 at P 80.

338. *Id.*

Q. Termination

1. Algonquin Gas Transmission, L.L.C.

Algonquin Gas Company, L.L.C. (Algonquin) filed revised tariff records proposing a provision that would permit mutually agreed upon termination of an existing service agreement in return for a negotiated exit fee paid by the shipper.³³⁹ PSEG Energy Resources & Trade L.L.C. (PSEG) and New Jersey Natural Gas Company and NJR Energy Services Companies (NJR) filed comments in response to the proposed tariff revision, stating that Algonquin should have to explain why shippers are not required to shed unneeded firm capacity through capacity release instead of using the proposed exit fee, and that any exit fee arrangement should be filed in separate filings with the Commission so that parties can comment and protest.³⁴⁰ The FERC accepted Algonquin's proposed tariff provision after finding it was just and reasonable, and not unduly discriminatory.³⁴¹ The FERC was not persuaded by PSEG's arguments that it should require a shipper to use capacity release rather than a termination with a negotiated exit fee.³⁴² The FERC explained that shippers will choose an available capacity release over an exit fee when it is economically realistic to do so.³⁴³ Finally, the FERC explained that pursuant to Sections 284.13(b)(1)(viii) and 154.602 of the Commission's regulations, Algonquin is required to post all accepted early termination agreements and explain the details of the arrangement on its website, and submit a statement to the Commission showing the reasons for any "early termination, a list of affected customers, and the contract demand provided to the customers under the service to be cancelled."³⁴⁴ The FERC stated that such measures will ensure transparency, instead of requiring Algonquin to include in the tariff a specific formula for calculating exit fees.³⁴⁵

2. Texas Gas Transmission, L.L.C.

Texas Gas Transmission, L.L.C. (Texas Gas) filed a mutually supported contractual restructuring package with SWN Energy Services Company, L.L.C. (Southwestern) that included a tariff provision "that would allow Texas Gas and any other customer on the Laterals to mutually terminate and/or modify firm service agreements if the customer meets certain requirements."³⁴⁶ Texas Gas desired to limit the termination right to customers on the Laterals because they are "stand-alone facilities, incremental laterals to Texas Gas' system and they are subject to heightened risks of re-contracting as they are approaching the end of their contracting life cycle."³⁴⁷ Through the payment of an exit fee and/or the modification

339. *Algonquin Gas Transmission, L.L.C.*, 161 F.E.R.C. ¶ 61,196 at PP 1-3 (2017).

340. *Id.* at PP 4-11.

341. *Id.* at P 5.

342. *Id.* at P 9.

343. *Id.*

344. 161 F.E.R.C. ¶ 61,196 at P 7.

345. *Id.*

346. *Texas Gas Transmission*, *supra* note 59, at P 1.

347. *Id.* at P 5.

of existing contracts, the proposed tariff provision provides that the revenue from the exit fee shall “equal the sum of (x) the present value (utilizing a discount factor that appropriately addresses the risk of such termination/modification) of all remaining monthly reservation charges under the firm service agreement(s) being terminated and/or modified; and (y) any other amounts outstanding under such agreements.”³⁴⁸ In addition, the proposed tariff would allow Texas Gas to “include the value of any other non-monetary factor material to Texas Gas’ agreement of the termination/modification utilizing Texas Gas’ reasonable business judgment.”³⁴⁹ The FERC approved the tariff provision permitting the pipeline to renegotiate with its customers the terms of its current service agreements, without requiring that the pipeline hold an open season to permit other customers to bid on the capacity.³⁵⁰ The FERC found that allowing pipelines to exercise their “business judgment to renegotiate” service agreements and to consider “other non-monetary factor[s] material to Texas Gas’ agreement to the termination/modification” is consistent with Commission precedent.³⁵¹ The FERC also found that Texas Gas is not required to use objective bid evaluation criteria when negotiating the modification or extension of an existing contract³⁵²

3. Dominion Cove Point LNG, L.P.

In a proceeding on remand from the United States Court of Appeals for the District of Columbia,³⁵³ BP Energy Company (BP Energy) argued that it was subjected to undue discrimination because Dominion Cove Point LNG, L.P. (Dominion) did not offer BP Energy “the same opportunity to relinquish terminal capacity that it afforded [Statoil Natural Gas LLC (Statoil)].”³⁵⁴ BP Energy had entered into an agreement for LNG import terminal services provided by Dominion pursuant to NGA section 7.³⁵⁵ Statoil had taken assignment of an agreement for LNG import terminal services provided by Dominion pursuant to NGA section 3.³⁵⁶ The FERC affirmed its prior finding that Dominion did not unduly discriminate against BP Energy by denying its request to terminate its agreement while it negotiated capacity reduction and an early termination of its agreement with Statoil.³⁵⁷ The Commission’s decision mainly turned on the different terminal services by Dominion under each agreement.³⁵⁸ The FERC found that NGA section 3(e)(4) “only bars negative impacts on the cost, quality or continuity of service to existing open access [terminal] service” provided under NGA section 7.³⁵⁹ The FERC therefore found it “appropriate to define ‘terms or conditions of service at the facility’ to

348. *Id.* at P 4.

349. *Id.*

350. *Id.* at P 38.

351. *Texas Gas Transmission, supra* note 59, at P 38.

352. *Id.* at P 39.

353. *BP Energy Co. v. FERC*, 828 F.3d 959 (D.C. Cir. 2016).

354. *Id.* at 962; *Dominion Cove Point LNG, L.P.*, 160 F.E.R.C. ¶ 61,134 at P 9 (2017).

355. 160 F.E.R.C. ¶ 61,134 at P 9.

356. *Id.*

357. *Id.*

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

359. 160 F.E.R.C. ¶ 61,134 at P 17.

include operational proscriptions and prescriptions, but to exclude terms or conditions that would not adversely impact existing terminal service, such [as] turn back and early termination.”³⁶⁰ Therefore, because BP Energy’s section 7 terminal service was not degraded or adversely affected in any respect, the early termination of Statoil’s section 3 terminal service did not violate the section 3(e)(4) protection against undue discrimination.³⁶¹ The FERC also found that BP Energy and Statoil are not similarly situated customers and do not merit similar treatment in regard to turn back and early contract termination because of the different market risks each customer faces in their different regulatory regimes.³⁶² Even if the customers have similar terms and conditions in their agreements, the FERC reaffirmed that BP Energy, as a section 7 customer, is subject to a framework of protections that Dominion is required to give them, whereas Statoil, as a section 3 customer, had to negotiate its own protections to be afforded them.³⁶³ Finally, the FERC did not find that Dominion’s willingness to enter into an agreement with Statoil to reduce their section 3 service agreements was tied to an agreement concerning future infrastructure projects.³⁶⁴ The FERC accepted Dominion’s explanation of a 2010 earnings conference call where they stated that they were willing to “‘work with’ Statoil on both the development of ‘infrastructure out of the Marcellus region’ and ‘potential liquefaction facilities’” as commentary regarding the potential for Statoil to participate in Dominion’s effort to transport additional gas from the Marcellus/Utica reserves to the Cove Point terminal.³⁶⁵

4. Dominion Transmission, Inc.

Dominion Transmission, Inc. (DTI) filed a notice of its intent to terminate a service agreement with Ascent Resources – Marcellus, LLC (Ascent), stating that the termination was part of a resolution between the parties involving an outstanding balance Ascent owed to DTI under its agreement.³⁶⁶ Rice Energy Marketing LLC (REM) filed comments in response to the termination requesting that DTI attach the termination agreement to the notice, and that DTI should be required to provide more information regarding the termination so that interested parties can determine if DTI’s actions are unduly discriminatory.³⁶⁷ DTI answered the comments and stated that while the service agreement was not attached to the filing it is “‘fully consistent with DTI’s standard Form of Service Agreement applicable to service under Rate Schedule FT.’”³⁶⁸ In terms of the reasons for the termination, DTI stated that pursuant to section 21.5 of the GT&C that DTI “‘may agree, on a not unduly discriminatory basis with a Customer to: (1) the termination of an existing Service Agreement prior to its expiration date contingent upon negotiated

360. *Id.* at P 19.

361. *Id.* at PP 20-22.

362. *Id.* at PP 26-31.

363. *Id.* at P 31.

364. 160 F.E.R.C. ¶ 61,134 at P 32.

365. *Id.* at PP 32-33.

366. *Dominion Transmission, Inc.*, 161 F.E.R.C. ¶ 61,002 at P 1 (2017).

367. *Id.* at P 4.

368. *Id.* at P 5.

conditions, including the payment of any agreed upon termination fees.”³⁶⁹ The FERC accepted DTI’s notice of termination.³⁷⁰ However, the FERC stated that pursuant to its notice in Docket No. RM01-5-000 it “may not issue an order on reports.”³⁷¹ Therefore, the FERC noted that DTI should be advised that future Service Agreement Termination Notices that are not protested, “will be treated as informational, and the Commission may not issue an order on those reports.”³⁷²

R. Force Majeure

1. Peregrine Oil & Gas II, L.L.C. v. Texas Eastern Transmission, L.P.

The Commission resolved certain issues and ordered that an investigation and a public trial-type evidentiary hearing under NGA § 5 be set to resolve the remaining issues raised by Peregrine Oil & Gas II, L.L.C.’s (Peregrine) complaint against Texas Eastern Transmission L.P. (Texas Eastern) alleging violations of Natural Gas Act § 4 and Texas Eastern’s gas tariff.³⁷³

Peregrine has alleged it is a producer of offshore natural gas that flows into Texas Eastern’s East Cameron Pipeline System, and through service provided by its Line 41-A System, Texas Eastern is the only interstate pipeline directly or indirectly connecting Peregrine’s offshore production to onshore Louisiana.³⁷⁴ Consequently, Peregrine claims that a series of maintenance-related outages occurring between the fall of 2013 and November 2016 adversely affected Texas Eastern’s service on the Line 41-A System in violation of Texas Eastern’s obligations under NGA § 4 and its tariff, thereby harming Peregrine.³⁷⁵

Peregrine “asserted that Texas Eastern violated” its service obligations under its tariff and “section 4 of the NGA” by (a) “failing to exercise due diligence to remedy the 2016 Outage on its Line 41-A System and by failing to timely fix the cause of such outage”, and (b) “requiring producers to pay extra non-tariff charges to Texas Eastern to reimburse it for the costs of the maintenance work as a precondition to Texas Eastern repairing and placing the Line 41-A System back in service.”³⁷⁶

Peregrine has also claimed that a “reimbursement agreement between Texas Eastern and certain producers (and ultimately Peregrine itself) constituted a charge ‘in connection with, the transportation or sale of natural gas subject to the jurisdiction of the Commission’ and, as such, the reimbursement agreement should have been filed with the Commission.”³⁷⁷

Peregrine asserts that Texas Eastern took two months to repair a pipeline leak that reasonably should have been repaired within ten days, resulting in \$2,600,397

369. *Id.*

370. *Id.* at P 7.

371. 161 F.E.R.C. ¶ 61,002 at P 7.

372. *Id.*

373. *Peregrine Oil & Gas II, LLC v. Texas E. Transmission, L.P.*, 163 F.E.R.C. ¶ 61,001 at PP 1, 27 (2018).

374. *Id.* at P 9.

375. *Id.* at PP 10-15.

376. *Id.* at P 2.

377. *Id.* at P 13.

in economic damages to Peregrine.³⁷⁸ Peregrine seeks an award of \$5,231,801, plus interest, for the damages it allegedly suffered as a result of Texas Eastern's failure to provide service on its Line 41-A System.³⁷⁹

Because Peregrine's natural gas was being transported on Texas Eastern's system, the Commission found that it had the requisite standing to file the present complaint against Texas Eastern.³⁸⁰ Despite the fact that Peregrine was not a direct customer of Texas Eastern, having held that producers whose natural gas is transported on a pipeline have a substantial indirect interest in that pipeline's rates, terms and conditions of service, even if they do not themselves have contracts for service on that pipeline, the Commission found that Peregrine has standing.³⁸¹

The Commission also found that, where it was undisputed that both outages of the Line 41-A System were only temporary, with service returning to normal after each outage, and a temporary pipeline outage does not amount to an NGA § 7 abandonment of service, neither outage could be regarded as an abandonment of service.³⁸²

2. Atlantic Coast Pipeline, L.L.C.

The Commission ordered the issuance of certificate authority allowing Atlantic Coast Pipeline, LLC (Atlantic) to develop the Atlantic Coast Pipeline Project (ACP), consisting of 604 miles of new interstate pipeline, compression and other related facilities extending from West Virginia to North Carolina and eastern Virginia.³⁸³

First, the Commission directed Atlantic to comply with Commission policies by revising a proposed definition of "force majeure" that included "arrests and priority limitation or restraining orders of any kind of the government of the United States or a State or of any civil or military entity."³⁸⁴ The Commission explained:

outages necessitated by compliance with government standards concerning the regular, periodic maintenance activities a pipeline must perform in the ordinary course of business to ensure the safe operation of the pipeline, including the Pipeline and Hazardous Materials Safety Administration's integrity management regulations, are non-force majeure events requiring full reservation charge credits.³⁸⁵

378. 163 F.E.R.C. ¶ 61,001 at P 15.

379. *Id.* at P 16.

380. *Id.* at P 25.

381. *Id.* (citing *Trailblazer Pipeline Co.*, 85 F.E.R.C. ¶ 61,345, at p. 62,347 (1998), *reh'g denied*, 87 F.E.R.C. ¶ 61,110, at p. 61,569 (1999)).

382. 163 F.E.R.C. ¶ 61,001 at P 26.

383. 161 F.E.R.C. ¶ 61,042 at PP 1, 326.

384. *Id.* at PP 140-41.

385. *Id.* at P 140 (citing *Kinder Morgan Louisiana Pipeline L.L.C.*, 154 F.E.R.C. ¶ 61,145 at P 30 (2016); citing also *TransColorado Gas Transmission Co.*, 144 F.E.R.C. ¶ 61,175 at PP 35-43 (2013); citing also *Gulf South Pipeline Co.*, 141 F.E.R.C. ¶ 61,224 at PP 28-47 (2012), *order on reh'g*, 144 F.E.R.C. ¶ 61,215 at PP 31-34 (2013)).

Conversely, according to the Commission:

outages resulting from one-time, non-recurring government requirements, including special, one-time testing requirements after a pipeline failure, are force majeure events requiring only partial crediting.³⁸⁶

Because Atlantic's proposed force majeure definition could be interpreted to include regular, periodic maintenance activities required to comply with government actions, the Commission found that it conflicted with Commission policy.³⁸⁷

Second, because Commission policy defines force majeure outages as events that are both "unexpected and uncontrollable," Atlantic's proposed definition of force majeure events conflicted with that policy to the extent it included "any other causes, whether of the kind herein enumerated or otherwise, *not reasonably within the control* of the party claiming suspension, which by due diligence such party is unable to overcome."³⁸⁸

3. PennEast Pipeline Company, L.L.C.

The Commission ordered the issuance of a certificate of public convenience and necessity to PennEast Pipeline Company, L.L.C. (PennEast), subject to certain conditions, authorizing it to construct and operate the PennEast Project, consisting of a new greenfield 116-mile natural gas pipeline system, three laterals, a compression station and appurtenant facilities serving markets in New Jersey, New York, Pennsylvania, and surrounding states, while addressing the curtailment and force majeure sections of PennEast's proposed tariff.³⁸⁹

The curtailment section of PennEast's proposed tariff provided:

Pipeline shall have the right to curtail or discontinue transportation services, in whole or in part, on all or a portion of its system at any time for reasons of Force Majeure or when, in Pipeline's sole judgment, capacity or operating conditions so require or it is desirable or necessary to make modifications, repairs or operating changes to its system.³⁹⁰

The Commission ordered PennEast to revise the emphasized phrase to comply with Commission policy because (a) "pipelines should plan routine repair, maintenance, and improvements through the scheduling process, and should not curtail confirmed scheduling nominations in order to perform such work" and (b) "pipelines may only 'curtail' service in an emergency situation or when an unexpected capacity loss occurs after the pipeline has scheduled service, and the pipeline is therefore unable to perform the service which it has scheduled."³⁹¹ Because

386. 161 F.E.R.C. ¶ 61,042 at P 140 (citing *Algonquin Gas Transmission, L.L.C.*, 153 F.E.R.C. ¶ 61,038 at P 104 (2015)).

387. 161 F.E.R.C. ¶ 61,042 at P 140.

388. *Id.* at P 141 (citing *North Baja Pipeline, L.L.C. v. FERC*, 483 F.3d 819, 823 (D.C. Cir. 2007), *aff'g*, *North Baja Pipeline, L.L.C.*, 109 F.E.R.C. ¶ 61,159 (2004), *order on reh'g*, 111 F.E.R.C. ¶ 61,101 (2005)); *see also* 154 F.E.R.C. ¶ 61,145 at P 29; *see also* 153 F.E.R.C. ¶ 61,038 at P 103 (emphasis added).

389. 162 F.E.R.C. ¶ 61,053 at PP 1, 4, 40, 81.

390. *Id.* at P 81 (emphasis added).

391. *Id.* at P 82 (citing *CenterPoint Energy Gas Transmission Co.*, 144 F.E.R.C. ¶ 61,195 at P 75 (2013); citing also *Ryckman Creek Resources, L.L.C.*, 136 F.E.R.C. ¶ 61,061 at P 68 (2011); citing also *MarkWest Pioneer, L.L.C.*, 125 F.E.R.C. ¶ 61,165 at P 52 (2008)).

“modifications, repairs or operating changes” are “not limited to emergency situations or unexpected losses of capacity”, instead of curtailing service after it is scheduled, pipelines should take outages required for routine repair, maintenance, and operating changes into account when scheduling service, according to the Commission.³⁹²

The Commission found PennEast’s proposed definition of “force majeure events” – which included “compliance with any court order, law, regulation or ordinance promulgated by any governmental authority having jurisdiction, whether federal, Indian, state or local, civil or military, the necessity for testing (as required by governmental authority or as deemed necessary for safe operation by the testing party)” – to be overly broad and conflicting with Commission policy to the extent it could be interpreted to sweep “regular, periodic maintenance activities required to comply with government actions” into the definition of force majeure events.³⁹³

Outages resulting from governmental actions are either force majeure or non-force majeure events, with the Commission explaining that (a) outages necessitated by compliance with government standards concerning the regular, periodic maintenance activities a pipeline must perform in the ordinary course of business to ensure the safe operation of the pipeline, including the Pipeline and Hazardous Materials Safety Administration’s integrity management regulations, are non-force majeure events, and (b) outages resulting from one-time, non-recurring government requirements, including special, one-time testing requirements after a pipeline failure, are force majeure events.³⁹⁴

Finally, because Commission policy defines force majeure outages as events that are both “unexpected and uncontrollable,” it rejected PennEast’s definition of force majeure events that purported to include “any other cause, whether of the kind herein enumerated, or otherwise, not within the control of the party claiming suspension and which by the exercise of due diligence such party is unable to prevent or overcome” and ordered PennEast to revise its definition accordingly.³⁹⁵

4. American Midstream (AlaTenn), L.L.C.

The Commission accepted the revised force majeure language proposed by American Midstream (AlaTenn), L.L.C. – excluding (a) outages necessitated by compliance with government-required regular or periodic maintenance activities,

392. 162 F.E.R.C. ¶ 61,053 at P 82.

393. *Id.* at P 87.

394. *Id.* (citing 154 F.E.R.C. ¶ 61,145 at P 30; citing also *DBM Pipeline, L.L.C.*, 152 F.E.R.C. ¶ 62,056 at PP 31-32 (2015); citing also 144 F.E.R.C. ¶ 61,175 at PP 35-43 (2013); citing also 141 F.E.R.C. ¶ 61,224 at PP 28-47 (2012), *order on reh’g*, 144 F.E.R.C. ¶ 61,215 at PP 31-34 (2013)) (as these are non-force majeure events, full reservation charge credits are required); *see also* 162 F.E.R.C. ¶ 61,053 at P 87 (as these are force majeure events, only partial reservation charge credits are required); *see also* 153 F.E.R.C. ¶ 61,038 at P 104.

395. 162 F.E.R.C. ¶ 61,053 at P 88 (citing *North Baja*, 483 F.3d at 823, *aff’g*, 109 F.E.R.C. ¶ 61,159 (2004), *order on reh’g*, 111 F.E.R.C. ¶ 61,101 (2005)); *see also* 154 F.E.R.C. ¶ 61,145 at P 29; *see also* 153 F.E.R.C. ¶ 61,038 at P 103.

or (b) outages to comply with the Pipeline and Hazardous Material Safety Administration's integrity management regulations from its definition of "force majeure" – bringing its tariff language into line with Commission policy.³⁹⁶

The Commission accepted AlaTenn's filed tariff procedures to determine reservation charge credits when firm service is interrupted under its firm rate schedules, while noting that partial credits may be provided pursuant to the "No-Profit method" under which the pipeline gives credits equal to its return on equity and income taxes starting on Day 1, or the "Safe Harbor method" under which the pipeline provides full credits after a short grace period (10 days or less) when no credit is due.³⁹⁷

5. Saltville Gas Storage Co.

The Commission found that Saltville Gas Storage Company, L.L.C.'s (Saltville) existing tariff, which lacked reservation charge crediting provisions for both non-force majeure and force majeure outages was inconsistent with the Commission's reservation charge crediting policy, and directed Saltville under NGA § 5, to either file tariff records conforming with the Commission's reservation charge crediting policy or explain why it should not be required to do so.³⁹⁸ Saltville had filed tariff records to remove an expired negotiated rate agreement with Public Service Co. of North Carolina, Inc.³⁹⁹ The Commission accepted the tariff records and required Saltville to either file revisions to its tariff concerning reservation charge credits to conform with Commission policy or to explain why it should not be required to do so.⁴⁰⁰

The Commission's reservation charge crediting policy, which requires pipelines to provide firm shippers with reservation charge credits when [pipelines] are unable to provide primary firm service "differentiates between the credits required in force majeure and non-force majeure outages of primary firm service."⁴⁰¹ "With respect to non-force majeure outages, where the outage occurred due to circumstances within a pipeline's control, including planned or scheduled maintenance, the Commission requires the pipeline to provide shippers a full reservation charge credit for the amount of primary firm service they nominated for scheduling which the pipeline failed to deliver."⁴⁰²

"Commission policy also requires that the pipeline provide partial reservation charge credits during periods when it cannot provide service because of a force

396. *American Midstream*, *supra* note 306, at PP 1, 3.

397. *Id.* at PP 10-2 (citing *Tennessee Gas Pipeline Co.*, Opinion No. 406, 76 F.E.R.C. ¶ 61,022 (1996), *order on reh'g*, Opinion No. 406-A, 80 F.E.R.C. ¶ 61,070 (1997), *as clarified by*, *Rockies Express Pipeline L.L.C.*, 116 F.E.R.C. ¶ 61,272 at P 63 (2006)) (pipelines may also use some other method which results in an equitable sharing of the risk).

398. 163 F.E.R.C. ¶ 61,140 at PP 7, 9 (the Commission's authority to order the modification of tariff records to conform to its reservation charge crediting policy is found in *North Baja*, 483 F.3d 819 (D.C. Cir. 2007), *aff'g*, 109 F.E.R.C. ¶ 61,159 (2004), *order on reh'g*, 111 F.E.R.C. ¶ 61,101 (2005)).

399. 163 F.E.R.C. ¶ 61,140 at P 1.

400. *Id.* at PP 1, 6.

401. *Id.* at P 7.

402. *Id.* (citing 76 F.E.R.C. ¶ 61,022 (1996), *order on reh'g*, 80 F.E.R.C. ¶ 61,070 (1997), *as clarified by*, 116 F.E.R.C. ¶ 61,272 at P 63 (2006)).

majeure event in order to share the risk of an event not in the control of the pipeline.”⁴⁰³

The Commission noted partial reservation charge credits may take the form of either (a) full reservation charge credits after a short grace period of ten days or less, or (b) partial crediting starting on the first day of a force majeure event.⁴⁰⁴

III. INFRASTRUCTURE

A. Pipelines

1. Sierra Club v. FERC

A divided panel of the United States Court of Appeals for the District of Columbia Circuit (DC Circuit) granted the Sierra Club’s petition for review ruling that the FERC did not take the requisite “hard look” under the National Environmental Policy Act of 1969 (NEPA), at the greenhouse-gas (GHG) emissions that will result from power plants burning the natural gas transported on three new interstate natural gas pipelines.⁴⁰⁵ The Court acknowledged that the FERC had prepared an EIS as required by the NEPA but the Commission had not taken a “hard look” at the environmental consequences of its actions, including alternatives to its proposed course.⁴⁰⁶ The Court determined that pursuant to Section 7(c) of the NGA, the commission was statutorily required to consider “the public convenience and necessity” of balancing the “public benefits against the adverse effects of the project’, . . . including adverse environmental effects.”⁴⁰⁷ The Court ruled that the EIS “should have either given a quantitative estimate of the downstream greenhouse emissions that will result from burning the natural gas that the pipeline will transport or explained more specifically why it could not have done so.”⁴⁰⁸ Accordingly, the court ruled the EIS “needed to include a discussion of the ‘significance’” of the indirect greenhouse-gas emissions and “the incremental impact of the action when added to past, present, and reasonably foreseeable future actions.”⁴⁰⁹ The court cautioned, however, that “quantification of greenhouse-gas emissions” was not “required every time those emissions are an indirect effect of an agency action” because in some cases “quantification may not be feasible.”⁴¹⁰ The Court also required the Commission to explain “as an aid to the relevant decisionmakers,” whether and why the Commission continues to maintain that “the Social Cost of Carbon is not useful for NEPA purposes, because several

403. 163 F.E.R.C. ¶ 61,140 at P 7 (citing Opinion No. 406, 76 F.E.R.C. ¶ 61,022, at p. 61,088 (1996) (“force majeure events are ‘unexpected and uncontrollable events.’”)).

404. 163 F.E.R.C. ¶ 61,140 at P 7 (citing *Dominion Transmission, Inc.*, 146 F.E.R.C. ¶ 61,101 at P 21 (2014); citing also 144 F.E.R.C. ¶ 61,215 at P 49 (2013); citing also *Northern Natural Gas Co.*, 141 F.E.R.C. ¶ 61,221 at P 20 (2012); citing also *Midwestern Gas Transmission Co.*, 137 F.E.R.C. ¶ 61,257 at PP 19-20 (2011)).

405. 42 U.S.C. § 4332(2)(C) (1975); see also 154 F.E.R.C. ¶ 61,080, *order on reh’g*, 156 F.E.R.C. ¶ 61,160 (2016), *appeal granted sub nom.* *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017) [hereinafter *Sierra Club*].

406. *Sierra Club*, *supra* note 405, at 1367.

407. *Id.* at 1373.

408. *Id.* at 1374.

409. *Id.*

410. *Id.*

of its components are contested and because not every harm it accounts for is necessarily ‘significant’ within the meaning of NEPA.”⁴¹¹

One judge dissented in part, finding the FERC was not obligated to consider the emissions of GHGs from newly constructed or expanded power plants because licensing of those plants was under the authority of a separate agency.⁴¹²

2. Adorers of the Blood of Christ v. FERC

The United States District Court for the Eastern District of Pennsylvania granted the FERC’s and Transcontinental Gas Pipeline Company, L.L.C.’s (Transco) motions to dismiss a claim by the Adorers of the Blood of Christ, United States Province, et al. (plaintiffs) which brought an action claiming the FERC violated the Religious Freedom Restoration Act (RFRA), by issuing a certificate of public convenience and necessity to Transco to build the Atlantic Sunrise Pipeline.⁴¹³ The Court found that it lacked subject matter jurisdiction over the plaintiffs’ RFRA claims.⁴¹⁴ The Court determined that plaintiffs had “failed to apply for a rehearing before FERC” and “failed to present their RFRA claims in any manner to the FERC, and ultimately to the appropriate Court of Appeals” and therefore were barred from pursuing “collateral review” of the Commission’s order.⁴¹⁵ The Court also rejected claims that the RFRA allowed plaintiffs to “bypass the specific procedure established by Congress in the NGA by bringing a RFRA suit against FERC” in the District Court.⁴¹⁶

3. New York State Dep’t of Environmental Conservation v. FERC

The United States Court of Appeals for the Second Circuit denied a petition for review and upheld a FERC order that determined the New York State Department of Environmental Conservation (NYDEC) had waived its certification authority for the pipeline by failing to respond within one year of receiving Millennium Pipeline Company, L.L.C.’s (Millennium) request for water quality certification, as required by Section 401 of the Clean Water Act (CWA).⁴¹⁷ “On November 13, 2015, Millennium filed an application with the FERC, pursuant to section 7(c) of the NGA, 15 U.S.C. § 717f(c), requesting” a certificate of public convenience and necessity.⁴¹⁸ “On November 18, 2015, Millennium submitted an application for a water quality certification to the” NYDEC.⁴¹⁹ The NYDEC “received the application on November 23, 2015”.⁴²⁰ “On November 9, 2016, FERC

411. *Sierra Club*, *supra* note 405, at 1375.

412. *Id.* at 1379-1383.

413. 42 U.S.C. §§ 2000bb-2000bb-4 (1993); *see also Transcontinental Gas Pipe Line Co.*, 158 F.E.R.C. ¶ 61,125, *certificate amended*, 159 F.E.R.C. ¶ 62,181, *reh’g denied*, 161 F.E.R.C. ¶ 61,250 (2017); *see also Adorers of the Blood of Christ v. FERC*, 283 F. Supp. 3d 342 (E.D. Pa. 2017).

414. *Adorers of the Blood of Christ*, 283 F. Supp. 3d at 345.

415. *Id.* at 345.

416. *Id.* at 347.

417. *New York State Dep’t of Env’tl. Conservation v. FERC*, 884 F.3d 450 (2d Cir. 2018); *see also* 33 U.S.C. § 1341(a)(1) (1977).

418. *New York State Dep’t of Env’tl. Conservation*, 884 F.3d at 452-53.

419. *Id.* at 453.

420. *Id.*

issued” its certificate.⁴²¹ On July 21, 2017, Millennium requested the FERC to determine that the NYDEC had “waived its authority under the Clean Water Act, and thus permit Millennium to proceed with construction.”⁴²² “While that request was pending, on August 30, 2017, [the NYDEC] denied Millennium’s application.”⁴²³

“On September 15, 2017, following the [NYDEC]’s decision, the [Commission] found that the [NYDEC]’s delay constituted a waiver of the [NYDEC]’s authority under the CWA.”⁴²⁴ It held that under the plain language of CWA section 401, the relevant date for assessing a waiver is the day the agency receives an application, in this case, November 23, 2015.⁴²⁵

The NYDEC appealed that ruling to the Second Circuit, which determined that the “plain language” of section 401 of the CWA “outlines a bright-line rule regarding the beginning of review: the timeline for a state’s action regarding a request for certification ‘shall not exceed one year’ after ‘receipt of such request.’”⁴²⁶ The Court reasoned that the statute “does not specify that this time limit only applies for ‘complete’ applications.”⁴²⁷ “If the statute required ‘complete’ applications, . . . states could blur this bright-line rule into a subjective standard, dictating that applications are ‘complete’ only when state agencies decide that they have all the information they need.”⁴²⁸ The Court pointed out that the “state agencies could thus theoretically request supplemental information indefinitely.”⁴²⁹ Accordingly, the Court concluded that the NYDEC waived its authority under section 401 and that the FERC properly issued a waiver order permitting Millennium to proceed with construction without a water quality certification.⁴³⁰

4. NEXUS Gas Transmission, L.L.C.

On August 25, 2017, the FERC issued a Certificate of Public Convenience and Necessity (Certificate Order) to NEXUS Gas Transmission, LLC (NEXUS) in which it granted NEXUS’s request to construct and operate a new, greenfield pipeline.⁴³¹ The Commission declined the U.S. Environmental Protection Agency’s suggestion to remove several sentences from its Environmental Impact Statement (EIS) related to its climate change discussion.⁴³² The Commission concluded that “[t]he final EIS appropriately discusses climate change, quantifies project-related [greenhouse gas] emissions, identifies emission reduction and mitigation measures and programs, and notes the projects’ consistency with climate goals

421. *Id.*

422. *Id.* at 454.

423. *New York State Dep’t of Env’tl. Conservation*, 884 F.3d at 454.

424. *Id.*

425. *Millennium Pipeline Co.*, 160 F.E.R.C. ¶ 61,065 (2017).

426. *New York State Dep’t of Env’tl. Conservation*, 884 F.3d at 455.

427. *Id.* at 455-56.

428. *Id.* at 456.

429. *Id.*

430. *Id.* at 456-57.

431. *NEXUS Gas Transmission, L.L.C.*, 160 F.E.R.C. ¶ 61,022 (2017).

432. *Id.* at PP 6-7, 12.

in the Midwest region.”⁴³³ The Commission also rejected the Sierra Club’s argument that the Commission should have used “a programmatic EIS,” noting that the agency is “not engaged in regional planning.”⁴³⁴ Rather, the Commission processes individual pipeline applications in carrying out its statutory responsibilities under the NGA.”⁴³⁵ Similarly, the Commission rebuffed allegations that the EIS “fail[ed] to consider the project’s indirect effects, particularly regarding impacts of induced upstream production of natural gas from the Marcellus and Utica Shale.”⁴³⁶

5. Mountain Valley Pipeline, L.L.C.

On October 13, 2017, the FERC issued a Certificate of Public Convenience and Necessity (Certificate Order) to Mountain Valley Pipeline, L.L.C. for authorization to construct and operate its proposed Mountain Valley Pipeline Project in West Virginia and Virginia (MVP Project).⁴³⁷ The Commission disagreed with commenters’ suggestion that it “should examine the need for pipeline infrastructure on a region-wide basis” because “Commission policy is to examine the merits of individual projects and each project must demonstrate a specific need.”⁴³⁸ The Commission also ruled that it was not necessary to “look behind the precedent agreements to evaluate project need” because “the project shippers are affiliated with Mountain Valley.”⁴³⁹

6. Transcontinental Gas Pipe Line Co.

On December 6, 2017, the FERC denied and dismissed rehearing requests of its February 3, 2017, order authorizing Transcontinental Gas Pipe Line Company, LLC (Transco) to construct, lease, and operate its proposed Atlantic Sunrise Project.⁴⁴⁰ The Commission declined to look beyond the market need reflected by the applicant’s contracts with shippers although it noted that it had “also analyzed a study by the Institute for Energy Economics and Financial Analysis” that “suggest[ed] that pipelines, like the Atlantic Sunrise Project, may serve to aid in the delivery of lower-priced natural gas to higher-priced markets.”⁴⁴¹ The Commission also explained that it “does not confer eminent domain powers” but that “it is NGA section 7(h) that authorizes that certificate holder to acquire the necessary

433. FERC CHAIR: COURT RULING WON’T CHANGE PIPELINE REVIEWS (2017), <https://www.rtoinsider.com/natural-gas-greenhouse-gas-emissions-ghg-77400/>.

434. FERC SIDESTEPS BROADER ISSUES IN APPROVALS OF PIPELINES (2017), https://www.wvgazette.com/news/special_reports/marcellus/ferc-sidesteps-broader-issues-in-approvals-of-pipelines/article_e05e33c5-6d1c-5c5f-8ebd-22b1beb91133.html.

435. *Id.*

436. 160 F.E.R.C. ¶ 61,022 at P 162.

437. *Mountain Valley Pipeline, L.L.C.*, 161 FERC ¶ 61, 043 (2017).

438. *Id.*

439. FERC’S APPROVAL OF MOUNTAIN VALLEY PIPELINE STIRS DEFIANCE, DETERMINATION (2017), https://www.roanoke.com/business/ferc-s-approval-of-mountain-valley-pipeline-stirs-defiance-determination/article_4b8c75b1-ae8b-57ca-8016-0e4d0dae6de4.html.

440. *Transcontinental Gas Pipe Line Co., L.L.C.*, 161 F.E.R.C. ¶ 61,250 (2017).

441. *Id.* at P 28.

land or property to construct the approved facilities by exercising the right of eminent domain if it cannot acquire the easement by an agreement with the landowner.”⁴⁴² The Commission also rejected the contention that the Commission violated its own regulations by issuing a conditional certificate.⁴⁴³

7. Florida Southeast Connection, L.L.C.

On March 14, 2018, the Commission issued an order on remand reinstating the certificate it had issued to the Southeast Market Pipelines Project (SMP Project).⁴⁴⁴ At issue was the Commission’s consideration of downstream greenhouse gas (GHG) emissions from gas transported by the three pipelines that make up the SMP Project.⁴⁴⁵ The court vacated and remanded the Commission’s orders in *Florida Southeast Connection, L.L.C.* authorizing construction and operation of the SMP Project and directed the Commission to revise the SMP Project’s environmental impact statement (EIS) to provide a quantitative estimate of the project’s downstream greenhouse emissions or to explain more specifically why the Commission cannot do so.⁴⁴⁶ The Court also directed the Commission to explain whether the Commission continues to regard the Social Cost of Carbon tool as not useful for NEPA purposes.⁴⁴⁷

The Commission “concluded that notwithstanding the additional analysis in the SEIS, it could not reach a finding whether downstream GHG emissions are significant and that the additional analysis does not alter staff’s conclusion in the prior final environmental impact statement that the SMP Project is an environmentally acceptable action.”⁴⁴⁸ The Commission declined to use the Social Cost of Carbon tool reiterating that the tool was “not appropriate in project-level environmental review under NEPA.”⁴⁴⁹ The Commission concluded that “using the Social Cost of Carbon would not assist us in determining whether downstream GHG emissions are significant.”⁴⁵⁰ Commissioners LaFleur and Glick dissented in part because the record did not support the Commission’s responses to the Court on downstream GHG emissions and the Social Cost of Carbon.⁴⁵¹

8. DTE Midstream Appalachia, L.L.C.

On March 15, 2018, the Commission issued an order authorizing DTE Midstream Appalachia, L.L.C. (DTE) to construct and operate a new interstate pipeline and related facilities in Berk County, Pennsylvania (Birdsboro Pipeline Project).⁴⁵² The Commission ruled that the record did “not demonstrate the requisite

442. *Id.* at P 31.

443. *Id.* at PP 43-47.

444. *Florida Southeast Connection, L.L.C.*, 162 F.E.R.C. ¶ 61,233 (2018).

445. *Id.* at P 1.

446. *Sierra Club*, *supra* note 405, at 1363, 1375; *see also* 154 F.E.R.C. ¶ 61,080, *order on reh’g*, 156 F.E.R.C. ¶ 61,160 (2016).

447. *Sierra Club*, *supra* note 405, at 1375.

448. 162 F.E.R.C. ¶ 61,233 at P 2.

449. *Id.* at PP 40, 44.

450. *Id.* at P 52.

451. 162 F.E.R.C. ¶ 61,233, at 1-2 (Glick dissenting).

452. *DTE Midstream Appalachia, L.L.C.*, 162 F.E.R.C. ¶ 61,238 (2018).

reasonably close causal relationship between future incremental natural gas production and the proposed project,” and therefore, it did not analyze the impacts from upstream natural gas production.⁴⁵³ The Commission’s environmental assessment did, however, evaluate the impacts from the downstream combustion of natural gas transported by the project.⁴⁵⁴ Commissioners LaFleur and Glick filed a joint dissent, in part, because the Commission declined to use the Social Cost of Carbon to consider the project’s environmental impacts.⁴⁵⁵

9. Dominion Transmission, Inc.

On May 18, 2018, the Commission denied rehearing of an order that issued Dominion Transmission, Inc. (Dominion) a certificate of public convenience and necessity to construct and operate its New Market Project.⁴⁵⁶ The Commission rejected the contention that the Commission “failed to properly evaluate the impacts of upstream and downstream activities in combination with the impacts of the New Market Project.”⁴⁵⁷ The Commission looked to the Council on Environmental Quality’s definition of “cumulative impacts” and concluded that “the incremental upstream and downstream activities that are the subject of [the rehearing request] do not meet the definition of cumulative impacts.”⁴⁵⁸ The Commission also concluded that the “[environmental assessment’s] findings were supported by substantial evidence.”⁴⁵⁹ Commissioner LaFleur dissented, in part, because she objected to the policy change announced to “limit[] the Commission’s review and disclosure of upstream and downstream [GHG] impacts.”⁴⁶⁰ Commissioner LaFleur also commented that “a key reason the Commission lacks the specificity of information to determine causation and reasonable foreseeability is because we have not asked applicants to provide this sort of detail in their pipeline applications.”⁴⁶¹ Commissioner Glick also expressed disagreement with the Commission’s conclusion that “the NGA and [NEPA] do not require that the Commission consider [GHG] emissions from the production or consumption of natural gas that may be the reasonably foreseeable result of the Commission’s certificate decisions.”⁴⁶² To this end, Commissioner Glick reasoned that “the determination of what environmental effects must be considered under NEPA should turn on a record-by-record inquiry of what effects are reasonably foreseeable, not on generic pronouncements divorced from the facts of any specific case.”⁴⁶³

B. Storage Projects

1. Tres Palacios Gas Storage, L.L.C.

453. *Id.* at P 53.

454. *Id.* at P 56.

455. *Id.*

456. *Dominion Transmission, Inc.*, 163 F.E.R.C. ¶ 61,128 (2018).

457. *Id.* at P 30.

458. *Id.* at P 40.

459. *Id.* at PP 45-75.

460. 163 F.E.R.C ¶ 61,128, at 1 (LaFleur dissenting).

461. *Id.* at 5 (LaFleur dissenting).

462. 163 F.E.R.C ¶ 61,128, at 1 (Glick dissenting).

463. *Id.* at 4 (Glick dissenting).

The FERC granted in part and denied in part Tres Palacios Gas Storage L.L.C.'s (Tres Palacios) request to amend the certificated capacities of its facility's three storage caverns to match their actual quantities.⁴⁶⁴ After finding that the proposal would not result in the loss of service to any current customers, the FERC stated that "Tres Palacios failed to meet its burden of demonstrating that its proposal will not affect [the] integrity" of two of the facility's caverns.⁴⁶⁵ In particular, the FERC noted that Tres Palacios' request for did not include sonar surveys for the two caverns for which it denied the proposed reduction in capacity.⁴⁶⁶ While Tres Palacios cited one instance in which the FERC allowed a change in capacity absent a sonar survey, the decision noted that "Tres Palacios's facility is a salt dome storage facility where a sonar survey provides the needed information" to assess the integrity of the cavern.⁴⁶⁷ Consequently, the FERC found that Tres Palacios failed to meet its burden in demonstrating that the reduced certificated capacity would not adversely affect the integrity of the caverns.⁴⁶⁸

C. Section 401 Water Quality

1. Millennium Pipeline Co. v. Seggos

In early 2017, Millennium went to the D.C. Circuit to ask for the court to act on its Clean Water Act (CWA) section 401 water quality certification (WQC) application because more than a year had passed since Millennium submitted its application to the New York State Department of Environmental Conservation (NYSDEC).⁴⁶⁹ The Court found that Millennium did not have standing to sue because the appropriate course of action would be for Millennium to present its request to the FERC.⁴⁷⁰

On July 5, 2017, NYSDEC issued a determination that Millennium's application was complete.⁴⁷¹ On July 21, 2017, Millennium filed a notice to proceed (NTP) request at FERC in which Millennium stated it had obtained all federally-required environmental permits, or waiver thereof, necessary for construction of the Project.⁴⁷² On August 30, 2017, NYSDEC issued its "Notice of Decision," in which NYSDEC stated that it conditionally "deemed denied" Millennium's application for a Water Quality Certification under Section 401 of the CWA.⁴⁷³ The purported reason for denial was rooted in a decision issued a week earlier by the

464. 160 F.E.R.C. ¶ 61,107, at P 1.

465. *Id.* PP 27, 48.

466. *Id.* at P 48.

467. *Id.* at P 52 (citing *Saltville Gas Storage Co.*, 122 F.E.R.C. ¶ 61,151 (2008)).

468. *Id.* at P 26 ("When analyzing proposed changes to operating parameters, the Commission's concern is the integrity of storage caverns (or reservoirs or formulations).").

469. *Millennium Pipeline Co. v. Seggos*, 860 F.3d 696 (D.C. Cir. 2017).

470. *Id.* at 698.

471. New York State Department of Environmental Conservation, *Notice of Complete Application*, DEPARTMENT OF ENVIRONMENTAL CONSERVATION (July 5, 2017), <http://www.dec.ny.gov/enb/110569.html>.

472. *Millennium Pipeline Co.*, 160 F.E.R.C. ¶ 61,065 (2017).

473. New York State Department of Environmental Conservation, *Notice of Decision*, DEPARTMENT OF ENVIRONMENTAL CONSERVATION (Aug. 30, 2017), https://www.dec.ny.gov/docs/permits_ej_operations_pdf/valleydecltr.pdf.

D.C. Circuit in *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017). Like *Sierra Club*, NYSDEC found that the FERC failed to consider or quantify the indirect downstream greenhouse gas emissions from the combustion of natural gas transported by the Project as part of NEPA review.⁴⁷⁴ Interestingly, as part of its review for an air permit for the only shipper on the Valley Lateral, CPV Valley, L.L.C., the power plant operator, NYSDEC had conducted potential GHG effects of combustion of natural gas when CPV applied for its permit.⁴⁷⁵

On September 15, 2017, the FERC issued its Declaratory Order Finding Waiver under Section 401 of The Clean Water Act, finding that NYSDEC waived its CWA authority.⁴⁷⁶ Consistent with FERC precedent in both NGA cases and hydroelectric licensing proceedings under the Federal Power Act, the FERC concluded that the triggering date for waiver under section 401 of the CWA as the date the certifying agency receives a certification application.⁴⁷⁷ In the case of Valley Lateral, NYSDEC received Millennium's formal written application on November 23, 2015.⁴⁷⁸ By failing to act on Millennium's request for certification by November 23, 2016, the FERC found NYSDEC waived its certification authority.⁴⁷⁹

On October 20, 2017 Millennium filed a renewed NTP at the FERC, which the FERC granted October 27, 2017.⁴⁸⁰ NYSDEC then proceeded to file an Emergency Stay at the Second Circuit, which was granted.⁴⁸¹ The stay was lifted on December 6, 2017, and Millennium began construction on December 7, 2017.⁴⁸² Finally, while getting to the merits of the case in *New York State Department of Environmental Conservation v. FERC*, the court concluded that the Department waived its authority to review Millennium's request for a water quality certification under the Clean Water Act by failing to act on that request within one year. Millennium put the Valley Lateral in service July 9, 2018.⁴⁸³

2. Constitution Pipeline Co. v. New York State Dep't of Envtl. Conservation

The Second Circuit Court of Appeals deferred to NYSDEC's expertise as to the significance of the information requested from Constitution Pipeline, given

474. *Id.*

475. Valley Lateral Project Environmental Assessment (FERC issued May 2016).

476. 160 F.E.R.C. ¶ 61,065 at P 2.

477. *Id.* at P 17.

478. *Id.* at P 1.

479. *Id.* at P 17.

480. Renewed Request for Notice to Proceed with Construction of Millennium Pipeline Co. Under CP16-17 (FERC issued Oct. 20, 2017); Letter Order Granting Millennium Pipeline Co. 07/21/2017 Request to Begin Construction re the Valley Lateral Project under CP16-17 (FERC issued Oct. 27, 2017).

481. *New York State Dep't of Envtl. Conservation*, 884 F.3d at 454.

482. *Id.*

483. Letter Order Granting Millennium Pipeline Co. 7/6/2018 Request to Place into Service the Valley Lateral Project under CP16-17 (FERC issued July 9, 2018).

evidence on record during the § 401 permit proceeding.⁴⁸⁴ Finally, the court concluded that the denial of the § 401 certification after the company refused to provide relevant information, despite repeated NYSDEC requests, was not arbitrary or capricious.⁴⁸⁵

Constitution Pipeline petitioned for certiorari to the United States Supreme Court, which was denied on April 30, 2018.⁴⁸⁶

484. *Constitution Pipeline Co. v. New York State Dep't of Env'tl. Conservation*, 868 F.3d 87, 103 (2d Cir. 2017).

485. *Id.*

486. Philipp C. Bobbitt, *Petition for a Writ of Certiorari*, SUPREME COURT DOCKET (Jan. 16, 2018), https://www.supremecourt.gov/DocketPDF/17/17-1009/28014/20180116171334386_Petition.pdf; Supreme Court of the United States, *Constitution Pipeline Company, LLC v. New York State Department of Environmental Conservation*, SCOTUS BLOG (Apr. 30, 2018), <http://www.scotusblog.com/case-files/cases/constitution-pipeline-company-llc-v-new-york-state-department-environmental-conservation/>.

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