

No. 18-1042

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**United States Court of Appeals  
for the Fourth Circuit**

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ORUS ASHBY BERKLEY, *ET AL.*,  
*Plaintiffs-Appellants,*

v.

MOUNTAIN VALLEY PIPELINE, LLC,  
FEDERAL ENERGY REGULATORY COMMISSION, *ET AL.*,  
*Defendants-Appellees.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA, ROANOKE DIVISION  
Hon. Elizabeth K. Dillon, District Court No. 7:17-cv-00357

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**BRIEF FOR DEFENDANTS-APPELLEES  
FEDERAL ENERGY REGULATORY COMMISSION, *ET AL.***

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**STATEMENT OF JURISDICTION**

**I. SUBJECT MATTER JURISDICTION**

This appeal arises from the district court's determination, after full briefing and a hearing, that it lacked subject matter jurisdiction to hear claims concerning an administrative proceeding pending before Defendant-Appellee the Federal Energy Regulatory Commission ("FERC" or the "Commission"). The agency proceeding involves the application of Defendant-Appellee Mountain Valley Pipeline, LLC ("Mountain Valley") for authorization under the Natural Gas Act, 15 U.S.C. § 717f (the "Act"), to construct an interstate natural gas pipeline.

Plaintiffs-Appellants Orus Ashby Berkley, *et al.* (collectively, “Landowners”) own property in Virginia and West Virginia in the path of the proposed pipeline; several Landowners, including Mr. Berkley, are participants in the FERC proceeding concerning Mountain Valley’s certificate application.

The district court concluded that the Act’s exclusive review provisions, 15 U.S.C. § 717r(a)-(b), as uniformly interpreted by numerous courts, precluded it from hearing Landowners’ claims, which must proceed through FERC and the appropriate court of appeals. *Berkley v. Mountain Valley Pipeline, et al.*, No. 17-357, 2017 WL 6327829, slip op. 4-9 (W.D. Va. Dec. 11, 2017) (“Dismissal Order”), JA 532-54.

In addition, the district court concluded that, even assuming Landowners’ claims fall outside the scope of the Act’s exclusive review provisions, district court jurisdiction would be barred under the analysis set forth in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), related Supreme Court precedents, and this Court’s decision in *Bennett v. U.S. Sec. & Exch. Comm’n*, 844 F.3d 174 (4th Cir. 2016). Dismissal Order 9-16, JA 540-47.

The district court correctly found that it lacked subject matter jurisdiction.

## **II. APPELLATE JURISDICTION**

This Court has jurisdiction to review the District Court’s dismissal under 28 U.S.C. § 1291.

## **STATEMENT OF THE ISSUE**

Whether the district court correctly concluded that the Natural Gas Act, 15 U.S.C. § 717r(a)-(b), barred it from exercising jurisdiction over constitutional claims concerning the Federal Energy Regulatory Commission's issuance of a certificate authorizing a natural gas pipeline, where such claims can be meaningfully addressed by the court of appeals at the conclusion of agency proceedings?

## **STATEMENT OF THE CASE**

### **I. STATUTORY AND REGULATORY BACKGROUND**

FERC is an independent regulatory commission comprising up to five members appointed by the President, with the advice and consent of the U.S. Senate. *See* Department of Energy Organization Act, 42 U.S.C. § 7171(a)-(b) (establishing the Commission and transferring authority to it). Under the Natural Gas Act, the Commission has “exclusive jurisdiction” over the “transportation and sale of natural gas in interstate commerce.” *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300-301 (1988).

Companies seeking to construct or expand interstate natural gas pipeline facilities must first obtain a certificate of “public convenience and necessity” from the Commission authorizing the construction or expansion. 15 U.S.C. § 717f(c). The Commission may issue a certificate only if it finds the proposed facility “is or

will be required by the present or future public convenience and necessity.” 15 U.S.C. § 717f(e). *See generally E. Tenn. Nat. Gas Co. v. Sage*, 361 F.3d 808, 819-20 (4th Cir. 2004) (describing process). The Commission has broad authority to attach conditions to any certificate it issues. 15 U.S.C. § 717f(e).

Once a FERC certificate issues, if the certificate holder is unable to reach agreement with property owners regarding appropriate compensation, the certificate holder may obtain necessary rights of way through eminent domain. 15 U.S.C. § 717f(h) (providing that eminent domain proceedings may proceed in “the district court of the United States for the district in which such property may be located, or in the State courts”); *see also E. Tenn. Nat. Gas Co.*, 361 F.3d at 821 (Congress, in the Natural Gas Act, “grant[ed] condemnation power to ‘private corporations . . . execut[ing] works in which the public is interested’”) (quoting *Mississippi & Rum River Boom Co. v. Patterson*, 98 U.S. 403, 406 (1878)).

The Natural Gas Act provides for agency rehearing and appellate review of final FERC orders relating to the issuance of certificates. 15 U.S.C. § 717r; *see generally Consol. Gas Supply Corp. v. FERC*, 611 F.2d 951, 957 (4th Cir. 1979).

A party seeking review of a FERC certificate order must first seek rehearing before the Commission. 15 U.S.C. § 717r(a). If the Commission denies rehearing, the Act then provides that an aggrieved party may file a petition for review in the appropriate court of appeals. *Id.* § 717r(b) (providing for judicial review in the

circuit where the natural gas company is located or has its principal place of business, or the D.C. Circuit).

On review, the court of appeals has “exclusive” jurisdiction “to affirm, modify, or set aside” a FERC order “in whole or in part.” *Id.* § 717r(b). However, “[n]o objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure to do so.” *Id.*

## **II. MOUNTAIN VALLEY CERTIFICATE PROCEEDING AND D.C. CIRCUIT APPEAL**

In October 2015, Mountain Valley submitted an application under the Natural Gas Act, 15 U.S.C. § 717f(c), to construct, own, and operate a new natural gas pipeline system to transport gas to markets in the mid-Atlantic, southeastern, and Appalachian regions. Application, Oct. 23, 2015, FERC Dkt. No. CP16-10 (describing proposed pipeline project).<sup>1</sup>

The application initiated an extensive regulatory review process before the Commission. The proceeding was open to the public and governed by the Natural Gas Act, 15 U.S.C. § 717f(c), the National Environmental Policy Act, 42 U.S.C. § 4321, *et seq.*, and the Administrative Procedure Act, 5 U.S.C. § 551, *et seq.* Numerous interested parties, including some of the Plaintiffs-Appellants here,

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<sup>1</sup> Filings in FERC proceedings are available on FERC’s website, at <https://www.ferc.gov/docs-filing/elibrary.asp>.

intervened in the Commission proceeding and/or submitted comments on the application to the Commission.

In October 2017, by a 2-1 vote, the Commission issued a certificate conditionally authorizing the proposed construction, subject to compliance with numerous environmental and operational conditions. Order Issuing Certificates and Granting Abandonment Authority, 161 FERC ¶ 61,043 (Oct. 13, 2017) (Acting Chairman Neil Chatterjee and Commissioner Robert F. Powelson; Commissioner Cheryl A. LaFleur dissenting), JA 330-465 (“Certificate Order”).<sup>2</sup> Among other things, the Commission evaluated the need for the project and determined that the Mountain Valley pipeline would “make reliable natural gas service available to end use customers and the market.” *Id.* PP 33-55, JA 342-53. *See also id.* PP 62-63, JA 356-57 (“The proposed projects in this proceeding[] are designed to primarily serve natural gas demand in the Northeast, Mid-Atlantic, and Southeast regions. Through the transportation of natural gas from the projects, the public at large will benefit from increased reliability of natural gas supplies.”).

As relevant here, the Commission addressed arguments that “the use of eminent domain in connection with the project would be unconstitutional because the project would only benefit private entities, not the public.” *Id.* PP 58-64, JA

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<sup>2</sup> The Commission is currently composed of Chairman Kevin J. McIntyre and Commissioners Cheryl A. LaFleur, Neil Chatterjee, Robert F. Powelson, and Richard Glick.

354-57 (noting the filing of Landowners' complaint). While observing that it is for the courts to determine the constitutionality of the Natural Gas Act's eminent domain provision, 15 U.S.C. § 717f(h), the Commission explained that its determination that the Mountain Valley project is in the "public convenience and necessity" satisfies the "public use" requirement for constitutional taking purposes. Certificate Order PP 60-61, JA 355-56.

After the Certificate Order issued, numerous parties filed requests for rehearing of the Certificate Order. *See* FERC Dkt. No. CP16-10. One rehearing request filed by multiple parties—including Mr. Berkley—raises numerous challenges, including constitutional claims relating to the exercise of eminent domain authority. Request for Rehearing and Rescission of Certificates and Motion for Stay of Appalachian Voices, *et al.*, FERC Dkt. Nos. 16-10 and 16-13, Nov. 13, 2017. The rehearing requests remain pending before the Commission; the Commission thus has not yet acted with finality in the agency proceeding.

Some of the parties to the Appalachian Voices rehearing request (but not Mr. Berkley) subsequently filed a petition for review of the Certificate Order in the D.C. Circuit. *Appalachian Voices, et al. v. FERC*, D.C. Cir. No. 17-1271 (consolidated with petitions for review filed by Blue Ridge Environmental Defense League, *et al.* ("Blue Ridge") in No. 18-1002 and Sierra Club, *et al.* in No. 18-

1006). The Appalachian Voices, Blue Ridge, and Sierra Club petitioners filed with that court motions for stay of the Certificate Order pending judicial review.

Because the Commission has not yet issued a final order addressing pending rehearing requests (including Mr. Berkley's rehearing request), the Commission filed a motion asking the court to dismiss the petitions in light of pending agency proceedings. FERC Motion to Dismiss for Lack of Jurisdiction, D.C. Cir. Nos. 17-1271, *et al.*, filed Jan. 26, 2018 (citing 15 U.S.C. § 717r(b) and cases). Once the Commission acts with finality on the rehearing requests, additional parties may choose to petition for judicial review of the FERC orders, and the court of appeals may proceed to the merits of the petitions.

A motions panel of the D.C. Circuit denied petitioners' motions for stay, finding that they failed to satisfy "the stringent requirements for a stay pending court review." Order, D.C. Cir. Nos. 17-1271, *et al.*, Feb. 2, 2018. In addition, the motions panel referred the Commission's motion to dismiss to a merits panel. *Id.*<sup>3</sup>

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<sup>3</sup> The Commission subsequently filed a motion asking the court to hold the case in abeyance or, in the alternative, to defer the filing of the certified index to the agency record until after the Commission issues an order on rehearing. Motion to Hold Proceeding in Abeyance or, in the Alternative, to Defer Filing of the Certified Index to the Record, D.C. Cir. Nos. 12-1271, *et al.*, Feb. 20, 2018. Also, in a related district court case, the Commission has moved to dismiss a complaint bringing constitutional/eminent domain challenges concerning both the Mountain Valley pipeline and Atlantic Coast pipeline certificate proceedings. Motion to Dismiss, *Bold Alliance, et al. v. FERC*, D.D.C. No. 17-1822, Dec. 21, 2017.

### III. DISTRICT COURT PROCEEDING

On July 27, 2017, before the Certificate Order issued, Landowners filed a complaint in the Western District of Virginia against the Commission, then-Acting Chairman Cheryl A. LaFleur, and Mountain Valley Pipeline. Complaint, JA 12-80.

Count One of the Complaint challenges the constitutionality of the standards applied by FERC in issuing gas pipeline certificates, and asserts that “FERC should be precluded from granting MVP a Certificate.” *Id.* PP 74-77, JA 40-41. Count Two alleges that the congressional delegation of authority in 15 U.S.C. § 717f(h) is “overly broad,” and, thus, “FERC . . . cannot confer [eminent domain] power to [Mountain Valley] or any other natural gas company.” Complaint PP 78-81, JA 41-42. Count Three further challenges FERC’s alleged “subdelegation” of eminent domain authority to Mountain Valley. *Id.* PP 82-84, JA 42.<sup>4</sup>

In addition, Landowners filed a motion for a preliminary injunction, asking the district court to “prohibit[] FERC from granting [Mountain Valley] the power of eminent domain . . . via issuance of a Certificate,” and “prohibit[] [Mountain Valley] from claiming or exercising any power of eminent domain under 15 U.S.C. § 717f(h) . . . .” Mot. for Prelim. Inj., July 27, 2017, JA 82.

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<sup>4</sup> Because Landowners voluntarily dismissed Count Four of the Complaint with prejudice, only Counts One, Two, and Three are at issue on appeal. Br. 10.

The Commission and Mountain Valley filed motions to dismiss for lack of jurisdiction, and filed oppositions to Landowners' motion for a preliminary injunction. After full briefing on the motions and a hearing, the district court granted the motions to dismiss. Dismissal Order, JA 532-47. The district court also denied the motion for preliminary injunction as moot. *Id.* 16, JA 547. This appeal followed.

### **SUMMARY OF ARGUMENT**

The district court correctly concluded that it lacked subject matter jurisdiction over Landowners' claims. First, because Landowners' claims relate to the pipeline certificate process before FERC, the Natural Gas Act divests the district court of jurisdiction to hear the claims. Under the Act's exclusive administrative and appellate review scheme, the claims may be addressed by the court of appeals at the conclusion of agency proceedings—but not by the district court. Second, the framework set forth in *Thunder Basin* and *Bennett* confirms that district court jurisdiction is lacking.

On appeal, Landowners appear to concede the meaning of the Natural Gas Act's exclusive review provision, and the applicability of *Thunder Basin* and *Bennett*. Landowners attempt, however, to avoid dismissal by characterizing the dismissed claims as pure constitutional challenges untethered to agency action. These characterizations are unavailing. As the district court correctly recognized,

Landowners' Complaint and arguments demonstrate that they are challenging Mountain Valley's ability to exercise eminent domain authority under a FERC-issued certificate order. That is, Landowners are not just concerned with an abstract constitutional violation, but with the impact of the FERC-authorized Mountain Valley pipeline on their land.

Challenges to the Certificate Order are pending before the agency on rehearing. Moreover, a petition for review of the Commission proceedings is already pending in the D.C. Circuit. Under the Natural Gas Act, 15 U.S.C. § 717r(b), at the conclusion of agency proceedings, the court of appeals will have exclusive jurisdiction to review the Commission's final orders regarding the Mountain Valley certificate application. In short, contrary to Landowners' contention, meaningful judicial review of Landowners' claims is available in the court of appeals at the conclusion of agency proceedings.

The Dismissal Order should be affirmed.

## **ARGUMENT**

### **I. STANDARD OF REVIEW**

This Court reviews the district court's dismissal for lack of subject matter jurisdiction *de novo*. *Bennett*, 844 F.3d at 178.

## **II. THE DISTRICT COURT CORRECTLY RECOGNIZED THAT LANDOWNERS' CLAIMS INHERE IN THE FERC CERTIFICATE PROCEEDING, AND MUST PROCEED TO JUDICIAL REVIEW UNDER THE NATURAL GAS ACT'S EXCLUSIVE REVIEW PROCEDURES**

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As the district court explained, this Circuit has long recognized the “broad reach” of the Natural Gas Act’s exclusive review provision, 15 U.S.C. § 717r. Dismissal Order 5 (quoting *Consol. Gas Supply Corp.*, 611 F.2d at 957), JA 536. As described above, *supra* pp. 4-5, the Act channels all litigation concerning the siting and construction of proposed interstate natural gas pipelines to the Commission, with judicial review available only in the federal courts of appeals (not federal district courts or state courts), and only at the conclusion of agency proceedings. Dismissal Order 4-9, JA 535-40.<sup>5</sup>

This Court—and numerous other courts—have uniformly interpreted this provision to preclude *de novo* litigation in district court of any issue “relating to final or preliminary [FERC] orders.” *E.g.*, *Consol. Gas*, 611 F.2d at 957; *Williams*

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<sup>5</sup> The Natural Gas Act, 15 U.S.C. §§ 717f(h) and 717u, provides district courts with limited jurisdiction over certain matters, not relevant here. Section 717f(h) provides district courts with jurisdiction over eminent domain proceedings pursuant to valid FERC certificate orders, but “does not provide challengers with an additional forum to attack the substance and validity of a FERC order.” *Williams*, 890 F.2d at 264. Section 717u provides district courts with jurisdiction “to enforce any liability or duty created by, or to enjoin any violation of . . . this chapter . . . .” *See, e.g., Town of Dedham v. FERC*, No. 15-12352, 2015 WL 4274884, at \*2 (D. Mass. July 15, 2015) (“[Section] 717u is simply an enforcement provision, not an open-ended grant of jurisdiction to the district courts.”).

*Nat. Gas Co. v. Oklahoma City*, 890 F.2d 255, 261-62 (10th Cir. 1989) (section 717r precludes district court litigation of “all issues inhering in the controversy” before FERC) (citing *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958)); *see also Me. Council of Atl. Salmon Fed. v. Nat’l Marine Fisheries Serv.*, 858 F.3d 690, 693 (1st Cir. 2017) (Souter, J., sitting by designation) (“The Supreme Court has made it clear that the jurisdiction provided [to the courts of appeals] by [the Federal Power Act’s direct review provision] is ‘exclusive,’ not only to review the terms of the specific FERC order, but over any issue ‘inhering in the controversy.’”) (citation omitted).<sup>6</sup>

Landowners acknowledge that “[t]here can be no doubt that section 717r . . . generally applies to all issues inhering in, or arising under FERC’s regulatory process.” Br. 41. In an effort to avoid the effect of that provision, however, Landowners (1) argue that the district court “misunderstood” the nature of their claims, and (2) seek to distinguish *Consolidated Gas, Williams*, and similar cases on a factual basis. Br. 36-49. These arguments are meritless.

First, the district court fully understood the nature of Landowners’ claims.

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<sup>6</sup> The Federal Power Act’s direct review provision, 16 U.S.C. § 825l, “parallels” the Natural Gas Act provision at issue here. *Williams*, 890 F.2d at 262; *see also Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981) (because relevant provisions of the Natural Gas Act and Federal Power Act, both administered by the Commission, “are in all material respects substantially identical,” it is “established practice” to cite “interchangeably decisions interpreting the pertinent sections of the two statutes”).

Landowners argued below that section 717r is not applicable because “they are not challenging a FERC order, but are instead raising constitutional challenges to the statutes granting authority to FERC in the first instance.” Dismissal Order 7, JA 538. The court rejected the argument, observing that “plaintiffs’ own complaint—and their standing arguments—make clear that they are concerned not with some abstract constitutional violation, but with the fact that their land will be affected by [Mountain Valley]’s proposed pipeline.” *Id.* 8, JA 539.

Indeed, Landowners’ Complaint demonstrates that their constitutional claims directly challenge, and are inextricably intertwined with, the Mountain Valley certificate proceeding pending before FERC. Count I of the Complaint challenges, on constitutional grounds, the standards employed by FERC to evaluate proposed pipeline projects— “[a]s applied by FERC generally and ultimately to [Mountain Valley] here.” Complaint PP 75-76, JA 41. Moreover, Count I states that “FERC should be precluded from granting [Mountain Valley] a Certificate.” *Id.* P 77, JA 41.

Counts II and III challenge the constitutionality of the Act’s eminent domain provision, 15 U.S.C. § 717f(h), also in the context of the Mountain Valley certificate proceeding. *See* Complaint P 81, JA 42 (“Because Congress’ delegation of the power of eminent domain to FERC is overly broad, FERC cannot lawfully . . . confer the power to [Mountain Valley] or any other natural gas

company.”); PP 83-84, JA 42 (because “FERC’s sub-delegation to [Mountain Valley] pursuant to a Certificate is . . . constitutionally impermissible[,] . . . FERC cannot lawfully delegate the power of eminent domain to [Mountain Valley] by issuing [Mountain Valley] a Certificate”).

Moreover, Landowners moved for preliminary injunctive relief, seeking to prevent the issuance of a FERC certificate to Mountain Valley. Mot. for Prelim. Inj., July 27, 2017, JA 82; Mem. of Law in Support of Mot. 3, JA 86 (“The Plaintiffs seek the aid of the Court in protecting their respective properties from an unlawful taking.”). *See also* Dismissal Order 14, JA 545 (“[P]laintiffs . . . conceded that if they were successful on their constitutional claims, the FERC order would be invalidated, at least insofar as it conveyed to [Mountain Valley] eminent domain authority.”).

Accordingly, the district court correctly concluded that Landowners’ constitutional claims “inhere” in the FERC certificate proceedings such that they are governed by section 717r. Dismissal Order 7-9, JA 538-40. “The law is clear that any attempt to challenge a license issued by the FERC, however artfully pleaded, will fall under the exclusive jurisdiction of the Federal Courts of Appeal under the [Natural Gas Act].” Dismissal Order 8, JA 539 (quoting *Sw. Ctr. for Biological Diversity v. FERC*, 967 F. Supp. 1166, 1172-73 (D. Ariz. 1997)).

Contrary to Landowners’ arguments, there is no basis for distinguishing this

case from the cases discussed in the district court's Dismissal Order. Br. 37-49. Although the cited cases do not necessarily address the application of the Act's exclusive review provision to the precise constitutional challenge presented here (*see* Dismissal Order 7, JA 538), the broad variety of claims over which courts have disclaimed subject matter jurisdiction demonstrates the scope and force of the Act's exclusive review provision. *See Williams*, 890 F.2d at 262 (“We would be hard pressed to formulate a doctrine with a more expansive scope.”).

At bottom, Landowners argue that their constitutional challenges may somehow be bifurcated from other claims arising from the FERC certificate proceedings, such that Landowners' claims may proceed in district court, while other claims proceed before the court of appeals on direct review of the final FERC orders.

In *Williams*, the court considered, and rejected, the argument that judicial review concerning FERC orders could be “bifurcate[ed]” on “substantive lines,” such that a party could litigate certain claims concerning a gas pipeline subject to FERC jurisdiction in state court, while the D.C. Circuit considered an appeal from the final FERC orders. 890 F.2d at 262-63. “[W]e fail to find provision in [section 717r] for the bifurcation of judicial review along substantive lines.” *Id.* “The roadway to resolution of the dispute . . . has been both charted and mandated by Congress. It makes no sense to permit the parties to chart their own route and thus

allow piecemeal and unending litigation to ensue.” *Id.* at 264.

Moreover, “we cannot imagine that Congress intended the exclusivity *vel non* of statutory review to depend on the substantive infirmity alleged. The policy behind having a special review procedure . . . disfavors bifurcating jurisdiction over various substantive grounds between [state or district] court and the court of appeals.” *Id.* at 262-63 (quoting *City of Rochester v. Bond*, 603 F.2d 927, 936 (D.C. Cir. 1979)).

In a similar context, this Court has rejected arguments that challenges to agency enforcement actions subject to delayed, exclusive review in the courts of appeals may be litigated in district court solely because they are framed as “constitutional” claims. *Bennett*, 844 F.3d at 181-88. Such arguments “provide no limiting principle,” because “[a]nyone could bypass the judicial-review scheme established by Congress simply by alleging a constitutional challenge.” *Id.* at 188. *See also Elgin v. Dep’t of Treasury*, 567 U.S. 1, 14 (2012) (statutory “objective of creating an integrated scheme of review would be seriously undermined” if a party could challenge an agency action “first in a district court, and then again in one of the courts of appeals, simply by alleging that the statutory authorization for such action is unconstitutional;” moreover, such an approach would “create the possibility of parallel litigation regarding the same agency action” before the agency and a district court).

Ultimately, as the district court observed, Landowners “have not cited a single case where a district court exercised jurisdiction over claims—whether characterized as constitutional challenges or otherwise—that would require a modification of a FERC order if the claims were successful.” Dismissal Order 7, JA 538. The district court correctly applied Natural Gas Act section 717r to the claims presented. There is no basis for departing from the uniform line of precedents and allowing Landowners to litigate claims in district court, in parallel with FERC and court of appeals proceedings.

### **III. THE *THUNDER BASIN* ANALYSIS CONFIRMS THAT THE DISTRICT COURT LACKS JURISDICTION TO HEAR LANDOWNERS’ CLAIMS**

As discussed in detail in the Dismissal Order, this Court has applied the so-called *Thunder Basin* framework to determine whether Congress has “impliedly preclude[d] [district court] jurisdiction by creating a statutory scheme of administrative adjudication and delayed judicial review in a particular court.” *Bennett*, 844 F.3d at 178 (citing *Thunder Basin*, 510 U.S. 200, *Elgin*, 567 U.S. 1, and *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010)).

As the district court explained, the *Thunder Basin* analysis involves two steps. First, “the court asks whether Congress’ intent to preclude district court jurisdiction is ‘fairly discernible in the statutory scheme,’ based on an examination

of the statute’s text, structure, and purpose.” Dismissal Order 9, JA 540 (citing *Thunder Basin*, 510 U.S. at 207; *Bennett*, 844 F.3d at 181).

Second, “the court asks whether plaintiffs’ claims ‘are of the type Congress intended to be reviewed within this statutory structure.’” Dismissal Order 9, JA 540 (citing *Thunder Basin*, 510 U.S. at 212). “In doing so, the court considers three factors, with the first being the most significant: (1) whether the statutory scheme ‘foreclose[s] all meaningful judicial review;’ (2) the extent to which the plaintiff’s claims are ‘wholly collateral’ to the statute’s review provisions; and (3) whether ‘agency expertise could be brought to bear on the questions presented.’” Dismissal Order 9-10, JA 540-41 (citing *Thunder Basin*, 510 U.S. at 212-13, and *Bennett*, 844 F.3d at 181).

The district court correctly held that application of the *Thunder Basin* analysis “clearly supports its conclusion that it lacks jurisdiction over the [Landowners]’ constitutional claims.” Dismissal Order 11, JA 542.

**A. Congressional Intent to Channel Litigation Regarding Pipeline Certificate Proceedings First to FERC, and then to the Courts of Appeals, Is “Fairly Discernible” in the Act**

As the district court explained, Congress’ intent to vest exclusive jurisdiction to review FERC certificate proceedings in the courts of appeals (at the conclusion of agency proceedings) is “fairly discernible” from the text of the Natural Gas Act. Dismissal Order 13, JA 544. “Much like the exclusive jurisdiction provision that

was at issue in *Thunder Basin* itself, the provision here provides for ‘exclusive’ jurisdiction in the court of appeals to ‘affirm, modify, or set aside such [FERC] order in whole or in part.’” *Id.* (quoting 15 U.S.C. § 717r(b)). “[A]lthough [Landowners] claim they are simply raising a general constitutional challenge, the effect of a ruling in their favor would be to modify or set aside the FERC order in whole or in part. By the very text of the statute, the authority to do that lies only with a court of appeals.” *Id.* See also *supra* pp. 4-5 and 12-18 (discussing 15 U.S.C. § 717r and cases).

**B. The Three *Thunder Basin* Factors Support Dismissal Here**

**1. “Meaningful” Judicial Review of Landowners’ Claims Is Available in the Courts of Appeals at the Conclusion of Agency Proceedings**

The district court correctly found that the first factor to be considered under *Thunder Basin* step two—whether the statutory scheme forecloses all “meaningful judicial review”—clearly favors a finding of no jurisdiction in the district court. Dismissal Order 13-14, JA 544-45. As the district court explained, “As to this important first factor, the statutory scheme here does not ‘foreclose all meaningful judicial review;’ it merely vests that review in a court of appeals.” *Id.* 14, JA 545 (“Indeed, *Thunder Basin*, *Elgin*, and *Bennett* all stand for the proposition that meaningful judicial review is available under a statutory scheme similar to the one here.”).

Under the statutory scheme at issue here, Landowners' constitutional claims may be raised to the court of appeals on review of final FERC orders. The process is illustrated in *Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960 (D.C. Cir. 2000). In that case, the appeals court considered a set of consolidated petitions challenging—on constitutional, environmental, and economic/evidentiary grounds—final FERC orders granting a certificate for pipeline construction. *Id.*

In particular, two petitioners in *Midcoast* argued that “the promotion of competition in natural gas markets is not a legitimate public interest sufficient to justify the condemnation of land required for the pipeline’s right-of-way,” and that the pipeline’s “taking of private property . . . is not constitutional” under the Fifth Amendment. *Id.* at 973. The court of appeals rejected the Fifth Amendment challenge on the merits, finding that “the takings complained of served a public purpose.” *Id.* The court’s resolution of the Fifth Amendment challenge in *Midcoast* rested both on its finding (in the same opinion) that FERC appropriately considered “the desirability of competition” in deciding to grant the certificate application, and FERC’s finding that the proposed pipeline would “serve the public convenience and necessity.” *Id.*

The *Midcoast* decision demonstrates that meaningful judicial review of constitutional challenges involving the Act’s eminent domain provision and FERC’s “public convenience and necessity” determinations is available in the

appeals court at the conclusion of agency proceedings. *See also* Dismissal Order 5-7, JA 536-38 (discussing cases, including cases “holding that district courts have no jurisdiction to review or modify FERC orders, even in cases where the challenge is not a direct challenge to the order”).

Here, Mr. Berkley and other affected property owners have raised—and the Commission has addressed—arguments challenging the need for the Mountain Valley project, and the constitutionality of the use of eminent domain in connection with the project. Certificate Order PP 33-55, JA 342-53 (project need), PP 58-64, JA 354-57 (constitutional/eminent domain issue). In particular, the Certificate Order addresses Landowners’ argument that the Commission’s “certification process falls short of the standard required by the Constitution for a taking: that the exercise of eminent domain is for a ‘public use.’” *Id.* P 60, JA 355. As the Certificate Order explains, the Commission’s “public convenience and necessity finding is equivalent to a ‘public use’ determination.” *Id.* P 61, JA 356 (citing cases). While the Commission does not sit as an Article III court resolving constitutional claims, its public interest findings help inform any later Article III resolution of constitutional (and other) claims. *See* Dismissal Order 14-15, JA 545-46.

Mr. Berkley and other parties have filed requests for rehearing that are pending before the Commission. *See supra* 7-8. Among other things, Mr.

Berkley's rehearing request raises various constitutional challenges relating to the exercise of eminent domain in connection with the project. *See* Request for Rehearing and Rescission of Certificates and Motion for Stay of Appalachian Voices, *et al.*, FERC Dkt. Nos. 16-10 and 16-13, Nov. 13, 2017.

Because Landowners' claims have been addressed by the Commission in the Certificate Order, and will be addressed further on rehearing, Landowners err in contending that their claims will "never enter the administrative process," and "will never be subject to a final order" as required by the Act for appellate review. Br. 17-18. Indeed, various parties have already filed petitions for review regarding the Mountain Valley certificate proceeding in the D.C. Circuit. *See supra* pp. 7-8. Accordingly, once the Commission issues a final order addressing all issues properly raised to it on rehearing, Landowners may seek and obtain meaningful judicial review of their constitutional (and other) claims in the court of appeals.

Finally, the Commission's issuance of a procedural "tolling" order in the agency proceeding, indicating that it requires additional time to consider and address the numerous matters raised by parties on rehearing, does not alter the analysis. *See* Order Granting Rehearing for Further Consideration, FERC Dkt. No. CP16-10 (Dec. 13, 2017). The use of a tolling order does not signify bad faith or intent to delay review, and the Commission's use of such tolling orders has been upheld by every court that has addressed the issue. *See, e.g., City of Glendale v.*

*FERC*, No. 03-1261, 2004 WL 180270, at \*1 (D.C. Cir. Jan. 22, 2004); *Kokajko v. FERC*, 837 F.2d 524, 525 (1st Cir. 1988); *Cal. Co. v. FPC*, 411 F.2d 720, 721 (D.C. Cir. 1969); *Gen. Am. Oil Co. v. FPC*, 409 F.2d 597, 599 (5th Cir. 1969).

## **2. The Constitutional Claims Here Are Not “Wholly Collateral” to the Agency Proceeding**

As discussed in the Dismissal Order, Landowners’ claims are not “wholly collateral” to the Mountain Valley certificate proceeding pending before FERC. Dismissal Order 12, 14, JA 543, 545. As the district court pointed out, “Here . . . , there was an active FERC proceeding at the time plaintiffs filed suit that had the potential to affect their properties, and now there is a FERC order that still has the potential to affect their properties. Thus, their constitutional challenges to that order are not ‘wholly collateral’ to an ongoing proceeding.” *Id.* 12, JA 543.

Moreover, the district court pointed out that, as in *Bennett*, Landowners’ claims are not “wholly collateral” because they are “the vehicle by which [plaintiffs] seek to reverse agency action.” Dismissal Order 14, JA 545 (quoting *Bennett*, 844 F.3d at 186-87, and noting that Landowners concede that, if they prevail on their constitutional claims, the Certificate Order would be invalidated, at least in part).

By contrast, as the district court observed, cases such as *Free Enterprise*, 561 U.S. at 490-91, and *Time Warner Entm’t Co. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996), demonstrate the types of challenges that may be considered “wholly

collateral” to a statutory scheme of exclusive administrative and judicial review. Dismissal Order 12, JA 543 (characterizing challenges in *Free Enterprise* and *Time Warner* as “entirely independent of any agency proceedings, whether actual or prospective”).

In *Free Enterprise*, for example, parties challenged the constitutionality of the Public Company Accounting Oversight Board. 561 U.S. at 490. The Supreme Court held that the challenge could properly proceed in district court, because the statutory provision at issue, governing review of orders of the Securities and Exchange Commission (which, under the Sarbanes-Oxley Act of 2002, appointed members of the Board), did not provide plaintiffs a “‘meaningful’ avenue” to judicial review. *Id.* at 490-91. *Cf. Del. Riverkeeper Network v. FERC*, No. 16-416 (D.D.C. March 22, 2017) (dismissing, under Fed. R. Civ. P. 12(b)(6), claims alleging that Commission is unconstitutionally structurally biased in pipeline certificate proceedings because of funding mechanism established in the Omnibus Budget Reconciliation Act of 1986), *on appeal*, D.C. Cir. No. 17-5084 (argument scheduled to be held March 22, 2018).

Here, Landowners are participants in the ongoing FERC proceeding, and have recourse to appellate review at the conclusion of that proceeding. Because their claims are intertwined with the agency proceedings, rather than “wholly collateral,” this factor supports the district court’s dismissal.

**3. As the Agency Entrusted with Administering the Natural Gas Act, FERC's Expertise and Record-Based Determinations Can and Should Be Brought to Bear on the Questions Presented**

It is undisputed that the Commission is not empowered to adjudicate the constitutionality of federal statutes. *See* Dismissal Order 14-15, JA 545-46. However, as this Court has recognized, an agency may “apply its expertise” to “‘threshold questions that may accompany a constitutional claim’ against a federal statute, even when the agency [has] disclaimed authority to resolve those constitutional claims.” *Bennett*, 844 F.3d at 187-88 (quoting *Elgin*, 567 U.S. at 22-23). In particular, the agency “‘might fully dispose of the case’ or ‘alleviate constitutional questions’ by resolving ‘preliminary questions’ or statutory questions it ‘routinely considers.’” Thus, the agency’s expertise could ‘be brought to bear.’” *Id.*

As the federal agency vested with exclusive jurisdiction to authorize interstate natural gas pipelines, the Commission has significant expertise and experience administering extensive, complex pipeline certificate proceedings involving numerous parties and numerous substantive and procedural issues. *See Millennium Pipeline Co., LLC v. Seggos*, 860 F.3d 696, 698 (D.C. Cir. 2017) (in matters pertaining to natural gas pipeline construction, “all roads lead to FERC”); *Minisink Residents for Env’t Preservation and Safety v. FERC*, 762 F.3d 97 (D.C. Cir. 2014) (“Decades ago, Congress decided to vest the [Commission] with

responsibility for overseeing the construction and expansion of interstate natural gas facilities. And in carrying out that charge, sometimes the Commission is faced with tough judgment calls as to where those facilities can and should be sited.”).

Where, as here, parties are directly challenging the Commission’s policies and standards for issuing certificates of public convenience and necessity, it is both necessary and appropriate for the Commission to address the threshold issues accompanying the constitutional claims, in particular, whether authorization of the pipeline at issue is in the “public convenience and necessity.” This threshold determination is essential to meaningful judicial review by the court of appeals on review of the final agency orders. *See, e.g., Elgin*, 567 U.S. at 19 (providing examples of how agency expertise can be “brought to bear” on constitutional issues, or even obviate the need for judicial review).

Accordingly, although the district court found that the final *Thunder Basin* factor “slightly favors” Landowners because FERC does not have expertise in ruling on constitutional questions, Dismissal Order 14, JA 545, the final factor actually supports dismissal because the Commission has significant public interest expertise that can be “brought to bear” on the constitutional issues presented.

### **CONCLUSION**

For the foregoing reasons, the district court’s Dismissal Order should be affirmed.

Respectfully submitted,

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March 2, 2018

**CERTIFICATE OF COMPLIANCE**

This brief complies with type-volume limits because, excluding the parts of the document exempted by Fed. R. App. R. 32(f), this brief contains 6,105 words.

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March 2, 2018

# **ADDENDUM STATUTES**

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Pub. L. 96-481, title II, §203(c), Oct. 21, 1980, 94 Stat. 2327, which provided that effective Oct. 1, 1984, this section is repealed, except that the provisions of this section shall continue to apply through final disposition of any adversary adjudication initiated before the date of repeal, was itself repealed by Pub. L. 99-80, §6(b)(1), Aug. 5, 1985, 99 Stat. 186.

#### SHORT TITLE

Pub. L. 96-481, title II, §201, Oct. 21, 1980, 94 Stat. 2325, provided that: "This title [enacting this section, amending section 634 of Title 15, Commerce and Trade, section 2412 of Title 28, Judiciary and Judicial Procedure, Rule 37 of the Federal Rules of Civil Procedure, set out in Title 28 Appendix, and section 1988 of Title 42, The Public Health and Welfare, and enacting provisions set out as notes under this section and section 2412 of Title 28] may be cited as the 'Equal Access to Justice Act'."

#### TERMINATION OF REPORTING REQUIREMENTS

For termination, effective May 15, 2000, of provisions in subsec. (e) of this section relating to annual report to Congress on the amount of fees and other expenses, see section 3003 of Pub. L. 104-66, as amended, set out as a note under section 1113 of Title 31, Money and Finance, and page 153 of House Document No. 103-7.

#### TERMINATION OF ADMINISTRATIVE CONFERENCE OF UNITED STATES

For termination of Administrative Conference of United States, see provision of title IV of Pub. L. 104-52, set out as a note preceding section 591 of this title.

#### PROHIBITION ON USE OF ENERGY AND WATER DEVELOPMENT APPROPRIATIONS TO PAY INTERVENING PARTIES IN REGULATORY OR ADJUDICATORY PROCEEDINGS

Pub. L. 102-377, title V, §502, Oct. 2, 1992, 106 Stat. 1342, provided that: "None of the funds in this Act or subsequent Energy and Water Development Appropriations Acts shall be used to pay the expenses of, or otherwise compensate, parties intervening in regulatory or adjudicatory proceedings funded in such Acts."

#### REVIVAL OF PREVIOUSLY REPEALED PROVISIONS

Pub. L. 99-80, §6, Aug. 5, 1985, 99 Stat. 186, provided that:

"(a) REVIVAL OF CERTAIN EXPIRED PROVISIONS.—Section 504 of title 5, United States Code, and the item relating to that section in the table of sections of chapter 5 of title 5, United States Code, and subsection (d) of section 2412 of title 28, United States Code, shall be effective on or after the date of the enactment of this Act [Aug. 5, 1985] as if they had not been repealed by sections 203(c) and 204(c) of the Equal Access to Justice Act [Pub. L. 96-481].

"(b) REPEALS.—

"(1) Section 203(c) of the Equal Access to Justice Act [which repealed this section] is hereby repealed.

"(2) Section 204(c) of the Equal Access to Justice Act [which repealed section 2412(d) of title 28] is hereby repealed."

#### CONGRESSIONAL FINDINGS AND PURPOSES

Pub. L. 96-481, title II, §202, Oct. 21, 1980, 94 Stat. 2325, provided that:

"(a) The Congress finds that certain individuals, partnerships, corporations, and labor and other organizations may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights in civil actions and in administrative proceedings.

"(b) The Congress further finds that because of the greater resources and expertise of the United States the standard for an award of fees against the United

States should be different from the standard governing an award against a private litigant, in certain situations.

"(c) It is the purpose of this title [see Short Title note above]—

"(1) to diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in specified situations an award of attorney fees, expert witness fees, and other costs against the United States; and

"(2) to insure the applicability in actions by or against the United States of the common law and statutory exceptions to the 'American rule' respecting the award of attorney fees."

#### LIMITATION ON PAYMENTS

Pub. L. 96-481, title II, §207, Oct. 21, 1980, 94 Stat. 2330, which provided that the payment of judgments, fees and other expenses in the same manner as the payment of final judgments as provided in this Act [probably should be "this title", see Short Title note above] would be effective only to the extent and in such amounts as are provided in advance in appropriation Acts, was repealed by Pub. L. 99-80, §4, Aug. 5, 1985, 99 Stat. 186.

### SUBCHAPTER II—ADMINISTRATIVE PROCEDURE

#### SHORT TITLE

The provisions of this subchapter and chapter 7 of this title were originally enacted by act June 11, 1946, ch. 324, 60 Stat. 237, popularly known as the "Administrative Procedure Act". That Act was repealed as part of the general revision of this title by Pub. L. 89-554 and its provisions incorporated into this subchapter and chapter 7 hereof.

#### § 551. Definitions

For the purpose of this subchapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

or except as to the requirements of section 552 of this title—

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49; or sections 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix;

(2) "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency;

(3) "party" includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a per-

son or agency admitted by an agency as a party for limited purposes;

(4) “rule” means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) “rule making” means agency process for formulating, amending, or repealing a rule;

(6) “order” means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) “adjudication” means agency process for the formulation of an order;

(8) “license” includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

(9) “licensing” includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

(10) “sanction” includes the whole or a part of an agency—

(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;

(B) withholding of relief;

(C) imposition of penalty or fine;

(D) destruction, taking, seizure, or withholding of property;

(E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;

(F) requirement, revocation, or suspension of a license; or

(G) taking other compulsory or restrictive action;

(11) “relief” includes the whole or a part of an agency—

(A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;

(B) recognition of a claim, right, immunity, privilege, exemption, or exception; or

(C) taking of other action on the application or petition of, and beneficial to, a person;

(12) “agency proceeding” means an agency process as defined by paragraphs (5), (7), and (9) of this section;

(13) “agency action” includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; and

(14) “ex parte communication” means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on

any matter or proceeding covered by this subchapter.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 381; Pub. L. 94-409, §4(b), Sept. 13, 1976, 90 Stat. 1247; Pub. L. 103-272, §5(a), July 5, 1994, 108 Stat. 1373; Pub. L. 111-350, §5(a)(2), Jan. 4, 2011, 124 Stat. 3841.)

HISTORICAL AND REVISION NOTES

<i>Derivation</i>	<i>U.S. Code</i>	<i>Revised Statutes and Statutes at Large</i>
(1) .....	5 U.S.C. 1001(a).	June 11, 1946, ch. 324, §2(a), 60 Stat. 237. Aug. 8, 1946, ch. 870, §302, 60 Stat. 918. Aug. 10, 1946, ch. 951, §601, 60 Stat. 993. Mar. 31, 1947, ch. 30, §6(a), 61 Stat. 37. June 30, 1947, ch. 163, §210, 61 Stat. 201. Mar. 30, 1948, ch. 161, §301, 62 Stat. 99.
(2)-(13) .....	5 U.S.C. 1001 (less (a)).	June 11, 1946, ch. 324, §2 (less (a)), 60 Stat. 237.

In paragraph (1), the sentence “Nothing in this Act shall be construed to repeal delegations of authority as provided by law,” is omitted as surplusage since there is nothing in the Act which could reasonably be so construed.

In paragraph (1)(G), the words “or naval” are omitted as included in “military”.

In paragraph (1)(H), the words “functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947” are omitted as executed. Reference to the “Selective Training and Service Act of 1940” is omitted as that Act expired Mar. 31, 1947. Reference to the “Sugar Control Extension Act of 1947” is omitted as that Act expired on Mar. 31, 1948. References to the “Housing and Rent Act of 1947, as amended” and the “Veterans’ Emergency Housing Act of 1946” have been consolidated as they are related. The reference to former section 1641(b)(2) of title 50, appendix, is retained notwithstanding its repeal by §111(a)(1) of the Act of Sept. 21, 1961, Pub. L. 87-256, 75 Stat. 538, since §111(c) of the Act provides that a reference in other Acts to a provision of law repealed by §111(a) shall be considered to be a reference to the appropriate provisions of Pub. L. 87-256.

In paragraph (2), the words “of any character” are omitted as surplusage.

In paragraph (3), the words “and a person or agency admitted by an agency as a party for limited purposes” are substituted for “but nothing herein shall be construed to prevent an agency from admitting any person or agency as a party for limited purposes”.

In paragraph (9), a comma is supplied between the words “limitation” and “amendment” to correct an editorial error of omission.

In paragraph (10)(C), the words “of any form” are omitted as surplusage.

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

CODIFICATION

Section 551 of former Title 5, Executive Departments and Government Officers and Employees, was transferred to section 2242 of Title 7, Agriculture.

AMENDMENTS

2011—Par. (1)(H). Pub. L. 111-350 struck out “chapter 2 of title 41;” after “title 12;”.

1994—Par. (1)(H). Pub. L. 103-272 substituted “subchapter II of chapter 471 of title 49; or sections” for “or sections 1622.”.

1976—Par. (14). Pub. L. 94-409 added par. (14).

the President, dated December 6, 1916, as amended by Executive order dated June 12, 1919;

(5) Oil Shale Reserve Numbered 2, located in Utah, established by Executive order of the President, dated December 6, 1916; and

(6) Oil Shale Reserve Numbered 3, located in Colorado, established by Executive order of the President, dated September 27, 1924.

In the administration of any of the functions transferred to, and vested in, the Secretary by this section the Secretary shall take into consideration the requirements of national security.

(Pub. L. 95-91, title III, §307, Aug. 4, 1977, 91 Stat. 581.)

**§ 7156a. Repealed. Pub. L. 105-85, div. C, title XXXIV, § 3403, Nov. 18, 1997, 111 Stat. 2059**

Section, Pub. L. 96-137, §2, Dec. 12, 1979, 93 Stat. 1061, related to assignment of naval officers to key management positions within Office of Naval Petroleum and Oil Shale Reserves in Department of Energy and to position of Director.

**§ 7157. Transfers from Department of Commerce**

There are transferred to, and vested in, the Secretary all functions of the Secretary of Commerce, the Department of Commerce, and officers and components of that Department, as relate to or are utilized by the Office of Energy Programs, but limited to industrial energy conservation programs.

(Pub. L. 95-91, title III, §308, Aug. 4, 1977, 91 Stat. 581.)

**§ 7158. Naval reactor and military application programs**

The Division of Naval Reactors established pursuant to section 2035 of this title, and responsible for research, design, development, health, and safety matters pertaining to naval nuclear propulsion plants and assigned civilian power reactor programs is transferred to the Department under the Under Secretary for Nuclear Security, and such organizational unit shall be deemed to be an organizational unit established by this chapter.

(Pub. L. 95-91, title III, §309, Aug. 4, 1977, 91 Stat. 581; Pub. L. 106-65, div. C, title XXXII, §3294(c), Oct. 5, 1999, 113 Stat. 970.)

REFERENCES IN TEXT

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

AMENDMENTS

1999—Pub. L. 106-65 struck out subsec. (a) designation before "The Division of Naval Reactors", substituted "Under Secretary for Nuclear Security" for "Assistant Secretary to whom the Secretary has assigned the function listed in section 7133(a)(2)(E) of this title", and struck out subsec. (b) which read as follows: "The Division of Military Application, established by section 2035 of this title, and the functions of the Energy Research

and Development Administration with respect to the Military Liaison Committee, established by section 2037 of this title, are transferred to the Department under the Assistant Secretary to whom the Secretary has assigned those functions listed in section 7133(a)(5) of this title, and such organizational units shall be deemed to be organizational units established by this chapter."

EFFECTIVE DATE OF 1999 AMENDMENT

Amendment by Pub. L. 106-65 effective Mar. 1, 2000, see section 3299 of Pub. L. 106-65, set out as an Effective Date note under section 2401 of Title 50, War and National Defense.

TRANSFER OF FUNCTIONS

All national security functions and activities performed immediately before Oct. 5, 1999, by the Office of Naval Reactors transferred to the Administrator for Nuclear Security of the National Nuclear Security Administration of the Department of Energy, and the Deputy Administrator for Naval Reactors of the Administration to be assigned the responsibilities, authorities, and accountability for all functions of the Office of Naval Reactors under Executive Order No. 12344, set out as a note under section 2511 of Title 50, War and National Defense, see sections 2406 and 2481 of Title 50.

Pub. L. 98-525, title XVI, §1634, Oct. 19, 1984, 98 Stat. 2649, which was formerly set out as a note under this section, was renumbered section 4101 of Pub. L. 107-314, the Bob Stump National Defense Authorization Act for Fiscal Year 2003, by Pub. L. 108-136, div. C, title XXXI, §3141(d)(2), Nov. 24, 2003, 117 Stat. 1757, and is set out as a note under section 2511 of Title 50, War and National Defense.

**§ 7159. Transfer to Department of Transportation**

Notwithstanding section 7151(a) of this title, there are transferred to, and vested in, the Secretary of Transportation all of the functions vested in the Administrator of the Federal Energy Administration by section 6361(b)(1)(B) of this title.

(Pub. L. 95-91, title III, §310, Aug. 4, 1977, 91 Stat. 582.)

SUBCHAPTER IV—FEDERAL ENERGY REGULATORY COMMISSION

**§ 7171. Appointment and administration**

**(a) Federal Energy Regulatory Commission; establishment**

There is established within the Department an independent regulatory commission to be known as the Federal Energy Regulatory Commission.

**(b) Composition; term of office; conflict of interest; expiration of terms**

(1) The Commission shall be composed of five members appointed by the President, by and with the advice and consent of the Senate. One of the members shall be designated by the President as Chairman. Members shall hold office for a term of 5 years and may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office. Not more than three members of the Commission shall be members of the same political party. Any Commissioner appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed only for the remainder of such term. A Commissioner may continue to serve after the expiration of his term until his successor is appointed and has been

confirmed and taken the oath of Office, except that such Commissioner shall not serve beyond the end of the session of the Congress in which such term expires. Members of the Commission shall not engage in any other business, vocation, or employment while serving on the Commission.

(2) Notwithstanding the third sentence of paragraph (1), the terms of members first taking office after April 11, 1990, shall expire as follows:

(A) In the case of members appointed to succeed members whose terms expire in 1991, one such member's term shall expire on June 30, 1994, and one such member's term shall expire on June 30, 1995, as designated by the President at the time of appointment.

(B) In the case of members appointed to succeed members whose terms expire in 1992, one such member's term shall expire on June 30, 1996, and one such member's term shall expire on June 30, 1997, as designated by the President at the time of appointment.

(C) In the case of the member appointed to succeed the member whose term expires in 1993, such member's term shall expire on June 30, 1998.

**(c) Duties and responsibilities of Chairman**

The Chairman shall be responsible on behalf of the Commission for the executive and administrative operation of the Commission, including functions of the Commission with respect to (1) the appointment and employment of hearing examiners in accordance with the provisions of title 5, (2) the selection, appointment, and fixing of the compensation of such personnel as he deems necessary, including an executive director, (3) the supervision of personnel employed by or assigned to the Commission, except that each member of the Commission may select and supervise personnel for his personal staff, (4) the distribution of business among personnel and among administrative units of the Commission, and (5) the procurement of services of experts and consultants in accordance with section 3109 of title 5. The Secretary shall provide to the Commission such support and facilities as the Commission determines it needs to carry out its functions.

**(d) Supervision and direction of members, employees, or other personnel of Commission**

In the performance of their functions, the members, employees, or other personnel of the Commission shall not be responsible to or subject to the supervision or direction of any officer, employee, or agent of any other part of the Department.

**(e) Designation of Acting Chairman; quorum; seal**

The Chairman of the Commission may designate any other member of the Commission as Acting Chairman to act in the place and stead of the Chairman during his absence. The Chairman (or the Acting Chairman in the absence of the Chairman) shall preside at all sessions of the Commission and a quorum for the transaction of business shall consist of at least three members present. Each member of the Commission, including the Chairman, shall have one vote. Actions of the Commission shall be determined by

a majority vote of the members present. The Commission shall have an official seal which shall be judicially noticed.

**(f) Rules**

The Commission is authorized to establish such procedural and administrative rules as are necessary to the exercise of its functions. Until changed by the Commission, any procedural and administrative rules applicable to particular functions over which the Commission has jurisdiction shall continue in effect with respect to such particular functions.

**(g) Powers of Commission**

In carrying out any of its functions, the Commission shall have the powers authorized by the law under which such function is exercised to hold hearings, sign and issue subpoenas, administer oaths, examine witnesses, and receive evidence at any place in the United States it may designate. The Commission may, by one or more of its members or by such agents as it may designate, conduct any hearing or other inquiry necessary or appropriate to its functions, except that nothing in this subsection shall be deemed to supersede the provisions of section 556 of title 5 relating to hearing examiners.

**(h) Principal office of Commission**

The principal office of the Commission shall be in or near the District of Columbia, where its general sessions shall be held, but the Commission may sit anywhere in the United States.

**(i) Commission deemed agency; attorney for Commission**

For the purpose of section 552b of title 5, the Commission shall be deemed to be an agency. Except as provided in section 518 of title 28, relating to litigation before the Supreme Court, attorneys designated by the Chairman of the Commission may appear for, and represent the Commission in, any civil action brought in connection with any function carried out by the Commission pursuant to this chapter or as otherwise authorized by law.

**(j) Annual authorization and appropriation request**

In each annual authorization and appropriation request under this chapter, the Secretary shall identify the portion thereof intended for the support of the Commission and include a statement by the Commission (1) showing the amount requested by the Commission in its budgetary presentation to the Secretary and the Office of Management and Budget and (2) an assessment of the budgetary needs of the Commission. Whenever the Commission submits to the Secretary, the President, or the Office of Management and Budget, any legislative recommendation or testimony, or comments on legislation, prepared for submission to Congress, the Commission shall concurrently transmit a copy thereof to the appropriate committees of Congress.

(Pub. L. 95-91, title IV, §401, Aug. 4, 1977, 91 Stat. 582; Pub. L. 101-271, §2(a), (b), Apr. 11, 1990, 104 Stat. 135.)

REFERENCES IN TEXT

This chapter, referred to in subsecs. (i) and (j), was in the original "this Act", meaning Pub. L. 95-91, Aug. 4,

**§ 825j. Investigations relating to electric energy; reports to Congress**

In order to secure information necessary or appropriate as a basis for recommending legislation, the Commission is authorized and directed to conduct investigations regarding the generation, transmission, distribution, and sale of electric energy, however produced, throughout the United States and its possessions, whether or not otherwise subject to the jurisdiction of the Commission, including the generation, transmission, distribution, and sale of electric energy by any agency, authority, or instrumentality of the United States, or of any State or municipality or other political subdivision of a State. It shall, so far as practicable, secure and keep current information regarding the ownership, operation, management, and control of all facilities for such generation, transmission, distribution, and sale; the capacity and output thereof and the relationship between the two; the cost of generation, transmission, and distribution; the rates, charges, and contracts in respect of the sale of electric energy and its service to residential, rural, commercial, and industrial consumers and other purchasers by private and public agencies; and the relation of any or all such facts to the development of navigation, industry, commerce, and the national defense. The Commission shall report to Congress the results of investigations made under authority of this section.

(June 10, 1920, ch. 285, pt. III, §311, as added Aug. 26, 1935, ch. 687, title II, §213, 49 Stat. 859.)

**§ 825k. Publication and sale of reports**

The Commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and is authorized to sell at reasonable prices copies of all maps, atlases, and reports as it may from time to time publish. Such reasonable prices may include the cost of compilation, composition, and reproduction. The Commission is also authorized to make such charges as it deems reasonable for special statistical services and other special or periodic services. The amounts collected under this section shall be deposited in the Treasury to the credit of miscellaneous receipts. All printing for the Federal Power Commission making use of engraving, lithography, and photolithography, together with the plates for the same, shall be contracted for and performed under the direction of the Commission, under such limitations and conditions as the Joint Committee on Printing may from time to time prescribe, and all other printing for the Commission shall be done by the Director of the Government Publishing Office under such limitations and conditions as the Joint Committee on Printing may from time to time prescribe. The entire work may be done at, or ordered through, the Government Publishing Office whenever, in the judgment of the Joint Committee on Printing, the same would be to the interest of the Government: *Provided*, That when the exigencies of the public service so require, the Joint Committee on Printing may authorize the Commission to make immediate contracts for engraving, lithographing,

and photolithographing, without advertisement for proposals: *Provided further*, That nothing contained in this chapter or any other Act shall prevent the Federal Power Commission from placing orders with other departments or establishments for engraving, lithographing, and photolithographing, in accordance with the provisions of sections 1535 and 1536 of title 31, providing for interdepartmental work.

(June 10, 1920, ch. 285, pt. III, § 312, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 859; amend-ed Pub. L. 113-235, div. H, title I, § 1301(b), (d), Dec. 16, 2014, 128 Stat. 2537.)

## CODIFICATION

“Sections 1535 and 1536 of title 31” substituted in text for “sections 601 and 602 of the Act of June 30, 1932 (47 Stat. 417 [31 U.S.C. 686, 686b])” on authority of Pub. L. 97-258, § 4(b), Sept. 13, 1982, 96 Stat. 1067, the first section of which enacted Title 31, Money and Finance.

## CHANGE OF NAME

“Director of the Government Publishing Office” substituted for “Public Printer” in text on authority of section 1301(d) of Pub. L. 113-235, set out as a note under section 301 of Title 44, Public Printing and Documents.

“Government Publishing Office” substituted for “Government Printing Office” in text on authority of section 1301(b) of Pub. L. 113-235, set out as a note preceding section 301 of Title 44, Public Printing and Documents.

**§ 825l. Review of orders****(a) Application for rehearing; time periods; modification of order**

Any person, electric utility, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, electric utility, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any entity unless such entity shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

**(b) Judicial review**

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United

States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

**(c) Stay of Commission's order**

The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order. (June 10, 1920, ch. 285, pt. III, § 313, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 860; amend-ed June 25, 1948, ch. 646, § 32(a), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107; Pub. L. 85-791, § 16, Aug. 28, 1958, 72 Stat. 947; Pub. L. 109-58, title XII, § 1284(c), Aug. 8, 2005, 119 Stat. 980.)

**CODIFICATION**

In subsec. (b), "section 1254 of title 28" substituted for "sections 239 and 240 of the Judicial Code, as amend-ed (U.S.C., title 28, secs. 346 and 347)" on authority of act June 25, 1948, ch. 646, 62 Stat. 869, the first section of which enacted Title 28, Judiciary and Judicial Procedure.

**AMENDMENTS**

2005—Subsec. (a). Pub. L. 109-58 inserted "electric utility," after "Any person," and "to which such person," and substituted "brought by any entity unless such entity" for "brought by any person unless such person".

1958—Subsec. (a). Pub. L. 85-791, § 16(a), inserted sentence to provide that Commission may modify or set aside findings or orders until record has been filed in court of appeals.

Subsec. (b). Pub. L. 85-791, § 16(b), in second sentence, substituted "transmitted by the clerk of the court to" for "served upon", substituted "file with the court" for "certify and file with the court a transcript of", and in-serted "as provided in section 2112 of title 28", and in third sentence, substituted "jurisdiction, which upon the filing of the record with it shall be exclusive" for "exclusive jurisdiction".

**CHANGE OF NAME**

Act June 25, 1948, eff. Sept. 1, 1948, as amended by act May 24, 1949, substituted "court of appeals" for "circuit court of appeals".

**§825m. Enforcement provisions**

**(a) Enjoining and restraining violations**

Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper District Court of the United States or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this chapter or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings under this chapter.

**(b) Writs of mandamus**

Upon application of the Commission the district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction to issue writs of mandamus commanding any person to comply with the provisions of this chapter or any rule, regulation, or order of the Commission thereunder.

**(c) Employment of attorneys**

The Commission may employ such attorneys as it finds necessary for proper legal aid and service of the Commission or its members in the conduct of their work, or for proper representation of the public interests in investigations made by it or cases or proceedings pending before it, whether at the Commission's own instance or upon complaint, or to appear for or represent the Commission in any case in court; and the expenses of such employment shall be paid out of the appropriation for the Commission.

**(d) Prohibitions on violators**

In any proceedings under subsection (a) of this section, the court may prohibit, conditionally or

Congress shall consider the amount of any funds received by the Commission in addition to those funds appropriated to it by the Congress.

(Pub. L. 86-380, §9, as added Pub. L. 89-733, §6, Nov. 2, 1966, 80 Stat. 1162.)

CODIFICATION

Section was formerly classified to section 2379 of Title 5 prior to the general revision and enactment of Title 5, Government Organization and Employees, by Pub. L. 89-554, §1, Sept. 6, 1966, 80 Stat. 378.

**CHAPTER 54—CABINET COMMITTEE ON OPPORTUNITIES FOR SPANISH-SPEAKING PEOPLE**

**§§ 4301 to 4312. Omitted**

CODIFICATION

Sections 4301 to 4312 of this title, Pub. L. 91-181, §§1-12, Dec. 30, 1969, 83 Stat. 838, were omitted pursuant to section 4312 of this title which provided that Pub. L. 91-181 shall expire five years after Dec. 30, 1969.

Section 4301, Pub. L. 91-181, §1, Dec. 30, 1969, 83 Stat. 838, related to Congressional declaration of purpose.

Section 4302, Pub. L. 91-181, §2, Dec. 30, 1969, 83 Stat. 838, related to establishment of Cabinet Committee on Opportunities for Spanish-Speaking People, its composition, appointment of Chairman.

Section 4303, Pub. L. 91-181, §3, Dec. 30, 1969, 83 Stat. 838, related to functions of Committee.

Section 4304, Pub. L. 91-181, §4, Dec. 30, 1969, 83 Stat. 839, related to administrative powers of the Committee.

Section 4305, Pub. L. 91-181, §5, Dec. 30, 1969, 83 Stat. 839, related to utilization of services and facilities of governmental agencies.

Section 4306, Pub. L. 91-181, §6, Dec. 30, 1969, 83 Stat. 839, related to compensation of personnel and transfer of personnel from other Federal departments and agencies.

Section 4307, Pub. L. 91-181, §7, Dec. 30, 1969, 83 Stat. 839, related to establishment of an Advisory Council on Spanish-Speaking Americans.

Section 4308, Pub. L. 91-181, §8, Dec. 30, 1969, 83 Stat. 840, related to nonimpairment of existing powers of other Federal departments and agencies.

Section 4309, Pub. L. 91-181, §9, Dec. 30, 1969, 93 Stat. 840, related to restrictions on political activities of Committee and Advisory Council.

Section 4310, Pub. L. 91-181, §10, Dec. 30, 1969, 83 Stat. 840; Pub. L. 92-122, Aug. 16, 1971, 85 Stat. 342, related to authorization of appropriations.

Section 4311, Pub. L. 91-181, §11, Dec. 30, 1969, 83 Stat. 840, related to submission of reports to the President and Congress.

Section 4312, Pub. L. 91-181, §12, Dec. 30, 1969, 83 Stat. 840, provided that this chapter shall expire five years after Dec. 30, 1969.

**CHAPTER 55—NATIONAL ENVIRONMENTAL POLICY**

Sec. 4321. Congressional declaration of purpose.

SUBCHAPTER I—POLICIES AND GOALS

4331. Congressional declaration of national environmental policy.

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

4332a. Accelerated decisionmaking in environmental reviews.

4333. Conformity of administrative procedures to national environmental policy.

4334. Other statutory obligations of agencies.

4335. Efforts supplemental to existing authorizations.

Sec. SUBCHAPTER II—COUNCIL ON ENVIRONMENTAL QUALITY

4341. Omitted.

4342. Establishment; membership; Chairman; appointments.

4343. Employment of personnel, experts and consultants.

4344. Duties and functions.

4345. Consultation with Citizens' Advisory Committee on Environmental Quality and other representatives.

4346. Tenure and compensation of members. Travel reimbursement by private organizations and Federal, State, and local governments.

4346a. Expenditures in support of international activities.

4346b. Expenditures in support of international activities.

4347. Authorization of appropriations.

SUBCHAPTER III—MISCELLANEOUS PROVISIONS

4361, 4361a. Repealed.

4361b. Implementation by Administrator of Environmental Protection Agency of recommendations of "CHESS" Investigative Report; waiver; inclusion of status of implementation requirements in annual revisions of plan for research, development, and demonstration.

4361c. Staff management.

4362. Interagency cooperation on prevention of environmental cancer and heart and lung disease.

4362a. Membership of Task Force on Environmental Cancer and Heart and Lung Disease.

4363. Continuing and long-term environmental research and development.

4363a. Pollution control technologies demonstrations.

4364. Expenditure of funds for research and development related to regulatory program activities.

4365. Science Advisory Board.

4366. Identification and coordination of research, development, and demonstration activities.

4366a. Omitted.

4367. Reporting requirements of financial interests of officers and employees of Environmental Protection Agency.

4368. Grants to qualified citizens groups.

4368a. Utilization of talents of older Americans in projects of pollution prevention, abatement, and control.

4368b. General assistance program.

4369. Miscellaneous reports.

4369a. Reports on environmental research and development activities of Agency.

4370. Reimbursement for use of facilities. Assistant Administrators of Environmental Protection Agency; appointment; duties.

4370a. Availability of fees and charges to carry out Agency programs.

4370b. Availability of fees and charges to carry out Agency programs.

4370c. Environmental Protection Agency fees.

4370d. Percentage of Federal funding for organizations owned by socially and economically disadvantaged individuals.

4370e. Working capital fund in Treasury.

4370f. Availability of funds after expiration of period for liquidating obligations.

4370g. Availability of funds for uniforms and certain services.

4370h. Availability of funds for facilities.

**§ 4321. Congressional declaration of purpose**

The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will pre-

vent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

(Pub. L. 91-190, §2, Jan. 1, 1970, 83 Stat. 852.)

#### SHORT TITLE

Section 1 Pub. L. 91-190 provided: "That this Act [enacting this chapter] may be cited as the 'National Environmental Policy Act of 1969'."

#### TRANSFER OF FUNCTIONS

Enforcement functions of Secretary or other official in Department of the Interior related to compliance with system activities requiring coordination and approval under this chapter, and enforcement functions of Secretary or other official in Department of Agriculture, insofar as they involve lands and programs under jurisdiction of that Department, related to compliance with this chapter with respect to pre-construction, construction, and initial operation of transportation system for Canadian and Alaskan natural gas transferred to Federal Inspector, Office of Federal Inspector for Alaska Natural Gas Transportation System, until first anniversary of date of initial operation of Alaska Natural Gas Transportation System, see Reorg. Plan No. 1 of 1979, §§102(e), (f), 203(a), 44 F.R. 33663, 33666, 93 Stat. 1373, 1376, effective July 1, 1979, set out in the Appendix to Title 5, Government Organization and Employees. Office of Federal Inspector for the Alaska Natural Gas Transportation System abolished and functions and authority vested in Inspector transferred to Secretary of Energy by section 3012(b) of Pub. L. 102-486, set out as an Abolition of Office of Federal Inspector note under section 719e of Title 15, Commerce and Trade. Functions and authority vested in Secretary of Energy subsequently transferred to Federal Coordinator for Alaska Natural Gas Transportation Projects by section 720d(f) of Title 15.

#### EMERGENCY PREPAREDNESS FUNCTIONS

For assignment of certain emergency preparedness functions to Administrator of Environmental Protection Agency, see Parts 1, 2, and 16 of Ex. Ord. No. 12656, Nov. 18, 1988, 53 F.R. 47491, set out as a note under section 5195 of this title.

#### ENVIRONMENTAL PROTECTION AGENCY HEADQUARTERS

Pub. L. 112-237, §2, Dec. 28, 2012, 126 Stat. 1628, provided that:

"(a) *Redesignation.*—The Environmental Protection Agency Headquarters located at 1200 Pennsylvania Avenue N.W. in Washington, D.C., known as the Ariel Rios Building, shall be known and redesignated as the 'William Jefferson Clinton Federal Building'.

"(b) *References.*—Any reference in a law, map, regulation, document, paper, or other record of the United States to the Environmental Protection Agency Headquarters referred to in subsection (a) shall be deemed to be a reference to the 'William Jefferson Clinton Federal Building'."

#### MODIFICATION OR REPLACEMENT OF EXECUTIVE ORDER No. 13423

Pub. L. 111-117, div. C, title VII, §742(b), Dec. 16, 2009, 123 Stat. 3216, provided that: "Hereafter, the President may modify or replace Executive Order No. 13423 [set out as a note under this section] if the President determines that a revised or new executive order will achieve equal or better environmental or energy efficiency results."

Pub. L. 111-8, div. D, title VII, §748, Mar. 11, 2009, 123 Stat. 693, which provided that Ex. Ord. No. 13423 (set out as a note under this section) would remain in effect on and after Mar. 11, 2009, except as otherwise provided

by law after Mar. 11, 2009, was repealed by Pub. L. 111-117, div. C, title VII, §742(a), Dec. 16, 2009, 123 Stat. 3216.

#### NECESSITY OF MILITARY LOW-LEVEL FLIGHT TRAINING TO PROTECT NATIONAL SECURITY AND ENHANCE MILITARY READINESS

Pub. L. 106-398, §1 [[div. A], title III, §317], Oct. 30, 2000, 114 Stat. 1654, 1654A-57, provided that: "Nothing in the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) or the regulations implementing such law shall require the Secretary of Defense or the Secretary of a military department to prepare a programmatic, nation-wide environmental impact statement for low-level flight training as a precondition to the use by the Armed Forces of an airspace for the performance of low-level training flights."

#### POLLUTION PROSECUTION

Pub. L. 101-593, title II, Nov. 16, 1990, 104 Stat. 2962, provided that:

##### "SEC. 201. SHORT TITLE.

"This title may be cited as the 'Pollution Prosecution Act of 1990'.

##### "SEC. 202. EPA OFFICE OF CRIMINAL INVESTIGATION.

"(a) The Administrator of the Environmental Protection Agency (hereinafter referred to as the 'Administrator') shall increase the number of criminal investigators assigned to the Office of Criminal Investigations by such numbers as may be necessary to assure that the number of criminal investigators assigned to the office—

"(1) for the period October 1, 1991, through September 30, 1992, is not less than 72;

"(2) for the period October 1, 1992, through September 30, 1993, is not less than 110;

"(3) for the period October 1, 1993, through September 30, 1994, is not less than 123;

"(4) for the period October 1, 1994, through September 30, 1995, is not less than 160;

"(5) beginning October 1, 1995, is not less than 200.

"(b) For fiscal year 1991 and in each of the following 4 fiscal years, the Administrator shall, during each such fiscal year, provide increasing numbers of additional support staff to the Office of Criminal Investigations.

"(c) The head of the Office of Criminal Investigations shall be a position in the competitive service as defined in 2102 of title 5 U.S.C. or a career reserve [reserved] position as defined in 3132(A) [3132(a)] of title 5 U.S.C. and the head of such office shall report directly, without intervening review or approval, to the Assistant Administrator for Enforcement.

##### "SEC. 203. CIVIL INVESTIGATORS.

"The Administrator, as soon as practicable following the date of the enactment of this Act [Nov. 16, 1990], but no later than September 30, 1991, shall increase by fifty the number of civil investigators assigned to assist the Office of Enforcement in developing and prosecuting civil and administrative actions and carrying out its other functions.

##### "SEC. 204. NATIONAL TRAINING INSTITUTE.

"The Administrator shall, as soon as practicable but no later than September 30, 1991 establish within the Office of Enforcement the National Enforcement Training Institute. It shall be the function of the Institute, among others, to train Federal, State, and local lawyers, inspectors, civil and criminal investigators, and technical experts in the enforcement of the Nation's environmental laws.

##### "SEC. 205. AUTHORIZATION.

"For the purposes of carrying out the provisions of this Act [probably should be "this title"], there is authorized to be appropriated to the Environmental Protection Agency \$13,000,000 for fiscal year 1991, \$18,000,000

therein, and, when found necessary for rate-making purposes, other facts which bear on the determination of such cost or depreciation and the fair value of such property.

**(b) Inventory of property; statements of costs**

Every natural-gas company upon request shall file with the Commission an inventory of all or any part of its property and a statement of the original cost thereof, and shall keep the Commission informed regarding the cost of all additions, betterments, extensions, and new construction.

(June 21, 1938, ch. 556, §6, 52 Stat. 824.)

**§ 717f. Construction, extension, or abandonment of facilities**

**(a) Extension or improvement of facilities on order of court; notice and hearing**

Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

**(b) Abandonment of facilities or services; approval of Commission**

No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

**(c) Certificate of public convenience and necessity**

(1)(A) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided*,

*however*, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

(B) In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however*, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(2) The Commission may issue a certificate of public convenience and necessity to a natural-gas company for the transportation in interstate commerce of natural gas used by any person for one or more high-priority uses, as defined, by rule, by the Commission, in the case of—

(A) natural gas sold by the producer to such person; and

(B) natural gas produced by such person.

**(d) Application for certificate of public convenience and necessity**

Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require.

**(e) Granting of certificate of public convenience and necessity**

Except in the cases governed by the provisos contained in subsection (c)(1) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall

have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

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

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

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

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

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

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

When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided*, That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds \$3,000.

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

AMENDMENTS

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

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

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

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

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

EFFECTIVE DATE OF 1988 AMENDMENT

Pub. L. 100-474, §3, Oct. 6, 1988, 102 Stat. 2302, provided that: “The provisions of this Act [amending this section and enacting provisions set out as a note under section 717w of this title] shall become effective one hundred and twenty days after the date of enactment [Oct. 6, 1988].”

TRANSFER OF FUNCTIONS

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

**§ 717g. Accounts; records; memoranda**

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

Every natural-gas company shall make, keep, and preserve for such periods, such accounts, records of cost-accounting procedures, correspondence, memoranda, papers, books, and other records as the Commission may by rules and regulations prescribe as necessary or appropriate for purposes of the administration of this chapter: *Provided, however*, That nothing in this chapter shall relieve any such natural-gas company from keeping any accounts, memoranda, or records which such natural-gas company may be required to keep by or under authority of the laws of any State. The Commission may prescribe a system of accounts to be kept by such natural-gas companies, and may classify such natural-gas companies and prescribe a system of accounts for each class. The Commission, after notice and opportunity for hearing, may determine by order the accounts in which particular outlays or receipts shall be entered, charged, or credited. The burden of proof to justify every accounting entry questioned by the Commission shall be on the person making, authorizing, or requiring such entry, and the Commission may suspend a charge or credit pending submission of satisfactory proof in support thereof.

**(b) Access to and inspection of accounts and records**

The Commission shall at all times have access to and the right to inspect and examine all ac-

**(b) Conference with State commissions regarding rate structure, costs, etc.**

The Commission may confer with any State commission regarding rate structures, costs, accounts, charges, practices, classifications, and regulations of natural-gas companies; and the Commission is authorized, under such rules and regulations as it shall prescribe, to hold joint hearings with any State commission in connection with any matter with respect to which the Commission is authorized to act. The Commission is authorized in the administration of this chapter to avail itself of such cooperation, services, records, and facilities as may be afforded by any State commission.

**(c) Information and reports available to State commissions**

The Commission shall make available to the several State commissions such information and reports as may be of assistance in State regulation of natural-gas companies. Whenever the Commission can do so without prejudice to the efficient and proper conduct of its affairs, it may, upon request from a State commission, make available to such State commission as witnesses any of its trained rate, valuation, or other experts, subject to reimbursement of the compensation and traveling expenses of such witnesses. All sums collected hereunder shall be credited to the appropriation from which the amounts were expended in carrying out the provisions of this subsection.

(June 21, 1938, ch. 556, §17, 52 Stat. 830.)

**§ 717q. Appointment of officers and employees**

The Commission is authorized to appoint and fix the compensation of such officers, attorneys, examiners, and experts as may be necessary for carrying out its functions under this chapter; and the Commission may, subject to civil-service laws, appoint such other officers and employees as are necessary for carrying out such functions and fix their salaries in accordance with chapter 51 and subchapter III of chapter 53 of title 5.

(June 21, 1938, ch. 556, §18, 52 Stat. 831; Oct. 28, 1949, ch. 782, title XI, § 1106(a), 63 Stat. 972.)

## CODIFICATION

Provisions that authorized the Commission to appoint and fix the compensation of such officers, attorneys, examiners, and experts as may be necessary for carrying out its functions under this chapter "without regard to the provisions of other laws applicable to the employment and compensation of officers and employees of the United States" are omitted as obsolete and superseded.

As to the compensation of such personnel, sections 1202 and 1204 of the Classification Act of 1949, 63 Stat. 972, 973, repealed the Classification Act of 1923 and all other laws or parts of laws inconsistent with the 1949 Act. The Classification Act of 1949 was repealed by Pub. L. 89-554, Sept. 6, 1966, §8(a), 80 Stat. 632, and reenacted as chapter 51 and subchapter III of chapter 53 of Title 5, Government Organization and Employees. Section 5102 of Title 5 contains the applicability provisions of the 1949 Act, and section 5103 of Title 5 authorizes the Office of Personnel Management to determine the applicability to specific positions and employees.

Such appointments are now subject to the civil service laws unless specifically excepted by those laws or

by laws enacted subsequent to Executive Order 8743, Apr. 23, 1941, issued by the President pursuant to the Act of Nov. 26, 1940, ch. 919, title I, §1, 54 Stat. 1211, which covered most excepted positions into the classified (competitive) civil service. The Order is set out as a note under section 3301 of Title 5.

"Chapter 51 and subchapter III of chapter 53 of title 5" substituted in text for "the Classification Act of 1949, as amended" on authority of Pub. L. 89-554, §7(b), Sept. 6, 1966, 80 Stat. 631, the first section of which enacted Title 5.

## AMENDMENTS

1949—Act Oct. 28, 1949, substituted "Classification Act of 1949" for "Classification Act of 1923".

## REPEALS

Act Oct. 28, 1949, ch. 782, cited as a credit to this section, was repealed (subject to a savings clause) by Pub. L. 89-554, Sept. 6, 1966, §8, 80 Stat. 632, 655.

**§ 717r. Rehearing and review****(a) Application for rehearing; time**

Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

**(b) Review of Commission order**

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with

it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which is supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

**(c) Stay of Commission order**

The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

**(d) Judicial review**

**(1) In general**

The United States Court of Appeals for the circuit in which a facility subject to section 717b of this title or section 717f of this title is proposed to be constructed, expanded, or operated shall have original and exclusive jurisdiction over any civil action for the review of an order or action of a Federal agency (other than the Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit, license, concurrence, or approval (hereinafter collectively referred to as "permit") required under Federal law, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.).

**(2) Agency delay**

The United States Court of Appeals for the District of Columbia shall have original and exclusive jurisdiction over any civil action for the review of an alleged failure to act by a Federal agency (other than the Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit required under Federal law, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.), for a facility subject to section 717b of this title or section 717f of this

title. The failure of an agency to take action on a permit required under Federal law, other than the Coastal Zone Management Act of 1972, in accordance with the Commission schedule established pursuant to section 717n(c) of this title shall be considered inconsistent with Federal law for the purposes of paragraph (3).

**(3) Court action**

If the Court finds that such order or action is inconsistent with the Federal law governing such permit and would prevent the construction, expansion, or operation of the facility subject to section 717b of this title or section 717f of this title, the Court shall remand the proceeding to the agency to take appropriate action consistent with the order of the Court. If the Court remands the order or action to the Federal or State agency, the Court shall set a reasonable schedule and deadline for the agency to act on remand.

**(4) Commission action**

For any action described in this subsection, the Commission shall file with the Court the consolidated record of such order or action to which the appeal hereunder relates.

**(5) Expedited review**

The Court shall set any action brought under this subsection for expedited consideration.

(June 21, 1938, ch. 556, §19, 52 Stat. 831; June 25, 1948, ch. 646, §32(a), 62 Stat. 991; May 24, 1949, ch. 139, §127, 63 Stat. 107; Pub. L. 85-791, §19, Aug. 28, 1958, 72 Stat. 947; Pub. L. 109-58, title III, §313(b), Aug. 8, 2005, 119 Stat. 689.)

REFERENCES IN TEXT

The Coastal Zone Management Act of 1972, referred to in subsec. (d)(1), (2), is title III of Pub. L. 89-454, as added by Pub. L. 92-583, Oct. 27, 1972, 86 Stat. 1280, as amended, which is classified generally to chapter 33 (§1451 et seq.) of Title 16, Conservation. For complete classification of this Act to the Code, see Short Title note set out under section 1451 of Title 16 and Tables.

CODIFICATION

In subsec. (b), "section 1254 of title 28" substituted for "sections 239 and 240 of the Judicial Code, as amended [28 U.S.C. 346, 347]" on authority of act June 25, 1948, ch. 646, 62 Stat. 869, the first section of which enacted Title 28, Judiciary and Judicial Procedure.

AMENDMENTS

2005—Subsec. (d). Pub. L. 109-58 added subsec. (d).

1958—Subsec. (a). Pub. L. 85-791, §19(a), inserted sentence providing that until record in a proceeding has been filed in a court of appeals, Commission may modify or set aside any finding or order issued by it.

Subsec. (b). Pub. L. 85-791, §19(b), in second sentence, substituted "transmitted by the clerk of the court to" for "served upon", substituted "file with the court" for "certify and file with the court a transcript of", and inserted "as provided in section 2112 of title 28", and, in third sentence, substituted "petition" for "transcript", and "jurisdiction, which upon the filing of the record with it shall be exclusive" for "exclusive jurisdiction".

CHANGE OF NAME

Act June 25, 1948, eff. Sept. 1, 1948, as amended by act May 24, 1949, substituted "court of appeals" for "circuit court of appeals" wherever appearing.

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

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

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

(3) The Commission may—

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

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

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

**(b) Information exempted from disclosure**

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

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

**(c) Information sharing**

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

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

**(d) Compliance with requirements**

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

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

**(e) Retroactive effect**

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

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

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

## REFERENCES IN TEXT

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

## PRIOR PROVISIONS

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

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

The District Courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder. Any criminal proceeding shall be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder may be brought in any such district or in the district wherein the defendant is an inhabitant, and process in such cases may be served wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291, and 1292 of title 28. No costs shall be assessed against the Commission in any judicial proceeding by or against the Commission under this chapter.

(June 21, 1938, ch. 556, §24, formerly §22, 52 Stat. 833; June 25, 1948, ch. 646, §1, 62 Stat. 875, 895; renumbered §24, Pub. L. 109-58, title III, §314(b)(1)(A), Aug. 8, 2005, 119 Stat. 690.)

## CODIFICATION

The words “the District Court of the United States for the District of Columbia” following “The District Courts of the United States” omitted as superfluous in view of section 132(a) of Title 28, Judiciary and Judicial Procedure, which states that “There shall be in each judicial district a district court which shall be a court of record known as the United States District Court for the district” and section 88 of title 28 which states that “The District of Columbia constitutes one judicial district”.

“Sections 1254, 1291, and 1292 of title 28” substituted in text for “sections 128 and 240 of the Judicial Code, as amended [28 U.S.C. 225 and 347]” on authority of act June 25, 1948, ch. 646, 62 Stat. 869, the first section of which enacted Title 28.

## PRIOR PROVISIONS

A prior section 24 of act June 21, 1938, was renumbered section 26 and is classified to section 717w of this title.

**§ 717v. Separability**

If any provision of this chapter, or the application of such provision to any person or circumstance, shall be held invalid, the remainder of the chapter, and the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

(June 21, 1938, ch. 556, §25, formerly §23, 52 Stat. 833; renumbered §25, Pub. L. 109-58, title III, §314(b)(1)(A), Aug. 8, 2005, 119 Stat. 690.)

**§ 717w. Short title**

This chapter may be cited as the “Natural Gas Act.”

(June 21, 1938, ch. 556, §26, formerly §24, 52 Stat. 833; renumbered §26, Pub. L. 109-58, title III, §314(b)(1)(A), Aug. 8, 2005, 119 Stat. 690.)

## SHORT TITLE OF 1988 AMENDMENT

Pub. L. 100-474, §1, Oct. 6, 1988, 102 Stat. 2302, provided that: “This Act [amending section 717f of this title and enacting provisions set out as a note under section 717f of this title] may be cited as the ‘Uniform Regulatory Jurisdiction Act of 1988’.”

**§ 717x. Conserved natural gas****(a) Determination of entitlement**

(1) For purposes of determining the natural gas entitlement of any local distribution company under any curtailment plan, if the Commission revises any base period established under such plan, the volumes of natural gas which such local distribution company demonstrates—

(A) were sold by the local distribution company, for a priority use immediately before the implementation of conservation measures, and

(B) were conserved by reason of the implementation of such conservation measures,

shall be treated by the Commission following such revision as continuing to be used for the priority use referred to in subparagraph (A).

(2) The Commission shall, by rule, prescribe methods for measurement of volumes of natural gas to which subparagraphs (A) and (B) of paragraph (1) apply.

**(b) Conditions, limitations, etc.**

Subsection (a) of this section shall not limit or otherwise affect any provision of any curtailment plan, or any other provision of law or regulation, under which natural gas may be diverted or allocated to respond to emergency situations or to protect public health, safety, and welfare.

**(c) Definitions**

For purposes of this section—

(1) The term “conservation measures” means such energy conservation measures, as determined by the Commission, as were implemented after the base period established under the curtailment plan in effect on November 9, 1978.

(2) The term “local distribution company” means any person engaged in the transportation, or local distribution, of natural gas and the sale of natural gas for ultimate consumption.

(3) The term “curtailment plan” means a plan (including any modification of such plan required by the Natural Gas Policy Act of 1978 [15 U.S.C. 3301 et seq.]) in effect under the Natural Gas Act [15 U.S.C. 717 et seq.] which provides for recognizing and implementing priorities of service during periods of curtailed deliveries.

(Pub. L. 95-617, title VI, §605, Nov. 9, 1978, 92 Stat. 3167.)

## REFERENCES IN TEXT

The Natural Gas Policy Act of 1978, referred to in subsection (c)(3), is Pub. L. 95-621, Nov. 9, 1978, 92 Stat. 3350, as amended, which is classified generally to chapter 60 (§3301 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 3301 of this title and Tables.

The Natural Gas Act, referred to in subsection (c)(3), is act June 21, 1938, ch. 556, 52 Stat. 821, as amended, which is classified generally to this chapter (§717 et seq.). For complete classification of this Act to the Code, see section 717w of this title and Tables.

## CODIFICATION

Section was enacted as part of the Public Utility Regulatory Policies Act of 1978, and not as part of the Natural Gas Act which comprises this chapter.

## DEFINITIONS

For definitions of terms used in this section, see section 2602 of Title 16, Conservation.

**§ 717y. Voluntary conversion of natural gas users to heavy fuel oil****(a) Transfer of contractual interests**

(1) In order to facilitate voluntary conversion of facilities from the use of natural gas to the use of heavy petroleum fuel oil, the Commission shall, by rule, provide a procedure for the approval by the Commission of any transfer to any person described in paragraph 2(B)(i), (ii), or (iii) of contractual interests involving the receipt of natural gas described in paragraph 2(A).

(2)(A) The rule required under paragraph (1) shall apply to—

(i) natural gas—

(I) received by the user pursuant to a contract entered into before September 1, 1977, not including any renewal or extension thereof entered into or on or after such date

***Orus Berkley v. Mountain Valley Pipeline, LLC***  
**4<sup>th</sup> Cir. No. 18-1042**

**Docket No. CP16-13**

**CERTIFICATE OF SERVICE**

I certify that on March 2, 2018, the foregoing document was served on all parties or their counsel of record through the Court's CM/ECF system.

*/s/ Susanna Y. Chu*  
Attorney

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