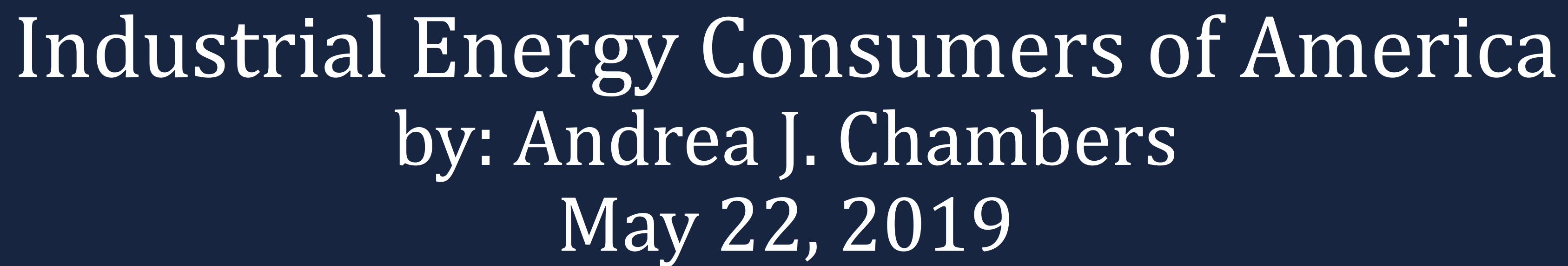

DLA PIPER

Commission Overview

FERC Commissioner Composition

- There are currently four commissioners, one short of the full five-commission body, but one more than what is needed for a quorum. Commissioners are appointed for a term of five years, and no more than three commissioners may be from the same political party.
- The four current commissioners are Chairman Neil Chatterjee (R), Commission Cheryl LaFleur (D), Commissioner Richard Glick (D), and Commissioner Bernard McNamee (R).
- The commissioners' terms are set to expire on a staggered basis:
  - Commissioner LaFleur – June 30, 2019
  - Commissioner McNamee – June 30, 2020
  - Chairman Chatterjee – June 30, 2021
  - Commissioner Glick – June 30, 2022
- Commissioner LaFleur was not re-nominated, thus, the President must make two nominations to bring the commission back to five members.

NGA Rates-Pipeline Rate Filings vs. Rate Investigations

Section 4 and 5 of the Natural Gas Act

- Under the Natural Gas Act ("NGA"), two sections govern rates for interstate pipelines:
- **Section 4** - Pipelines can request a rate increase under Section 4 of the NGA. Under the law, the proposed rate increase can be suspended for up to 5 months, and the Commission usually sets the increase for hearing and settlement, with the rates becoming effective at the end of the suspension period subject to refund and subject to the outcome of the hearing.
  - Pipelines are no longer required to make rate filings, and if they are over-earning they don't.
- **Section 5** - The Commission or Intervenors may file a complaint requesting an investigation of the justness of the pipelines current rates. However, there is no refund authority associated with Section 5, and lower rates are prospective and not effective until a settlement or final Commission order.
  - The lack of refund authority is problematic because pipelines can drag out the hearing to prevent lower rates from becoming effective. They can also file a Section 4 rate increase to lock in the complaint period and to avoid having to lower their rates.

Tax Developments Affecting Pipeline Rates

United Airlines Decision and Tax Cut and Jobs Act

- The Tax Cuts and Jobs Act of 2017 (“TCJA”) lowered the corporate tax rate from 35 percent to 21 percent, reducing the corporate income tax expense for all corporate pipelines going forward.
- The D.C. Circuit decision in *United Airlines v. FERC (“United Airlines”)* held that Master Limited Partnership (“MLP”) pipelines were not entitled to a tax allowance in rates, as MLPs do not pay taxes at the partnership level. (*See* 827 F.3rd 122 (D.C.Cir.2016)).
- In response to the TCJA and *United Airlines*, the Commission issued Order No. 849 on July 18, 2018.

Order No. 849 Seeks to Determine Rate Impact

Pipelines to File Informational Report and Given Options to Reduce Rates

- Order No. 849 required most jurisdictional pipelines to file a Form 501-G, a one-time report which shows each pipeline's rate of return before and after the tax rate reduction and court ruling.
- In addition to filing Form 501-G, Order No. 849 also required pipelines to either:
  - file a limited NGA section 4 filing to reduce the pipeline's rates to reflect the decrease in the federal corporate income tax rate pursuant to the TCJA and the elimination of the income tax allowance for MLPs, consistent with the Commission's Revised Policy Statement;
  - make a commitment to file a general NGA section 4 rate case or pre-packaged settlement in the near future;
  - file a statement explaining why an adjustment to its rates is not needed; or
  - take no action other than filing the one-time report.
- Form 501-G allowed MLPs to zero out accumulated deferred income tax balances, with the rate impact to be determined in individual cases.

Pipeline Increased Annual Returns Due to TCJA

Billions of Dollars of Potential Over-Recovery due to Tax Changes

- One consulting firm analyzed the impact of the TCJA on pipeline costs and revenues based on Form 2 data of a selected group of 20 pipelines.
- The study demonstrates that these 20 pipelines will earn additional return of three-quarters of a billion dollars annually ($725.7 million/year) due solely to the reduction in the federal corporate income tax rate.
- Additionally, the study shows that these 20 pipelines have amassed excess Accumulated Deferred Income Taxes of $6.27 billion.
- Given that there are over 100 interstate natural gas pipelines whose rates are regulated by FERC, we estimated that, without Commission action, losses to manufacturers will total several billion dollars per year.
- Some shippers filed protests of Section 501-G filings, but limited resources meant they needed to be selective.

Pipelines' Respond to Order No. 849

Stark Example of Need for Reform to Section 5 of the NGA

- FERC does not have the authority to require pipelines to reduce rates without a Section 5 investigation, therefore, FERC had to try to incentivize pipelines to reduce rates and offered an option for a limited Section 4 rate reduction to reflect the tax change in Order No. 849.
  - FERC also stated it would not investigate any pipeline that made a limited reduction if the informational filing showed the rate of return afterwards was below 12%. Pipelines also were encouraged to enter settlements that reflected the tax reduction.
- Because only a few pipelines filed limited Section 4 reductions, the Commission used the information obtained through Form 501-Gs to institute six Section 5 investigations into pipeline rates to-date.
- Some other pipelines settled and reduced their rates in the settlement, and some indicated that they would file a Section 4 increase.

FERC Responds to Informational Filings

FERC Issues Section 5 Investigations of Six Entities

- On November 30, 2018, FERC accepted a Limited Section 4 Rate Reduction filed by East Tennessee Natural Gas, but initiated a Section 5 investigation based on the Form 501-G to determine if further rate reductions were warranted.
- FERC issued three orders January 16, 2019 initiating Section 5 rate investigations and setting for hearing the Form 501-G filings of Northern Natural Gas Co. (RP19-59), Panhandle Eastern Pipe Line Co., LP (RP19-78), and Bear Creek Storage Co., LLC (RP19-51).
- On March 20, 2019, FERC initiated an investigation following its review of the Form 501-G and other filings submitted by Stagecoach (RP19-439).
- As discussed on the next slide, some pipelines entered into voluntary settlements.
- The Commission also terminated many Form 501-G proceedings without initiating a Section 5.

Results in Selected 501-G Cases

Pipeline	Status
El Paso Natural Gas, RP19-73	Settlement with approx. 14% rate reduction
East Tenn. Natural Gas, RP19-63, RP19-64	1% voluntary rate reduction; Settlement in Principle with additional rate reduction to be filed
Northern Border Pipeline, RP19-411, RP19-414	Prior settlement mandated rate reductions of 5% in 2018,10.5% in 2019, and 12.5% in 2020; Settlement amended with additional 2% rate reduction
Tennessee Gas Pipeline, RP19-351	Settlement with 8.5% rate reduction in 2019, additional 2% rate reductions in each of 2020 & 2021
Alqonquin Gas Trans., RP19-57	Voluntary settlement discussions ongoing
Northern Natural Gas, RP19-59	Section 5 settlement proceeding ongoing
Panhandle Eastern Pipe Line, RP19-78	Section 5 settlement proceeding ongoing

Results in Selected 501-G Cases

Pipeline	Status
Kern River Gas Trans., RP19-55	Settlement with approx. 11% rate reduction
Gas Transmission Northwest, RP15-904	Settlement with approx. 5% rate reduction for negotiated rate shippers; varying reductions on other rate schedules
Dominion Energy Overthrust Transmission Inc., RP18-442	Settlement with approx. 22% rate reduction
Tuscarora Gas Trans., RP19-416, RP19-419	Voluntary 1.7% rate reduction; settlement with interim rate reduction in usage charges effective Feb. 1; further 10.8% reduction effective Aug. 1

FERC Notice of Inquiry on Return of Equity Policy

Focus Initially Was on Electric Transmission Returns, But May be Applied to Gas Pipelines

- On March 21, FERC issued a Notice of Inquiry (“NOI”) that seeks information and stakeholder views regarding whether, and, if so, how, the Commission should modify how it determines the return on equity (“ROE”) to be used in designing jurisdictional rates charged by public utilities, as well as interstate natural gas and oil pipelines.
- The NOI follows the D.C. Circuit’s decision in *Emera Maine v. FERC (854 F. 3rd 9 (2017))*, reversing and vacating Opinion No. 531. In Opinion No. 531, the Commission adopted a two-step discounted cash flow (“DCF”) approach to calculate the base ROE for electric utilities, but chose an ROE at the mid-point of the upper end of the established zone of reasonableness.
- ROE is a major cost driver in all interstate natural gas pipeline rate proceedings.
- While there appears to be a concern on the part of FERC that it is necessary to increase returns for electric transmission owners to drive investment, there does not seem to be a similar need for increased returns for pipeline owners who appear to be sponsoring many new pipelines and expansions.

FERC Notice of Inquiry on Return of Equity Policy

Topics to be Covered in Comments Due June 26, 2019

- The Commission seeks comments on eight general topics:
  - the role of the Commission's base ROE in investment decision-making and what objectives should guide the Commission's approach;
  - whether uniform application of the Commission's base ROE policy across the electric, interstate natural gas pipeline and oil pipeline industries is appropriate;
  - the performance of the DCF model;
  - the composition of proxy groups;
  - the financial model choice;
  - the mismatch between market-based ROE determinations and book-value rate base;
  - how the Commission determines whether an existing ROE is unjust and unreasonable under the first prong of the Federal Power Act section 206; and
  - the mechanics and implementation of the models.
- Comments are due on June 26, 2019 and Reply Comments are due on July 25, 2019.

Transportation Security Administration Cybersecurity Roadmap

Prioritizing Transportation Sector Protection

- On December 4, 2018, the Transportation Security Administration (“TSA”) released its Cybersecurity Roadmap, which will guide efforts to prioritize cybersecurity measures within TSA and across the transportation systems sector.
- The roadmap closely aligns with the Department of Homeland Security’s Cybersecurity Strategy published earlier in 2018. It stresses the inextricable risks to critical cyber and physical transportation infrastructure, and provides a way forward to improve and protect the systems from threats.
- The roadmap identifies four major priorities that will help the agency achieve its cybersecurity goals:
  - Identify cyber security risks;
  - Reduce vulnerabilities to systems and critical infrastructure across the transportation systems sector;
  - Mitigate consequences if and when incidents do occur; and
  - Strengthen security and ensure the resilience of the system.

Transportation Security Administration Cybersecurity Roadmap

Focus on Sharing Cyber Threats Including to Pipeline Systems

- In unveiling its Roadmap, the TSA makes it clear for the first time ever that it has direct oversight of cybersecurity for all seven sectors that are part of the Transportation Systems Sector ("TSS"): ***pipeline*** systems, aviation, highway and motor carrier, maritime, mass transit and passenger rail, freight rail, and postal and shipping.
- It is important to note that this may be the largest cybersecurity oversight ever of the pipelines sector. With respect to foreign entities, efforts will include:
  - Creating a process that will determine which "foreign transportation entities" will receive cyber threat information and developing "cyber threat information sharing agreements that provide clear guidance on distribution and use of threat information"; and
  - Developing an outline and rules of engagement that will include sharing pipelines cyber threats with "relevant foreign government and private sector entities."

Executive Order on Promoting Energy Infrastructure

Reducing Regulatory Permit Delays for Oil and Gas Pipelines (*e.g.*, Clean Water Act Permits)

- On April 10, 2019, President Trump signed two executive orders ("EO") aimed at making it easier for firms to build oil and gas pipelines and harder for state agencies to intervene.
- **The orders are a response to the oil and gas industry, which has complained that pipeline delays caused by high-profile protests and court battles over permits, including environmental permits, have slowed expanded production.**
- President Trump declared that outdated federal guidance and regulations on water quality certifications are causing confusion and uncertainty and hindering the development of energy infrastructure.
- As a result, President Trump ordered the Administrator of the Environmental Protection Agency ("EPA") to consult with states, tribes and the relevant executive departments and agencies to review these materials to determine whether any provisions should be clarified to reduce confusion and regulatory uncertainty.

Executive Order on Promoting Energy Infrastructure

Pipeline Section 401 Clean Water Act Permits

- The review that EPA must conduct appears aimed at addressing recent efforts in some states to exploit the Clean Water Act's Section 401 process to hinder energy projects by focusing on the following:
  - The need to promote timely Federal-State cooperation and collaboration;
  - The appropriate scope of water quality reviews;
  - Types of conditions that may be appropriate to include in a certification;
  - Expectations for reasonable review times for various types of certification requests; and
  - The nature and scope of information States and authorized tribes may need in order to substantively act on a certification request within a prescribed period of time.

Executive Order on Promoting Energy Infrastructure

Pipeline Section 401 Clean Water Act Permits - EPA

- President Trump ordered that upon completion of the review of existing guidance and regulations, but no later than 60 days from the date of the EO (*i.e.*, June 9, 2019), the Administrator of the EPA shall issue new guidance to States, and authorized tribes to supersede the currently-effective Section 401 interim guidance.
- President Trump ordered that upon completion of the review, but no later than 120 days from the date of the EO (*i.e.*, August 8, 2019), the Administrator of the EPA shall review the Section 401 implementing regulations for consistency with the policies set forth above and publish revised rules for notice and comment.
- Such revised rules shall be finalized no later than 13 months after the date of the order (*i.e.*, May 10, 2020).

Executive Order on Promoting Energy Infrastructure

Pipeline Section 401 Clean Water Act Permits – Interagency Coordination

- Following the issuance of the new EPA Section 401 guidance, the Administrator of the EPA will lead an interagency review, in coordination with the head of each agency that issues permits or licenses subject to Section 401 certification requirements, such as FERC and the Army Corps of Engineers, of existing regulations and guidance for consistency with the EPA guidance and rulemaking.
- The heads of these agencies will then update their respective agency's guidance within 90 days (*i.e.*, no later than September 7, 2019).
- Within 90 days of the EPA finalizing revised rules regarding Section 401, the heads of these agencies shall initiate a rulemaking to ensure their respective regulations are consistent with the EPA's revised rules (*i.e.*, no later than August 8, 2020).

Executive Order on Promoting Energy Infrastructure

LNG

- Currently, the Department of Transportation's safety regulations for LNG facilities in 40 C.F.R. Part 193 apply uniformly to all LNG facilities regardless of size (*e.g.*, small-scale peak shaving and large-scale import and export terminals).
- Because the current rules were developed to regulate small facilities and new LNG export terminals are in various stages of development, **President Trump ordered the Secretary of Transportation to initiate a rulemaking to update Part 193 using risk-based standards (*i.e.*, those that impose regulatory requirements commensurate with the associated risk) to the maximum extent practicable.** The EO requires the Secretary to finalize that rulemaking no later than 13 months after the date of the EO.
- In addition, President Trump directed that the Secretary of Transportation propose for notice and comment rulemaking, no later than 100 days from the date of the order, a rule that would allow LNG to be transported via rail in approved tank cars. The rule shall be finalized no later than 13 months from the date of the EO.

Executive Order on Promoting Energy Infrastructure

Regional Constraints on Energy Infrastructure

- **Report on New England Constraints:** President Trump directed the Secretary of Transportation, in consultation with the Secretary of Energy, to submit **a report regarding the economic and other effects caused by the inability to transport sufficient quantities of natural gas and other domestic energy resources into New England**. The report must be submitted within 180 days of the EO and assess to what extent state, local, tribal, and territorial actions have contributed to these issues.
- **Report on West Coast Export Constraints:** President Trump also directed the Secretary of Energy, in consultation with the Secretary of Transportation, to submit **a report regarding the economic and other effects caused by the limitation on the export of coal, oil, natural gas, and other domestic energy resources through the west coast of the United States**. This report shall also be submitted within 180 days of the EO and assess to what extent state, local, tribal, and territorial actions have contributed to such effects.

Executive Order on International Cross-Border Permitting

International Oil Pipeline Crossings

- Citing concerns that the policies of certain executive agencies have hindered the permitting process and relations with neighboring countries, President Trump's second EO **transfers authority from the Secretary of State to the President to issue, deny or amend Presidential permits for certain international border crossing facilities, including oil pipelines**.
- Under the EO, such decisions shall now reside solely with the President. The EO requires the State Department to complete its review of any application and to provide any opinion supporting the issuance of a permit to the President within 60 days of receipt of the application. The EO will effectively eliminate what has, at times, been a lengthy State Department review process. These reforms would allow the President to permit a project like the Keystone XL pipeline, which was famously denied after the type of State Department review that is being eliminated.
- The EO applies to all Presidential permits for "pipelines . . . and similar facilities for exportation or importation of all products," "facilities for the transportation of persons or things," "bridges," and "motor and rail vehicle" border crossings. **The EO specifically excepts, however, natural gas import and export facilities, electric transmission lines, and licenses to land or operate submarine cables.**

Thank you