

ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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**In the United States Court of Appeals  
for the District of Columbia Circuit**

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No. 13-1148  
\_\_\_\_\_

R. GORDON GOOCH, *Petitioner*,

v.

FEDERAL ENERGY REGULATORY COMMISSION AND  
UNITED STATES OF AMERICA, *Respondents*.

\_\_\_\_\_  
ON PETITION FOR REVIEW OF AN ORDER OF THE  
FEDERAL ENERGY REGULATORY COMMISSION  
\_\_\_\_\_

**BRIEF FOR RESPONDENTS FEDERAL ENERGY REGULATORY  
COMMISSION AND UNITED STATES OF AMERICA**

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## **CIRCUIT RULE 28(A)(1) CERTIFICATE**

### **A. Parties**

To counsel's knowledge, all parties before this Court and the Federal Energy Regulatory Commission are listed in Petitioner's brief.

### **B. Ruling Under Review**

Order On Complaint, *R. Gordon Gooch v. Colonial Pipeline Company*, FERC Docket No. OR12-24-000, 142 FERC ¶ 61,220 (Mar. 25, 2013) ("Complaint Order"), R. 7, JA 0226.

### **C. Related Cases**

Issues raised in this appeal were raised in *R. Gordon Gooch v. FERC et al.*, No. 12-1356 (D.C. Cir. Jan. 4, 2013) (unpublished order). In that case, this Court dismissed the petition for review for lack of jurisdiction.

*/s/ Lisa B. Luftig*  
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December 9, 2013

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## GLOSSARY

Br.	Opening brief of Petitioner
Colonial	Intervenor Colonial Pipeline Company
Commission or FERC	Federal Energy Regulatory Commission
Complaint Order	R. Gordon Gooch v. Colonial Pipeline Company, FERC Docket No. OR12-24, 142 FERC ¶ 61,220 (Mar. 25, 2013)
Energy Policy Act	Energy Policy Act of 1992, Pub. L. No. 102-486, §§ 1801-1804, 106 Stat. 2776, 3010-12 (1992), <i>reprinted in</i> 42 U.S.C. § 7172 note
Form No. 6	FERC Form No. 6, Annual Report for Oil Pipelines
Order No. 561	<i>Revisions to Oil Pipeline Regulations Pursuant to the Energy Policy Act of 1992</i> , Order No. 561, FERC Stats. & Regs. [Regs. Preambles, 1991-1996] ¶ 30,985 (1993)
Order No. 571	<i>Cost-of-Service Reporting and Filing Requirements for Oil Pipelines</i> , Order No. 571, FERC Stats. & Regs. [Regs. Preambles 1991-1996] ¶ 31,006 (1994), <i>on reh'g</i> , Order No. 571-A, FERC Stats. & Regs. [Regs. Preambles 1991-1996] ¶ 31,012 (1995)
Page 700	FERC Form No. 6, Page 700, Annual Cost of Service Based Analysis Schedule

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No. 13-1148

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R. GORDON GOOCH,  
*Petitioner,*

v.

FEDERAL ENERGY REGULATORY COMMISSION AND  
UNITED STATES OF AMERICA,  
*Respondents.*

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ON PETITION FOR REVIEW OF AN ORDER OF THE  
FEDERAL ENERGY REGULATORY COMMISSION

---

**BRIEF FOR RESPONDENTS  
FEDERAL ENERGY REGULATORY COMMISSION AND  
UNITED STATES OF AMERICA**

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**STATEMENT OF THE ISSUES**

1. Whether Petitioner R. Gordon Gooch has demonstrated that he has standing to challenge an order of the Federal Energy Regulatory Commission (“Commission” or “FERC”) dismissing his complaint that Colonial Pipeline Company (“Colonial”) charges excessive rates for interstate oil pipeline transportation service.

2. Assuming jurisdiction, whether the Commission reasonably dismissed Mr. Gooch's complaint for failure to show he is "adversely affected" by Colonial's rates, reasonably dismissed his other requests to initiate enforcement actions, investigations, and rulemaking proceedings, and properly addressed his request for a FERC Commissioner to recuse himself from the case.

### **COUNTERSTATEMENT OF JURISDICTION**

Mr. Gooch lacks standing to appeal the challenged order because he has not suffered any justiciable injury in this case. As set forth more fully in Part I of the Argument, *infra*, Mr. Gooch's opening brief fails to provide any demonstration of standing. His claim of \$5.02 in alleged excessive gasoline charges in 2011 is much too speculative to satisfy the Article III standing requirements of injury-in-fact and causation. Further, FERC does not regulate gasoline prices, so any injury arising from excessive gasoline prices is not redressible by FERC. Because Mr. Gooch has failed to make this required demonstration, this Court should dismiss.

### **STATUTORY AND REGULATORY PROVISIONS**

The pertinent statutes and regulations are contained in the Addendum to this brief.

### **INTRODUCTION**

This appeal arises from a complaint by R. Gordon Gooch, in his individual capacity as a consumer of retail motor gasoline, against Colonial, an interstate oil pipeline that transports petroleum products such as motor gasoline and jet fuel over

an area extending from Houston, Texas to Linden, New Jersey. Mr. Gooch's petition is based on the premise that any individual consumer may challenge an oil pipeline's rates, and be entitled to a full hearing on the merits, simply by comparing the pipeline's reported cost and revenue figures. Such a rule would open the door to millions of potential complaints by private citizens, potentially paralyzing the Commission's streamlined ratemaking policy that was mandated by Congress.

Mr. Gooch's complaint asserted that Colonial's pipeline rates are unjust and unreasonable, based on a comparison of the Colonial's reported revenue and cost of service figures. He asserted damages of \$5.02, which he calculated by dividing the disparity between the cost and revenue figures by the estimated population in areas served by Colonial's pipeline. Mr. Gooch also sought the criminal prosecution of Colonial's officers and directors and requested a broad rulemaking against 47 pipelines.

In the order on review, the Commission determined that Mr. Gooch's back-of-the-envelope damages claim was too speculative to demonstrate that he has been "adversely affected," as required by the Commission's regulations governing complaints under the Interstate Commerce Act, by Colonial's alleged over-earnings. Mr. Gooch's assertion of damages did not even attempt to identify the impact any such over-recoveries might have on the price he ultimately pays for

gasoline. Accordingly, the Commission dismissed the complaint for failure to satisfy threshold pleading standards. *Gooch v. Colonial Pipeline Co.*, 142 FERC ¶ 61,220 (2013) (“Complaint Order”), R. 7, JA 0226.<sup>1</sup>

## STATEMENT OF FACTS

### I. STATUTORY AND REGULATORY BACKGROUND

In 1906, Congress extended the definition of common carrier under the Interstate Commerce Act to oil pipelines and required that their rates be just and reasonable. *See* 49 U.S.C. app. § 1(5) (1988). In 1977, in conjunction with the formation of the Department of Energy, regulatory authority over oil pipelines under the Act was transferred from the Interstate Commerce Commission to the newly-created FERC. *See* Section 402(b) of the Department of Energy Organization Act, 42 U.S.C. § 7172(b). The traditional standards governing rate regulation under the Interstate Commerce Act were not modified. *See generally Frontier Pipeline Co. v. FERC*, 452 F.3d 774, 776 (D.C. Cir. 2006) (explaining background of statute and its unusual citation format, to 49 U.S.C. § 1 *et seq.* (1976), *reprinted in* 49 U.S.C. app. § 1 *et seq.* (1988)). The Department of Energy Organization Act gave FERC broad authority to promulgate regulations for administering its responsibilities under the Interstate Commerce Act. *See* 42

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<sup>1</sup> “R.” refers to a record item. “JA” refers to the Joint Appendix page number. “P” refers to the internal paragraph number within a FERC order.

U.S.C. § 7172(h) (“The Commission is authorized to prescribe rules, regulations, and statements of policy of general applicability with respect to any function of the jurisdiction of the Commission pursuant to this section.”).

### **A. Rate Methodologies**

For years, the Commission applied traditional cost-of-service methods to its review of oil pipeline rates. *See Williams Pipe Line Co.*, Opinion No. 154-B, 31 FERC ¶ 61,377 at 61,833 (1985). Adjudicated rate proceedings for oil pipelines, although few in number, were long, complicated, and costly. *See Revisions to Oil Pipeline Regulations Pursuant to the Energy Policy Act of 1992*, Order No. 561, FERC Stats. & Regs. [Regs. Preambles, 1991-1996] ¶ 30,985 at 30,943 (1993), *on reh’g*, Order No. 561-A, FERC Stats. & Regs. [Regs. Preambles, 1991-1996] ¶ 31,000 (1994), *aff’d*, *Ass’n of Oil Pipe Lines v. FERC*, 83 F.3d 1424 (D.C. Cir. 1996). For that reason, Congress passed the Energy Policy Act of 1992,<sup>2</sup> requiring FERC to establish “a simplified and generally applicable ratemaking methodology” for oil pipelines and “to streamline procedures . . . relating to oil pipeline rates in order to avoid unnecessary regulatory costs and delays.” Energy Policy Act §§ 1801(a), 1802(a). *See generally ExxonMobil Oil Corp. v. FERC*, 487 F.3d 945, 956-57 (D.C. Cir. 2007) (summarizing background of Energy Policy

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<sup>2</sup> Pub. L. No. 102-486, §§ 1801-1804, 106 Stat. 2776, 3010-12 (1992), *reprinted in* 42 U.S.C. § 7172 note.

Act and implementing rulemaking).

Accordingly, in 1993, the Commission issued Order No. 561, in which it adopted a methodology for oil pipelines to adjust their rates using an index system that establishes industry-wide ceiling levels for such rates. *See* Order No. 561 at 30,940-41; *see also* 18 C.F.R. § 342.3 (methodologies and procedures for indexed rate changes). *See generally Ass'n of Oil Pipe Lines*, 83 F.3d at 1430-31. The purpose of this process is to allow rates to track inflation in the general economy, essentially preserving pipelines' existing rates in real economic terms. Order No. 561 at 30,948-50.

As this Court has recognized, pure cost-based regulation frequently blunts the incentive to operate efficiently. *See, e.g., Associated Gas Distribs. v. FERC*, 824 F.2d 981, 995 (D.C. Cir. 1987). By relaxing the relationship between costs and rates, an indexing scheme gives “greater emphasis to productive efficiency in noncompetitive markets than does traditional cost-of-service regulation.” Order No. 561 at 30,948 (footnote omitted). It incorporates both a carrot and a stick: a pipeline that does better than average in containing costs can keep some of the savings; a pipeline whose cost increases exceed the industry-wide ceiling will see its rate of return decline. *Cf. Five-Year Review of Oil Pricing Index*, 114 FERC ¶ 61,293 at P 57 (2006) (“We recognized in adopting a uniform index for all pipelines that inevitably some pipelines would over-earn while others will under-

earn. It is a fact simply inherent in an industry-wide pipeline index.”). In either event, “use of such a formula gives the pipelines incentives to pursue cost-saving innovations.” *Flying J Inc. v. FERC*, 363 F.3d 495, 496 (D.C. Cir. 2004). See generally *Farmers Union Cent. Exch., Inc. v. FERC*, 734 F.2d 1486, 1502 (D.C. Cir. 1984) (recognizing that reasonableness is a “zone,” not a precise point, and FERC has discretion to consider legitimate non-cost factors to allow variation within that zone); accord *Permian Basin Area Rate Cases*, 390 U.S. 747, 797-98 (1968); *Me. Pub. Utils. Comm’n v. FERC*, 520 F.3d 464, 471 (D.C. Cir. 2008); *Interstate Natural Gas Ass’n v. FERC*, 285 F.3d 18, 31 (D.C. Cir. 2002).

Although the index rate “is designed to cover the bulk of pipelines ‘as a general rule,’” this Court’s opinion in *Ass’n of Oil Pipe Lines* provides a helpful overview of the several other kinds of oil pipeline rates that can be considered just and reasonable under Commission regulations. *Ass’n of Oil Pipe Lines*, 83 F.3d at 1430. First, Congress, through the Energy Policy Act, created “grandfathered rates”: “oil pipeline rates that had not been protested or opposed for a one-year period before October 24, 1992, were ‘deemed to be just and reasonable (within the meaning of section 1(5) of the Interstate Commerce Act),’ subject to narrow exceptions.” 83 F.3d at 1429. Second, “a pipeline can file for individualized cost-of-service rates . . . ‘if it shows that there is a substantial divergence between actual costs experienced by the carrier and the rate resulting from the application of the

index . . . .” *Id.* The Commission also allows “market-based rates if [a pipeline] is able to make ‘an affirmative showing that the oil pipeline lacks significant market power in the relevant markets.’” *Id.* at 1431. Finally, “a pipeline may file a rate change where it can secure the agreement of all existing customers.” *Id.* *See* 18 C.F.R. § 342.4 (acceptable rate methodologies other than indexed rates are cost-of-service rates, market-based rates and settlement rates).

## **B. Reporting Requirements**

To further assist the Commission in the administration of its jurisdictional responsibilities, the Interstate Commerce Act authorizes the Commission to prescribe annual or other periodic reports. *See* 49 U.S.C. app. §§ 13(1), 15(1), 15(7). Through FERC Form No. 6, the Commission collects annual financial information from crude and refined product pipelines subject to the Commission’s jurisdiction, such as Colonial, as prescribed in section 357.2 of the Commission’s regulations. *See* 18 C.F.R. § 357.2. Page 700 of FERC Form No. 6 provides a simplified presentation of an oil pipeline’s jurisdictional cost-of-service. Page 700 serves as a preliminary screening tool to evaluate pipeline rates. However, “[P]age 700 information alone is not intended to show what a just and reasonable rate should be.” Order No. 571-A, 69 FERC ¶ 61,411, at p. 31,254 (1994).

On September 20, 2012, the Commission issued a Notice of Proposed Rulemaking making certain changes to Page 700 of FERC Form No. 6. *See*

*Revisions to Page 700 of FERC Form No. 6*, FERC Stats. & Regs. ¶ 32,692 (2012).

After notice and comment, including comment from Mr. Gooch, the Commission issued its Final Rule on July 18, 2013. *See Revisions to Page 700 of FERC Form No. 6*, Order No. 783, 144 FERC ¶ 61,049 (2013). Specifically, Order No. 783 expands the information to be provided by oil pipelines with respect to rate base, rate of return, and income tax allowance. *Id.* The modifications in the rule are “to allow shippers and interested entities to more easily calculate an oil pipeline’s actual rate of return on equity for preliminary screening purposes.” *Id.* at P 5; *see also id.* at P 45 (“revisions provide increased transparency and information to assist the Commission and the public in reviewing oil pipeline rates”). Certain participants in the rulemaking proceeding sought rehearing; rehearing requests remain pending before the Commission.

### **C. Complaint Procedures**

Section 13(1) of the Interstate Commerce Act provides for complaints against oil pipeline rates:

Any person, firm, [or] corporation . . . complaining of anything done or omitted to be done by any common carrier . . . may apply to said Commission by petition. . . . If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

49 U.S.C. app. § 13(1). Pursuant to authority granted to FERC in the Department of Energy Organization Act (42 U.S.C.A. § 7172(h)) and the Energy Policy Act (§§ 1801(a), 1802(a)), the Commission implemented procedural rules to administer the Interstate Commerce Act, including procedures for addressing complaints under Section 13(1). *See* 18 C.F.R. Part 343. These rules include prudential requirements to demonstrate that a complaint “must allege reasonable grounds for asserting that . . . the rate is so substantially in excess of the actual cost increases incurred by the carrier that the rate is unjust and unreasonable . . . .” *Id.* § 343.2(c)(2) (challenge to non-indexed rates); *see also id.* § 343.2(c)(1) (challenge to an indexed rate must allege that it violates applicable ceiling level or is “so substantially in excess” of the pipeline’s costs as to be unjust and unreasonable).

In addition, a complaint must: (1) set forth how the issues presented in the complaint relate to or affect the complainant (18 C.F.R § 385.206(b)(3)); (2) attempt to quantify the financial impact or burden (if any) created for the complainant as a result of the action or inaction (*id.* § 385.206(b)(4)); and (3) indicate other impacts resulting from the complained action or inaction (*id.* § 385.206(b)(5)). A protest or complaint that does not meet all pleading requirements will be dismissed. *Id.* § 343.2(c)(4).

## II. THE COMPLAINT ORDER

Mr. Gooch filed his complaint with the Commission on August 14, 2012, pursuant to Section 13(1) of the Interstate Commerce Act and 18 C.F.R. § 385.206. R. 1, JA 0001. The Commission noticed the complaint on August 16, 2012, setting a deadline for Colonial to answer the complaint. R. 2, JA 0164. Colonial timely filed its answer on September 4, 2012. R. 3, JA 0166.

The complaint asserted that, in 2011, Colonial reported on Page 700 of its FERC Form No. 6 annual report a cost of service of \$723,867,703 and revenues of \$975,118,102. Complaint at 38, JA 0047. The complaint alleged that this represented an over-recovery of \$251,250,399, and that Colonial reported significant over-recoveries for 2010 as well on its Page 700. *Id.* The complaint then asserted that, “[u]sing Colonial’s claim that 50,000,000 Americans are affected by Colonial, that calculates to \$5.02 per affected American in 2011.” *Id.* at 49, JA 0058.

Mr. Gooch also filed a Motion for Recusal on September 13, 2012, based on comments made by FERC Chairman Jon Wellinghoff in response to a question at the conclusion of a public speech. R. 4, JA 0193. Chairman Wellinghoff sought advice from the FERC Designated Agency Ethics Official, who concluded that there was no legal requirement for the Chairman to recuse himself from the proceeding. FERC’s Ethics Official concluded that Chairman Wellinghoff’s

“remarks were very general and did not refer to Colonial, its rates, or its profits. Thus, although the reporter in his question refers to Mr. Gooch, the general statements attributed to you do not reference the specific proceeding, any specific filing, or the specific parties.” Memorandum at 4, R. 6, JA 0223. FERC’s Ethics Official concluded that he “[did] not believe that the statements at issue, under the applicable legal standard, have removed the presumption that [the Chairman is] capable of fairly adjudicating the proceedings. *Id.* at 6, JA 0225. Based on that advice, which was included in the record of this proceeding and cited in the Complaint Order (at P 1 n.3, JA 0226), Chairman Wellinghoff declined to recuse himself.

Chairman Wellinghoff ultimately voted, along with all four of the other Commissioners, to deny Mr. Gooch’s complaint. Although two of the five Commissioners wrote separately on the utility of providing future would-be complainants with more information about the required showing, all five unanimously decided that – by any standard – Mr. Gooch failed to show he was “adversely affected” by Colonial. *Id.* at P 13, JA 0230; 142 FERC ¶ 61,220 at 62,497 (Moeller, Comm’r, concurring in part and dissenting in part ), JA 0232; *id.* at 62,497 (Norris, Comm’r, concurring), JA 0233. The Complaint Order (at P 17, JA 0230) also denied Mr. Gooch’s request for the Commission to initiate criminal actions against Colonial’s officers and directors.

The Commission emphasized that it “is committed to increasing the transparency of publicly available oil pipeline information.” Complaint Order at P 18, JA 0231. To that end, the Commission noted an ongoing proceeding in which “it has proposed to modify Page 700 of the FERC Form No. 6 to enable the calculation by interested parties of a pipeline’s actual rate of return on equity.” *Id.* (citing *Revisions to Page 700 of FERC Form No. 6*, Notice of Proposed Rulemaking, FERC Stats. & Regs. ¶ 32,692 (2012)).

### **SUMMARY OF ARGUMENT**

In dismissing Mr. Gooch’s complaint, the Commission did not reach the merits of his arguments, or any of the numerous arguments raised by Colonial in defense of its rates (including arguments regarding the *prima facie* showing required by FERC regulations for challenges to different kinds of oil pipeline rates). Rather, the Commission properly dismissed the complaint because Mr. Gooch failed to satisfy threshold pleading requirements. That is enough to justify the Commission’s decision.

On review, this Court lacks jurisdiction because Mr. Gooch’s calculation of his alleged injury is too speculative to satisfy Article III standing requirements, and the causal connection is too hypothetical. Because the Commission does not regulate gasoline prices, Mr. Gooch’s claimed injury is not redressible by a

favorable decision from this Court. (Nor did Mr. Gooch make any effort to explain or support his standing in his opening brief, as required by this Court.)

Even assuming jurisdiction, Mr. Gooch's asserted damage of \$5.02 failed to satisfy the Commission's requirement that a complainant show that he is "adversely affected" by the challenged rate. That regulatory requirement is consistent with the Interstate Commerce Act and the Commission's authority to promulgate regulations to administer that Act. Both the statute and the Commission's implementing regulations afford the agency considerable discretion in considering complaints. The Commission also reasonably declined to initiate its own investigation or to refer the officers and directors of Colonial to the United States Department of Justice for criminal prosecution.

Although two FERC Commissioners would have preferred to include additional guidance in the order describing FERC's pleading requirements, such an advisory opinion was not necessary to the Commission's decision where, as here, the Commission unanimously agreed that Mr. Gooch's complaint failed to meet those requirements by any standard. The Commission was well within its discretion to adjudicate on a case-by-case basis without prejudging factual scenarios that were not presented. Similarly, FERC Chairman Jon Wellinghoff, based upon the advice given by the FERC Designated Agency Ethics Officer, acted well within his discretion to decline to recuse himself from this case.

## ARGUMENT

### I. MR. GOOCH LACKS STANDING

#### A. Mr. Gooch Failed To Make Any Demonstration Of Standing

Mr. Gooch has failed to demonstrate that he has standing. This Court requires an appellant's opening brief to include "the basis of the claim for standing." D.C. Cir. Rule 28(a)(7). Further, the Circuit Rule provides that "[w]hen the . . . petitioner's standing is not apparent from the administrative record, the brief must include arguments and evidence establishing the claim of standing." *Id.* (citing *Sierra Club v. EPA*, 292 F.3d 895, 900-01 (D.C. Cir. 2002)); *cf. Americans For Safe Access v. Drug Enf. Admin.*, 706 F.3d 438, 444 (D.C. Cir. 2013) (declining to invoke Circuit Rule 28(a)(7) where petitioners made a serious effort to satisfy the rule by setting forth their evidence and arguments in their opening brief, and where the government did not raise objections that Circuit Rule had been violated). Mr. Gooch's brief makes no such effort, nor is his basis for standing apparent from the administrative record. Therefore, the petition should be dismissed.

#### B. The Allegation Of Damage Does Not Satisfy Minimum Constitutional Standing Requirements

In any event, Mr. Gooch lacks standing. To obtain review of a Commission order, a party must meet the requirements of Article III. *See, e.g., Nat'l Comm. for the New River, Inc. v. FERC*, 433 F.3d 830, 832 (D.C. Cir. 2005); *Exxon Co.*,

*U.S.A. v. FERC*, 182 F.3d 30, 43 (D.C. Cir. 1999) (holding that traditional standing principles apply to determine whether a party is “aggrieved” by a FERC order issued pursuant to the Interstate Commerce Act). *See also Gettman v. Drug Enf. Admin.*, 290 F.3d 430, 433 (D.C. Cir. 2002) (in claims of procedural injury, a particularized concrete injury still required); *Wis. Pub. Power Inc. v. FERC*, 493 F.3d 239, 269 (D.C. Cir. 2007) (same). “[T]here is nowhere in our legal system a recognized interest merely in ‘being heard’ as an end in itself.” *Sargeant v. Dixon*, 130 F.3d 1067, 1070 (D.C. Cir. 1997).

In order to establish standing, a party must generally show injury-in-fact, causation and redressibility. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Where – as here – a petitioner is not the object of the federal action or inaction (regulation of Colonial’s rates), standing is “substantially more difficult to establish.” *Id.* at 562 (“[w]hen . . . a plaintiff’s asserted injury arises from the government’s allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed” (emphasis in original)).

### **1. Injury-in-fact**

The first element of standing is to show an “injury-in-fact,” which is “an invasion of a legally protected interest which is (a) concrete and particularized, and (b) ‘actual or imminent, not ‘conjectural’ or ‘hypothetical.’” *Id.* at 560. Mr. Gooch asserts that he (and 50 million other end-users of gasoline) paid \$5.02 more

for gasoline in 2011 because Colonial's rates were excessive. Br. at 32. He has provided no concrete evidence, before the Commission or this Court, sufficient to support this calculation; rather, the complaint was based on a subtraction of Colonial's costs from its revenues (as reported in its publicly available Page 700 data), divided by 50 million consumers (a number drawn from a statement on Colonial's webpage).

That cursory method of calculating damages is not sufficient to provide standing. That is especially true when Mr. Gooch's claim for damages is based entirely on his belief that the justness and reasonableness of oil pipeline rates, such as those charged by Colonial, is based entirely on costs. *See* Br. at 8, 11, 19 (lawful rates cannot exceed a pipeline's costs of providing service). That belief is mistaken, as Colonial has authority to charge market-based rates, *see* Complaint Order at P 2, JA 0227, and as Commission regulations offer various methods of ratemaking (indexed rates, cost-of-service rates, market-based rates, and settlement rates), *see* 18 C.F.R. §§ 342.3 - 342.4. *See also supra* pp. 5-9 (explaining various ratemaking methods following Energy Policy Act of 1992). Although all rates must be just and reasonable (*Farmers Union*, 734 F.2d at 1509-10), reasonableness is not a precise point but rather a "zone" (*id.* at 1502).

Moreover, Mr. Gooch did not substantiate that his gasoline was purchased from a petroleum products pipeline owned by Colonial or that the retailer of the

gasoline passed on any cost related to transportation— and there is no basis in the record to support such findings. Without these factual underpinnings, any alleged injury can hardly be considered “concrete” or “particularized” to Mr. Gooch. Rather, it is a generalized grievance that could be alleged by virtually anyone. Br. at 32. *See Delta Commercial Fisheries Ass’n v. Gulf of Mex. Fishery Mgmt. Council*, 364 F.3d 269 (5th Cir. 2004) (generalized interest in proper application of the law is not injury-in-fact sufficient for standing).

Mr. Gooch also is not injured by the Commission’s decision not to refer Colonial’s officers and directors to the Department of Justice for criminal prosecution. *See Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) (“[A] private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another.”). Finally, as discussed further *infra* pp. 29-31, Mr. Gooch has failed to state a claim with respect to the Commission’s determinations whether to initiate a rulemaking or whether to investigate an oil pipeline on its own motion. Such decisions, fraught with policy considerations and issues of allocation of limited Commission resources, are committed to agency discretion and generally unreviewable. *See S. Ry. Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444, 455-57 (1979) (investigative authority under Interstate Commerce Act permissive and discretionary). *See also Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (agency decision whether to enforce or prosecute presumptively unreviewable); *Midwest*

*Indep. Transmission Sys. Operator, Inc. v. FERC*, 388 F.3d 903, 906 (D.C. Cir. 2004) (denying petition for review “[b]ecause we order rulemaking ‘only in the rarest and most compelling of circumstances,’ and because we defer to an agency’s view of its own regulatory priorities”) (quoting *WWHT, Inc. v. FCC*, 656 F.2d 807, 818 (D.C. Cir. 1981)).

## 2. Causation

The second element of standing is to show “a causal connection between the injury and the conduct complained of – the injury has to be ‘fairly . . . traceable to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.’” *Lujan*, 504 U.S. at 560 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)). Here, Mr. Gooch’s calculations assume, without basis in the record, that Colonial’s rate is passed on equally to all intermediaries shipping petroleum products on Colonial’s system, that such cost is passed down to each gasoline station served by Colonial, and that such gasoline stations pass the cost on to consumers in equal (or roughly equal) proportions, regardless of market forces. His “theory stacks speculation upon hypothetical upon speculation, which does not establish an ‘actual or imminent’ injury.” *N.Y. Regional Interconnect, Inc. v. FERC*, 634 F.3d 581, 587 (D.C. Cir. 2011) (rejecting standing theory of petitioner transmission developer because the alleged injury “rests on a chain of hypothetical events, none of which

is certain to occur”). *See also Fla. Audubon Soc’y v. Bentsen*, 94 F.3d 658, 666-68 (D.C. Cir. 1996) (no standing where injury was “speculative” and based on “conjecture”). Accordingly, he has failed to show that the Complaint Order caused his purported injury.

### **3. Redressibility**

Finally, Article III standing requires a showing that “it must be ‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’” *Lujan*, 504 U.S. at 561 (quoting *Simon*, 426 U.S. at 38). Even if he could show injury-in-fact and causation, Mr. Gooch provides zero basis in the record to conclude that any reduction in oil transportation prices would produce a corresponding reduction in gasoline prices (instead of retail sellers of gasoline simply retaining the profit if market prices could support it). Absent any showing that reductions in oil transportation rates would necessarily cause corresponding reductions in gasoline prices, there is no basis in the record to conclude that lowering Colonial’s transportation rates would reduce the price Mr. Gooch (or any other end-use consumer) pays for gasoline. *See Pub. Citizen, Inc. v. Natl. Highway Traffic Safety Admin.*, 489 F.3d 1279, 1291 (D.C. Cir. 2007) (citing *Allen v. Wright*, 468 U.S. 737, 759 (1984) (the “links in the chain of causation between the challenged Government conduct and the asserted injury are far too weak”)).

Further, the Commission is unable to redress Mr. Gooch's injury because it lacks jurisdiction over the retail prices charged for gasoline. Courts dismiss claims brought by end users of products that FERC does not directly regulate. For example, in *Klamath Water Users Ass'n v. FERC*, 534 F.3d 735 (D.C. Cir. 2008), this Court found that an electricity consumer lacked standing because California and Oregon state utility commissions – not FERC – controlled retail rates, and thus found that a favorable ruling from FERC would not provide redress to the petitioner. *Id.* at 737. Conversely, this Court found standing where a party's injury flowed from rates directly within the authority of FERC. *See Miss. Valley Gas Co. v. FERC*, 68 F.3d 503, 508 (D.C. Cir. 1995). Mr. Gooch's claims are analogous to those raised in *Klamath* because his alleged injury (excessive gasoline charges) stems from retail gasoline prices which are not in any way regulated by the Commission. Because the Commission does not regulate gasoline prices, Mr. Gooch has not shown that his injury, even if it were concrete and particularized, could be redressed by FERC.

At best, the claimed damages appear to be based on an "increased risk" of paying a higher rate for gasoline. But "[o]pening the courthouse to these kinds of increased-risk claims would drain the 'actual or imminent' requirement of meaning in cases involving consumer challenges to an agency's regulation (or lack of regulation); would expand the 'proper – and properly limited' – constitutional role

of the Judicial Branch beyond deciding actual cases or controversies; and would entail the Judiciary exercising some part of the Executive’s responsibility to take care that the law be faithfully executed.” *Pub. Citizen*, 489 F.3d at 1295 (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (citations omitted)). Because of these concerns, courts only recognize standing in such cases “when there was at least *both* (i) a *substantially* increased risk of harm and (ii) a *substantial* probability of harm with that increase taken into account.” *Id.* (emphasis in original) (citing *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1234-35 (D.C. Cir. 1996)). Although it is an admittedly difficult burden of proof for Mr. Gooch, that is not a reason to find standing in this case. *See Clapper v. Amnesty Int’l USA*, 133 S.Ct. 1138, 1154 (2013) (“The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing.”) (quoting cases).

## **II. THE COMMISSION ACTED APPROPRIATELY IN DISMISSING MR. GOOCH’S COMPLAINT**

### **A. Standard Of Review**

The Court reviews FERC orders under the Administrative Procedure Act’s arbitrary and capricious standard. *See, e.g., Sithe/Independence Power Partners v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999). A court must satisfy itself that the agency “articulate[d] a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” *Motor Vehicle Mfrs.*

*Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). Deference to the Commission's decisions regarding rate issues is broad, because of "the breadth and complexity of the Commission's responsibilities." *Permian Basin Area Rate Cases*, 390 U.S. at 790; see also *Morgan Stanley Capital Group, Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 532 (2008) ("the statutory requirement that rates be 'just and reasonable' is obviously incapable of precise judicial definition, and [the Court] afford[s] great deference to the Commission in its rate decisions").

Courts review a federal agency's interpretation of its enabling statute in accordance with *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984). Where Congress has expressly delegated authority to an agency "it is at the zenith of its powers. Its regulations are entitled to 'more than mere deference or weight.'" *Am. Trucking Ass'ns, Inc. v. ICC*, 627 F.2d 1313, 1320 (D.C. Cir. 1980) (quoting *Batterton v. Francis*, 432 U.S. 416, 426 (1977)). In addition, courts "afford substantial deference to the Commission's interpretations of its own regulations, deferring to the agency unless its interpretation is plainly erroneous or inconsistent with the regulation[s] . . . ." *N. Border Pipeline Co. v. FERC*, 129 F.3d 1315, 1318 (D.C. Cir. 1997) (internal quotation marks and

citation omitted); accord *Central Vt. Pub. Serv. Corp. v. FERC*, 214 F.3d 1366, 1369 (D.C. Cir. 2000).

**B. The Commission Has Broad Discretion To Develop Regulations To Administer The Interstate Commerce Act**

In the Energy Policy Act of 1992, Congress directed FERC to develop “streamline[d] procedures of the Commission relating to oil pipeline rates in order to avoid unnecessary regulatory costs and delays.” Energy Policy Act § 1801(a), 106 Stat. at 3010. *See also* pp. 5-9 (statutory and regulatory background). The Commission adopted procedures for Interstate Commerce Act § 13(1) complaints, requiring a reasonable threshold showing under 18 C.F.R. § 343.2(c), as an exercise of its statutory discretion under the Interstate Commerce Act and its general discretion to order its own proceedings. This Court has already affirmed the Commission’s protest and complaint procedures. *See Ass’n of Oil Pipe Lines*, 83 F.3d at 1428, 1444 (upholding indexing scheme, including protest and complaint procedures); *see also Mobil Oil Exploration & Producing Se., Inc. v. United Distrib. Cos.*, 498 U.S. 211, 230 (1991) (recognizing deference due to matters of agency procedure). As this Court has held, “it is not the place of this court to interfere, absent a clear violation of the statutory terms,” in matters where Congress has explicitly and impliedly delegated to an agency “to resolve ‘subordinate questions of procedure. . . .’” *Am. Trucking*, 627 F.2d at 1321 (quoting *FCC v. Schreiber*, 381 U.S. 279, 289 (1965)).

Imposing a threshold for pursuing Section 13(1) complaints is consistent with the Interstate Commerce Act. First, the Act does not guarantee that the Commission will hold an evidentiary hearing on every complaint; rather, the statute gives the Commission considerable discretion to prescribe the format of complaints. *See* 49 U.S.C. app. § 13(1) (“[I]t shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper,” but only “[if] there shall appear to be any reasonable ground for investigating[.]”). If a complaint does not set forth the elements required by the rules, the Commission can dismiss it, just as courts may dismiss a complaint for failure to state a cause of action.<sup>3</sup> In contrast, a separate provision, governing complaints brought by state commissions, expressly precludes a requirement to show damage. 49 U.S.C. app. § 13(2) (“[n]o complaint shall at any time be dismissed because of the absence of direct damage to the complainant”).

As relevant here, the Commission interprets its regulations to require a showing that a complainant under Section 13(1) is “adversely affected” by an oil pipeline’s actions or inactions. *See, e.g., Cont’l Res., Inc. v. Bridger Pipeline, LLC*, 113 FERC ¶ 61,178 at P 8 (2005). That interpretation is entitled to judicial respect. *See N. Border Pipeline*, 129 F.3d at 1318.

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<sup>3</sup> Whether or not it needed to do so, the Commission duly noticed the complaint, and Colonial timely answered. Under any interpretation of section 13(1), the Commission complied with all that was required.

**C. The Commission Properly Dismissed Mr. Gooch’s Complaint For Failure To Show He Is “Adversely Affected” By Colonial’s Rates**

Applying Commission regulations in this case, all five Commissioners determined that Mr. Gooch had not satisfied his burden. Complaint Order at P 15, JA 0230; 142 FERC ¶ 61,220 at 62,497 (Moeller, Comm’r, concurring in part and dissenting in part ) (“I concur in dismissing the complaint for failing to demonstrate that Mr. Gooch has been harmed”), JA 0232; *id.* at 62,497 (Norris, Comm’r, concurring) (“In today’s order, the Commission correctly dismisses Mr. Gooch’s complaint because he did not adequately demonstrate that he has been adversely affected by Colonial’s pipeline rates, as required by the Commission’s regulations and precedent.”), JA 0233. The Commission reasonably found that “[t]he damages claimed by Mr. Gooch are too speculative to demonstrate that he has been adversely affected by Colonial’s alleged over-earnings.” Complaint Order at P 15, JA 0230. In particular, the Commission rejected his cursory calculation, finding that dividing alleged over-recoveries by “the number of consumers living in the entire area served by Colonial” is not a proper basis for asserting injury. *Id.*

The Commission expressed doubt whether “the pipeline’s transportation costs have such an effect on the retail motor gasoline prices paid by Mr. Gooch.” *Id.* Rather, the Commission reasoned, “[t]he market price for petroleum products, such as motor gasoline, is influenced by a variety of factors, and the relatively

insignificant influence of marginal changes in pipeline rates can be subsumed by other market forces.” *Id.* Thus, “Mr. Gooch has not demonstrated that the pipeline’s transportation costs are not wholly or in part absorbed by the pipeline’s shippers or other intermediaries before Mr. Gooch pays for motor gasoline.” *Id.* Accordingly, “Mr. Gooch has not demonstrated that transportation costs associated with any alleged over-recoveries by Colonial are passed onto him via the price for retail motor gasoline.” *Id.*

Allowing a complaint to proceed on such scant allegations of a tenuous connection to the alleged violation could open the door to the filing of complaints by virtually any end-user of gasoline or petroleum products. Such a scenario would be contrary to the streamlined, efficient ratemaking process that Congress mandated in the Energy Policy Act of 1992. *See* discussion *supra* pp. 5-6.

**D. The Commission Appropriately Limited The Scope Of The Complaint Order**

**1. The Commission Appropriately Noted Its Separate Rulemaking On Transparency Of Pipeline Rates**

While it dismissed this particular Complaint, the Commission emphasized its commitment to “increas[e] the transparency of publicly available oil pipeline information,” as demonstrated by a separate rulemaking in which the Commission proposed to modify annual pipeline reports (Page 700) to better enable interested parties to calculate a pipeline’s actual rate of return on equity. Complaint Order at

P 18, JA 0231; *see supra* pp. 9-10. Numerous parties, including Mr. Gooch, filed comments in that proceeding, which the Commission later addressed at length in its Final Rule. *See Revisions to Page 700 of FERC Form No. 6*, Order No. 783, 144 FERC ¶ 61,049 at P 6 (2013); *see also id.* at PP 35-39 (addressing Mr. Gooch’s comments). Mr. Gooch’s particular challenges to that Final Rule (*see Br. 37-41*), which remains pending on requests for rehearing (filed by parties other than Mr. Gooch) before the Commission, are not properly presented for judicial review in this particular complaint case. *See, e.g., Brooklyn Union Gas Co. v. FERC*, 409 F.3d 404, 406 (D.C. Cir. 2005) (court will not “reach out” and consider decision made after the order on review).

## **2. The Commission Appropriately Declined To Outline General Guidance For Complainants**

The Commission was well within its discretion not to provide guidance to would-be complainants detailing what a successful complaint would look like. Although two Commissioners would have preferred to give such guidance, the Commission is free to act by case-by-case adjudication as opposed to generically. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 293 (1974); *see also SEC v. Chenery*, 332 U.S. 194, 203 (1947) (“And the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.”). The standard that all complainants must meet is that they be “adversely affected” by the pipelines’ rates or practices.

Complaint Order at PP 14-15, JA 0230. This standard is no secret, and the Commission appropriately found it unnecessary to delineate the precise bare minimum showing – in a case that all five Commissioners agreed fell short.

### **3. The Commission Appropriately Declined To Institute Criminal Prosecutions**

The Commission also reasonably rejected Mr. Gooch’s claims against Colonial’s officers and directors. Section 10 of the Interstate Commerce Act, which provides for criminal sanctions for certain violations of the Act, relates to misdemeanor proceedings before a U.S. District Court, not actions before the Commission. Complaint Order at P 17, JA 0230. Furthermore, while Section 12 of the Act authorizes the Commission to direct prosecution by the United States for violations, the use of such authority is discretionary. *See* 49 U.S.C. app. § 12(1)(a) (the Commission, through a United States Attorney, “*may* apply to institute in the proper court and to prosecute . . . for the enforcement of the provisions of this chapter . . .”) (emphasis added); *see generally* *Sierra Club v. Jackson*, 648 F.3d 848, 855-57 (D.C. Cir. 2011) (“[I]n cases that involve agency decisions not to take enforcement action, we begin with the presumption that the agency’s action is unreviewable.”); *Bennett v. Panama Canal Co.*, 475 F.2d 1280, 1282 (D.C. Cir. 1973) (“*may*” is a permissive, not a mandatory, term). Because the Interstate Commerce Act commits referrals for prosecution to FERC discretion, FERC’s decision is unreviewable, and Mr. Gooch has failed to state a claim under the

Administrative Procedure Act. *See Sierra Club*, 648 F.3d at 854-55 (“Because the APA does not apply to agency action committed to agency discretion by law, a plaintiff who challenges such an action cannot state a claim under the APA.”) (quoting *Oryszak v. Sullivan*, 576 F.3d 522, 525 (D.C. Cir. 2009)).

#### **4. The Commission Appropriately Declined To Initiate A Broad Rulemaking Against 47 Pipelines**

The Commission also properly declined to address Mr. Gooch’s “petition for redress of grievances” for the Commission to pursue a rulemaking or broad investigation against 47 pipeline companies. The Commission’s decision whether to address a request for generic action in the context of a complaint against an individual pipeline is within its considerable statutory discretion. *See generally ExxonMobil*, 487 F.3d at 953 (“policy choices about ratemaking are the responsibility of the Commission”); 49 U.S.C. app. § 13(1) (“[I]t shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.”). Further, as a general matter, the Commission has broad discretion to determine how best to allocate its resources for the most efficient resolution of matters before it. *See, e.g., Mobil Oil*, 498 U.S. at 230 (“The question of ‘how best to handle related, yet discrete, issues in terms of procedures’ is a matter committed to agency discretion; “[t]he [lower] court clearly overshot the mark” if it required the agency to resolve a particular issue in a particular proceeding in a particular way) (internal citations omitted); *Tenn. Valley*

*Mun. Gas Ass'n v. FERC*, 140 F.3d 1085, 1088 (D.C. Cir. 1998) (“An agency has broad discretion to determine when and how to hear and decide the matters that come before it.”) (citing cases); *N. Border Pipeline*, 129 F.3d at 1319 (same). The Commission’s reasonable decision to act now on Mr. Gooch’s complaint against Colonial, and to act later on generic improvements to its regulation of oil pipelines such as Colonial, is entitled to respect.

### **III. FERC CHAIRMAN’S DECISION NOT TO RECUSE HIMSELF WAS APPROPRIATE**

Mr. Gooch also challenges FERC Chairman Wellinghoff’s decision not to recuse himself from this matter. *See* Br. 6, 13, 29. Mr. Gooch contends that, were the Court to conclude that Chairman Wellinghoff was required to recuse himself, the Complaint Order “falls,” losing the third vote for the majority. Br. 13, 29. But, as noted *supra* at pp. 12, 25, 28 (and as Mr. Gooch actually concedes at Br. 34), all five Commissioners agreed that the complaint failed – by any measure – to meet the Commission’s pleading requirements.

There is a well-settled presumption of impartiality afforded to public officials. *See Nuclear Info. & Res. Serv. v. NRC*, 509 F.3d 562, 571 (D.C. Cir. 1992); *see also La. Ass’n of Indep. Producers & Royalty Owners v. FERC*, 958 F.2d 1101, 1119 (D.C. Cir. 1992) (quoting *Withrow v. Larkin*, 421 U.S. 35 (1975)). This presumption cannot be overcome merely by showing that an official has “taken a public position, or has expressed strong views, or holds an underlying

philosophy with respect to an issue in dispute.” *Nuclear Info & Res. Serv.*, 509 F.3d at 571 (citing *United Steelworkers of Am. v. Marshall*, 647 F.2d 1189, 1208 (D.C. Cir. 1981)). Rather, “given the roles that an agency official must play in the give and take of sometimes rough and tumble policy debates, courts must tread lightly when presented” with disqualification challenges. *Id.* To this end, courts apply an abuse of discretion standard when reviewing recusal decisions. *Metro. Council of NAACP Branches v. FCC*, 46 F.3d 1154, 1164 (D.C. Cir. 1995); *see also Miss. Indus. v. FERC*, 808 F.2d 1525, 1567 (D.C. Cir. 1987) (recognizing that “recusal decisions are subject to a very deferential, abuse of discretion standard of review”) (reversed in part on other grounds).

The applicable legal standard to determine bias is whether “a disinterested observer may conclude that [an agency official] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.” *Cinderella Career & Finishing School, Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970). Applying that test, this Court has explained that it would “set aside a commission member’s decision not to recuse himself from his duties only where he has demonstrably made up [his] mind about important and specific factual questions and [is] impervious to contrary evidence.” *Metro. Council of NAACP*, 46 F.3d at 1165 (citing *United Steelworkers*, 674 F.2d at 109).

At issue here are two remarks made by Chairman Wellinghoff in response to a reporter's questions after a public speech. First, Chairman Wellinghoff noted that the cost of crude oil transportation to consumers added to the cost of a barrel of oil "is cents on the barrel, a tiny amount of money." Second, he noted that the Commission is, "I think, fully implementing the law [with respect to oil pipeline rates]," and that he had not "seen anything personally that would indicate that we need to change the law. I don't believe we need to do anything significant with respect to oversight of oil pipelines." Memorandum at 2, JA 0221.

The Chairman's remarks did not specifically mention the complaint filed by Mr. Gooch, nor did they mention Colonial, the respondent pipeline in that complaint. Further, the Chairman's remarks were appropriately conditioned with a limitation on his present knowledge, suggesting that further information could change his views on the subject.

Chairman Wellinghoff responded to Mr. Gooch's recusal request by seeking the guidance of FERC's Designated Agency Ethics Official. The thorough analysis by that official found that recusal was not necessary. FERC's Ethics Official concluded that Chairman Wellinghoff's "remarks were very general and did not refer to Colonial, its rates, or its profits. Thus, although the reporter in his question refers to Mr. Gooch, the general statements attributed to you do not reference the specific proceeding, any specific filing, or the specific parties."

Memorandum at 4, JA 0223. FERC's Ethics Official concluded that he "[did] not believe that the statements at issue, under the applicable legal standard, have removed the presumption that [the Chairman is] capable of fairly adjudicating the proceedings." *Id.* at 6, JA 0225. This memorandum, and a memorandum to the record by the Chairman, were cited in the Complaint Order and included in the administrative record. *See* Complaint Order at P 1 n.3, JA 0226.

In sum, Chairman Wellinghoff's decision not to recuse himself was consistent with the guidance of the agency's ethics official and well within applicable legal standards. His decision not to recuse falls well short of abuse of discretion implicating judicial intervention.

## CONCLUSION

For the reasons stated, the petition should be dismissed for lack of standing; in the alternative, the Commission's order should be affirmed on the merits.

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**Final Brief: December 9, 2013**

**CERTIFICATE OF COMPLIANCE**

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I certify that the Final Brief of Respondents contains 7,848 words, not including the tables of contents and authorities, the glossary, the certificates of counsel, and the addendum.

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December 9, 2013

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Regulatory Commission, upon the request of the licensee of FERC project numbered 4656 (and after reasonable notice) is authorized, in accordance with the good faith, due diligence, and public interest requirements of section 13 and the Commission's procedures under such section, to extend until March 26, 1999, the time required for the licensee to acquire the required real property and commence the construction of project numbered 4656.

(5) The authorization for issuing extensions under paragraphs (1) through (4) shall terminate 3 years after the date of enactment of this section. To facilitate requests under such subsections, the Commission may consolidate the requests. The Commission shall provide at the beginning of each Congress a report on the status of all extensions granted by Congress regarding the requirements of section 13 of the Federal Power Act, including information about any delays by the Commission on the licensee and the reasons for such delays.

(d) EMINENT DOMAIN- Section 21 of the Federal Power Act is amended by striking the period at the end thereof and adding the following: *'Provided further, That no licensee may use the right of eminent domain under this section to acquire any lands or other property that, prior to the date of enactment of the Energy Policy Act of 1992, were owned by a State or political subdivision thereof and were part of or included within any public park, recreation area or wildlife refuge established under State or local law. In the case of lands or other property that are owned by a State or political subdivision and are part of or included within a public park, recreation area or wildlife refuge established under State or local law on or after the date of enactment of such Act, no licensee may use the right of eminent domain under this section to acquire such lands or property unless there has been a public hearing held in the affected community and a finding by the Commission, after due consideration of expressed public views and the recommendations of the State or political subdivision that owns the lands or property, that the license will not interfere or be inconsistent with the purposes for which such lands or property are owned.'*

## **TITLE XVIII--OIL PIPELINE REGULATORY REFORM**

### **SEC. 1801. OIL PIPELINE RATEMAKING METHODOLOGY.**

(a) ESTABLISHMENT- Not later than 1 year after the date of the enactment of this Act, the Federal Energy Regulatory Commission shall issue a final rule which establishes a simplified and generally applicable ratemaking methodology for oil pipelines in accordance with section 1(5) of part I of the Interstate Commerce Act.

(b) EFFECTIVE DATE- The final rule to be issued under subsection (a) may not take effect before the 365th day following the date of the issuance of the rule.

### **SEC. 1802. STREAMLINING OF COMMISSION PROCEDURES.**

(a) RULEMAKING- Not later than 18 months after the date of the enactment of this Act, the Commission shall issue a final rule to streamline procedures of the Commission relating to oil pipeline rates in order to avoid unnecessary regulatory costs and delays.

(b) SCOPE OF RULEMAKING- Issues to be considered in the rulemaking proceeding to be conducted under subsection (a) shall include the following:

(1) Identification of information to be filed with an oil pipeline tariff and the availability to the public of any analysis of such tariff filing performed by the Commission or its staff.

## TITLE 49, APPENDIX—TRANSPORTATION

*This Appendix consists of sections of former Title 49 that were not included in Title 49 as enacted by Pub. L. 95-473 and Pub. L. 97-449, and certain laws related to transportation that were enacted after Pub. L. 95-473. Sections from former Title 49 retain the same section numbers in this Appendix. For disposition of all sections of former Title 49, see Table at beginning of Title 49, Transportation.*

Chap.	Sec.	Chap.	Sec.
1.	Interstate Commerce Act, Part I; General Provisions and Railroad and Pipe Line Carriers .....	33.	Public Airports..... 2401
2.	Legislation Supplementary to "Interstate Commerce Act" [Repealed, Transferred, or Omitted].....	34.	Motor Carrier Safety ..... 2501
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8.	Interstate Commerce Act, Part II; Motor Carriers [Repealed or Transferred].....	141	Sec.
9.	Civil Aeronautics [Repealed, Omitted, or Transferred].....	171	1 to 23, 25. Repealed.
10.	Training of Civil Aircraft Pilots [Omitted or Repealed].....	250	26. Safety appliances, methods, and systems.
11.	Seizure and Forfeiture of Carriers Transporting, etc., Contraband Articles .....	301	(a) "Railroad" defined.
12.	Interstate Commerce Act, Part III; Water Carriers [Repealed].....	401	(b) Order to install systems, etc.; modification; negligence of railroad....
13.	Interstate Commerce Act, Part IV; Freight Forwarders [Repealed].....	751	(c) Filing report on rules, standards, and instructions; time; modification.
14.	Federal Aid for Public Airport Development [Repealed or Transferred] ....	781	(d) Inspection by Secretary of Transportation; personnel.
15.	International Aviation Facilities .....	901	(e) Unlawful use of system, etc.
16.	Development of Commercial Aircraft [Omitted] .....	1001	(f) Report of failure of system, etc., and accidents.
17.	Medals of Honor for Acts of Heroism..	1101	(g) Repealed.
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19.	Interstate Commerce Act, Part V; Loan Guaranties [Repealed] .....	1181	26a to 27. Repealed.
20.	Federal Aviation Program.....	1201	§ 1. Repealed. Pub. L. 95-473, § 4(b), (c), Oct. 17, 1978, 92 Stat. 1466, 1470; Pub. L. 96-258, § 3(b), June 3, 1980, 94 Stat. 427.
21.	Urban Mass Transportation .....	1211	Section repealed subject to an exception related to transportation of oil by pipeline. Section 402 of Pub. L. 95-607, which amended par. (14) of this section by adding subdiv. (b) and redesignating existing subdiv. (b) as (c) subsequent to the repeal of this section by Pub. L. 95-473, was repealed by Pub. L. 96-258. For disposition of this section in revised Title 49, Transportation, see Table at beginning of Title 49. See, also, notes following Table.
22.	High-Speed Ground Transportation [Omitted or Repealed] .....	1231	Prior to repeal, section read as follows:
23.	Department of Transportation .....	1301	§ 1. Regulation in general; car service; alteration of line
24.	Natural Gas Pipeline Safety.....	1601	(1) Carriers subject to regulation
25.	Aviation Facilities Expansion and Improvement.....	1631	The provisions of this chapter shall apply to common carriers engaged in—
26.	Hazardous Materials Transportation Control [Repealed] .....	1651	(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or
27.	Hazardous Materials Transportation.....	1671	(b) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water; or
28.	National Transportation Safety Board.	1701	(c) Repealed. June 19, 1934, ch. 652, title VI, § 602(b), 48 Stat. 1102;
29.	Hazardous Liquid Pipeline Safety .....	1761	
30.	Abatement of Aviation Noise .....	1801	
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from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only insofar as such transportation takes place within the United States.

### (2) Transportation subject to regulation

The provisions of this chapter shall also apply to such transportation of passengers and property, but only insofar as such transportation takes place within the United States, but shall not apply—

(a) To the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State and not shipped to or from a foreign country from or to any place in the United States as aforesaid, except as otherwise provided in this chapter;

(b) Repealed. June 19, 1934, ch. 652, title VI, § 802(b), 48 Stat. 1102.

(c) To the transportation of passengers or property by a carrier by water where such transportation would not be subject to the provisions of this chapter except for the fact that such carrier absorbs, out of its port-to-port water rates or out of its proportional through rates, any switching, terminal, lighterage, car rental, trackage, handling, or other charges by a rail carrier for services within the switching, drayage, lighterage, or corporate limits of a port terminal or district.

### (3) Definitions

(a) The term "common carrier" as used in this chapter shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this chapter it shall be held to mean "common carrier." The term "railroad" as used in this chapter shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" as used in this chapter shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. The term "person" as used in this chapter includes an individual, firm, co-partnership, corporation, company, association, or joint-stock association; and includes a trustee, receiver, assignee, or personal representative thereof.

(b) For the purposes of sections 5, 12(1), 20, 304(a)(7), 310, 320, 904(b), 910, and 913 of this Appendix, where reference is made to control (in referring to a relationship between any person or persons and another person or persons), such reference shall be construed to include actual as well as legal control, whether maintained or exercised through or by reason of the method of or circumstances surrounding organization or operation, through or by common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or through or by any other direct or indirect means; and to include the power to exercise control.

### (4) Duty to furnish transportation and establish through routes; division of joint rates

It shall be the duty of every common carrier subject to this chapter to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this chapter to establish reasonable through routes with common carriers by water subject to chapter 12 of this Appendix, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

### (5) Just and reasonable charges; applicability; criteria for determination

(a) All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful. The provisions of this subdivision shall not apply to common carriers by railroad subject to this chapter.

(b) Each rate for any service rendered or to be rendered in the transportation of persons or property by any common carrier by railroad subject to this chapter shall be just and reasonable. A rate that is unjust or unreasonable is prohibited and unlawful. No rate which contributes or which would contribute to the going concern value of such a carrier shall be found to be unjust or unreasonable, or not shown to be just and reasonable, on the ground that such rate is below a just or reasonable minimum for the service rendered or to be rendered. A rate which equals or exceeds the variable costs (as determined through formulas prescribed by the Commission) of providing a service shall be presumed, unless such presumption is rebutted by clear and convincing evidence, to contribute to the going concern value of the carrier or carriers proposing such rate (hereafter in this paragraph referred to as the "proponent carrier"). In determining variable costs, the Commission shall, at the request of the carrier proposing the rate, determine only those costs of the carrier proposing the rate and only those costs of the specific service in question, except where such specific data and cost information is not available. The Commission shall not include in variable cost any expenses which do not vary directly with the level of service provided under the rate in question. Notwithstanding any other provision of this chapter, no rate shall be found to be unjust or unreasonable, or not shown to be just and reasonable, on the ground that such rate exceeds a just or reasonable maximum for the service rendered or to be rendered, unless the Commission has first found that the proponent carrier has market dominance over such service. A finding that a carrier has market dominance over a service shall not create a presumption that the rate or rates for such service exceed a just and reasonable maximum. Nothing in this paragraph shall prohibit a rate increase from a level which reduces the going concern value of the proponent carrier to a level which contributes to such going concern value and is otherwise just and reasonable. For the purposes of the preceding sentence, a rate increase which does not raise a rate above the incremental costs (as determined through formulas prescribed by the Commission) of rendering the service to which such rate applies shall be presumed to be just and reasonable.

(c) As used in this chapter, the terms—

(i) "market dominance" refers to an absence of effective competition from other carriers or modes of transportation, for the traffic or movement to which a rate applies; and

(ii) "rate" means any rate or charge for the transportation of persons or property.

(d) Within 240 days after February 5, 1976, the Commission shall establish, by rule, standards and procedures for determining, in accordance with section 15(9) of this Appendix, whether and when a carrier possesses market dominance over a service rendered or to be rendered at a particular rate or rates. Such rules shall be designed to provide for a practical determination without administrative delay. The Commission shall solicit and consider the recommendations of the Attorney General and of the Federal Trade Commission in the course of establishing such rules.

**(5½) Exchange of services**

Nothing in this Act shall be construed to prevent any common carrier subject to this Act from entering into or operating under any contract with any telephone, telegraph, or cable company, for the exchange of their services.

**(6) Classification of property for transportation; regulations and practices; demurrage charges**

It is made the duty of all common carriers subject to the provisions of this chapter to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this chapter upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful. Demurrage charges shall be computed, and rules and regulations relating to such charges shall be established, in such a manner as to fulfill the national needs with respect to (a) freight car utilization and distribution, and (b) maintenance of an adequate freight car supply available for transportation of property.

**(7) Free transportation for passengers prohibited; exceptions; penalty**

No common carrier subject to the provisions of this chapter, shall, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees, its officers, time inspectors, surgeons, physicians, and attorneys at law, and the families of any of the foregoing; to the executive officers, general chairmen, and counsel of employees' organizations when such organizations are authorized and designated to represent employees in accordance with the provisions of the Railway Labor Act [45 U.S.C. 151 et seq.]; to ministers of religion, traveling secretaries of railroad Young Men's Christian Associations, inmates of hospitals and charitable and eleemosynary institutions, and persons exclusively engaged in charitable and eleemosynary work; to indigent, destitute and homeless persons, and to such persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation; to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Homes, including those about to enter and those returning home after discharge; to necessary caretakers of livestock, poultry, milk, and

fruit; to employees on sleeping cars, express cars, and to linemen of telegraph and telephone companies; to railway mail-service employees and persons in charge of the mails when on duty and traveling to and from duty, and all duly accredited agents and officers of the United States Postal Service and the Railway Mail Service and post-office inspectors while traveling on official business, upon the exhibition of their credentials; to customs inspectors, and immigration officers; to newsboys on trains, baggage agents, witnesses attending any legal investigation in which the common carrier is interested, persons injured in wrecks and physicians and nurses attending such persons; *Provided*, That this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers, and their families; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation; *And provided further*, That this provision shall not be construed to prohibit the privilege of passes or franks, or the exchange thereof with each other, for the officers, agents, employees, and their families of such telegraph, telephone, and cable lines, and the officers, agents, employees and their families of other common carriers subject to the provisions of this chapter; *Provided further*, That the term "employees" as used in this paragraph shall include furloughed, pensioned, and superannuated employees, persons who have become disabled or infirm in the service of any such common carrier, and the remains of a person killed in the employment of a carrier and exemployees traveling for the purpose of entering the service of any such common carrier; and the term "families" as used in this paragraph shall include the families of those persons named in this proviso, also the families of persons killed, and the widows during widowhood and minor children during minority of persons who died, while in the service of any such common carrier. Any common carrier violating this provision shall be deemed guilty of a misdemeanor and for each offense, on conviction, shall pay to the United States a penalty of not less than \$100 nor more than \$2,000, and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass, or free transportation shall be subject to a like penalty. Jurisdiction of offenses under this provision shall be the same as that provided for offenses in sections 41 to 43 of this Appendix.

**(8) Transportation of commodity manufactured or produced by railroad forbidden**

It shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier.

**(9) Switch connections and tracks**

Any common carrier subject to the provisions of this chapter, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on

**§ 8. Liability in damages to persons injured by violation of law**

In case any common carrier subject to the provisions of this chapter shall do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

(Feb. 4, 1887, ch. 104, pt. I, § 8, 24 Stat. 382; Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543.)

**§ 9. Repealed. Pub. L. 95-473, § 4(b), (c), Oct. 17, 1978, 92 Stat. 1466, 1470**

Section repealed subject to an exception related to transportation of oil by pipeline. For disposition of this section in revised Title 49, Transportation, see Table at beginning of Title 49. See, also, notes following Table.

Prior to repeal, section read as follows:

**§ 9. Remedies of persons damaged; election; witnesses**

Any person or persons claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter in any district court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit.

(Feb. 4, 1887, ch. 104, pt. I, § 9, 24 Stat. 382; Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167; Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543; Oct. 15, 1970, Pub. L. 91-452, title II, § 243(a), 84 Stat. 931.)

**§ 10. Repealed. Pub. L. 95-473, § 4(b), (c), Oct. 17, 1978, 92 Stat. 1466, 1470**

Section repealed subject to an exception related to transportation of oil by pipeline. For disposition of this section in revised Title 49, Transportation, see Table at beginning of Title 49. See, also, notes following Table.

Prior to repeal, section read as follows:

**§ 10. Violation of regulations by carrier; discrimination; penalties**

**(1) Violation by carrier or officer; penalty**

Any common carrier subject to the provisions of this chapter, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall willfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or who shall aid or abet therein, or shall willfully omit or fail to do any act, matter, or thing in this chapter required to be done, or shall cause or willingly suffer or permit any act, matter, or thing so directed or required by this

chapter to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this chapter for which no penalty is otherwise provided, or who shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed \$5,000 for each offense: *Provided*, That if the offense for which any person shall be convicted as aforesaid shall be an unlawful discrimination in rates, fares, or charges for the transportation of passengers or property, such person shall, in addition to the fine hereinbefore provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court.

**(2) False billing or classification by carrier; penalty**

Any common carrier subject to the provisions of this chapter, or, whenever such common carrier is a corporation, any officer or agent thereof, or any person acting for or employed by such corporation, who, by means of false billing, false classification, false weighing, or false report of weight, or by any other device or means, shall knowingly and willfully assist, or shall willingly suffer or permit, any person or persons to obtain transportation for property at less than the regular rates then established and in force on the line of transportation of such common carrier, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding \$5,000, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense.

**(3) Obtaining lower rates by false billing, etc., or by false claim; penalty**

Any person, corporation, or company, or any agent or officer thereof, who shall deliver property for transportation to any common carrier subject to the provisions of this chapter, or for whom, as consignor or consignee, any such carrier shall transport property, who shall knowingly and willfully, directly, or indirectly, himself or by employee, agent, officer, or otherwise, by false billing, false classification, false weighing, false representation of the contents of the package or the substance of the property, false report of weight, false statement, or by any other device or means, whether with or without the consent or connivance of the carrier, its agent, or officer, obtain or attempt to obtain transportation for such property at less than the regular rates than established and in force on the line of transportation; or who shall knowingly and willfully, directly or indirectly, himself or by employee, agent, officer, or otherwise, by false statement or representation as to cost, value, nature, or extent of injury, or by the use of any false bill, bill of lading, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to be false, fictitious, or fraudulent, or to contain any false, fictitious, or fraudulent statement or entry, obtain or attempt to obtain any allowance, refund, or payment for damage or otherwise in connection with or growing out of the transportation of or agreement to transport such property, whether with or without the consent or connivance of the carrier, whereby the compensation of such carrier for such transportation, either before or after payment, shall in fact be made less than the regular rates then established and in force on the line of transportation, shall be deemed guilty of fraud, which is declared to be a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was wholly or in part committed, be subject for each offense to a fine of not exceeding \$5,000 or imprisonment in the penitentiary for a term of not exceeding two years, or both in the discretion of

the court: *Provided*, That the penalty of imprisonment shall not apply to artificial persons.

(4) **Inducing unjust discrimination; penalty; liability for damages**

If any such person, or any officer or agent of any such corporation or company, shall, by payment of money or other thing of value, solicitation, or otherwise, induce or attempt to induce any common carrier subject to the provisions of this chapter, or any of its officers or agents, to discriminate unjustly in his, its, or their favor as against any other consignor or consignee in the transportation of property, or shall aid or abet any common carrier in any such unjust discrimination, such person or such officer or agent of such corporation or company shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding \$5,000, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense; and such person, corporation, or company shall also, together with said common carrier, be liable, jointly or severally, in an action to be brought by any consignor or consignee discriminated against in any court of the United States of competent jurisdiction for all damages caused by or resulting therefrom.

(Feb. 4, 1887, ch. 104, pt. I, § 10, 24 Stat. 382; Mar. 2, 1889, ch. 382, § 2, 25 Stat. 857; June 18, 1910, ch. 309, § 10, 36 Stat. 549; Feb. 28, 1920, ch. 91, § 414, 41 Stat. 483; June 19, 1934, ch. 652, § 602(b), 48 Stat. 1102; Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543.)

§ 11. **Repealed. Pub. L. 95-473, § 4(b), (c), Oct. 17, 1978, 92 Stat. 1466, 1470**

Section repealed subject to an exception related to transportation of oil by pipeline. For disposition of this section in revised Title 49, Transportation, see Table at beginning of Title 49. See, also, notes following Table.

Prior to repeal, section read as follows:

§ 11. **Interstate Commerce Commission; appointment, term, and qualifications of Commissioners**

A commission is created and established to be known as the Interstate Commerce Commission, which shall be composed of eleven Commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. The Commissioners appointed under this chapter and their successors, shall continue in office for terms of seven years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the Commissioner whom he shall succeed. Of the Commissioners in office on January 1, 1926, the term of one shall expire December 31 in each of the years 1926, 1927, and 1932 and the terms of two shall expire December 31, in each of the years 1928, 1929, 1930, and 1931. Any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. Not more than six of the Commissioners shall be appointed from the same political party. No person in the employ of or holding any official relation to any common carrier subject to the provisions of this chapter, or owning stock or bonds thereof, or who is in any manner pecuniarily interested therein, shall enter upon the duties of or hold such office. Said Commissioners shall not engage in any other business, vocation, or employment. No vacancy in the Commission shall impair the right of the remaining Commissioners to exercise all the powers of the Commission. Upon the expiration of his term of office a Commissioner shall continue to serve until his successor is appointed and shall have qualified.

(Feb. 4, 1887, ch. 104, pt. I, §§ 11, 24, 24 Stat. 383, 387; June 29, 1906, ch. 3591, § 8, 34 Stat. 595; Aug. 9, 1917, ch. 50, § 1, 40 Stat. 270; Feb. 28, 1920, ch. 91, § 440, 41

Stat. 497; July 16, 1935, ch. 383, 49 Stat. 481; Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543.)

§ 12. **Repealed. Pub. L. 95-473, § 4(b), (c), Oct. 17, 1978, 92 Stat. 1466, 1470**

Section repealed subject to an exception related to transportation of oil by pipeline. For disposition of this section in revised Title 49, Transportation, see Table at beginning of Title 49. See, also, notes following Table.

Prior to repeal, section read as follows:

§ 12. **Authority and duties of Commission; witnesses; depositions**

(1) **Authority, duties, and proceedings of Commission; witnesses; exemption from applicability of chapter for persons, class of persons, etc.; procedures for establishment and revocation**

(a) The Commission shall have authority, in order to perform the duties and carry out the objects for which it was created, to inquire into and report on the management of the business of all common carriers subject to the provisions of this chapter, and to inquire into and report on the management of the business of persons controlling, controlled by, or under a common control with, such carriers, to the extent that the business of such persons is related to the management of the business of one or more such carriers, and the Commission shall keep itself informed as to the manner and method in which the same are conducted. The Commission may obtain from such carriers and persons such information as the Commission deems necessary to carry out the provisions of this chapter; and may transmit to Congress from time to time such recommendations (including recommendations as to additional legislation) as the Commission may deem necessary. The Commission is authorized and required to execute and enforce the provisions of this chapter; and, upon the request of the Commission, it shall be the duty of any United States attorney to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this chapter and for the punishment of all violations thereof, and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; and for the purposes of this chapter the Commission shall have power to require, by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation.

(b) Whenever the Commission determines, upon petition by the Secretary or an interested party or upon its own initiative, in matters relating to a common carrier by railroad subject to this chapter, after notice and reasonable opportunity for a hearing, that the application of the provisions of this chapter (i) to any person or class of persons, or (ii) to any services or transactions by reason of the limited scope of such services or transactions, is not necessary to effectuate the national transportation policy declared in this Act, would be an undue burden on such person or class of persons or on interstate and foreign commerce, and would serve little or no useful public purpose, it shall, by order, exempt such persons, class of persons, services, or transactions from such provisions to the extent and for such period of time as may be specified in such order. The Commission may, by order, revoke any such exemption whenever it finds, after notice and reasonable opportunity for a hearing, that the application of the provisions of this chapter to the exempted person, class of persons, services, or transactions, to the extent specified in such order, is necessary to effectuate the national transportation policy declared in this Act and to achieve effective regulation

by the Commission, and would serve a useful public purpose.

**(2) Attendance of witnesses and production of documents**

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the Commission, or any party to a proceeding before the Commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section.

**(3) Compelling attendance and testimony of witnesses, etc.**

And any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any common carrier subject to the provisions of this chapter, or other person, issue an order requiring such common carrier or other person to appear before said Commission (and produce books and papers if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

**(4) Depositions**

The testimony of any witness may be taken, at the instance of a party, in any proceeding or investigation depending [pending] before the Commission, by deposition, at any time after a cause or proceeding is at issue on petition and answer. The Commission may also order testimony to be taken by deposition in any proceeding or investigation pending before it, at any stage of such proceeding or investigation. Such depositions may be taken before any judge of any court of the United States, or any United States commissioner, or any clerk of a district court, or any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court, or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, nor interested in the event of the proceeding or investigation. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition. Any person may be compelled to appear and depose, and to produce documentary evidence, in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the Commission as hereinbefore provided.

**(5) Oath; subscription of testimony on deposition**

Every person deposing as herein provided shall be cautioned and sworn (or affirm, if he so request) to testify the whole truth, and shall be carefully examined. His testimony shall be reduced to writing by the magistrate taking the deposition, or under his direction, and shall, after it has been reduced to writing, be subscribed by the deponent.

**(6) Deposition in foreign country; filing of depositions**

If a witness whose testimony may be desired to be taken by deposition be in a foreign country, the deposition may be taken before an officer or person designated by the Commission, or agreed upon by the parties by stipulation in writing to be filed with the Commission. All depositions must be promptly filed with the Commission.

**(7) Fees for depositions**

Witnesses whose depositions are taken pursuant to this chapter, and the magistrate or other officer taking the same, shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

(Feb. 4, 1887, ch. 104, pt. I, § 12, 24 Stat. 383; Mar. 2, 1889, ch. 382, § 3, 25 Stat. 858; Feb. 10, 1891, ch. 128, 26

Stat. 743; May 28, 1896, ch. 252, § 19, 29 Stat. 184; Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167; Feb. 28, 1920, ch. 91, § 415, 41 Stat. 484; Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543; Sept. 18, 1940, ch. 722, title I, § 9(a), 54 Stat. 910; June 25, 1948, ch. 646, § 1, 62 Stat. 909; Feb. 5, 1976, Pub. L. 94-210, title II, § 207, 90 Stat. 42.)

§ 13. Repealed. Pub. L. 95-473, § 4(b), (c), Oct. 17, 1978, 92 Stat. 1466, 1470

Section repealed subject to an exception related to transportation of oil by pipeline. For disposition of this section in revised Title 49, Transportation, see Table at beginning of Title 49. See, also, notes following Table.

Prior to repeal, section read as follows:

**§ 13. Complaints to and investigations by Commission**

**(1) Complaint to Commission of violation of law by carrier; reparation; investigation**

Any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier complaining of anything done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

**(2) Complaints by State commissions; inquiry on Commission's own motion; expenses of State commissions**

Said Commission shall, in like manner and with the same authority and powers, investigate any complaint forwarded by the railroad commissioner or railroad commission or any State or Territory at the request of such commissioner or commission, and the Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said Commission by any provision of this chapter, or concerning which any question may arise under any of the provisions of this chapter, or relating to the enforcement of any of the provisions of this chapter. And the said Commission shall have the same powers and authority to proceed with any inquiry instituted on its motion as though it had been appealed to by complaint or petition under any of the provisions of this chapter, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had excepting orders for the payment of money. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant. Representatives of State commissions sitting with the Commission, under the provisions of this section, in cases pending before the Commission, shall receive such allowances for travel and subsistence expense as the Commission shall provide.

**§ 15. Determination of rates, routes, etc.; routing of traffic; disclosures, etc.**

**(1) Commission empowered to determine and prescribe rates, classifications, etc.**

Whenever, after full hearing, upon a complaint made as provided in section 13 of this Appendix, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property, as defined in section 1 of this Appendix, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

**(2) Orders of Commission**

Except as otherwise provided in this chapter, all orders of the Commission, other than orders for the payment of money, shall take effect within such reasonable time as the Commission may prescribe. Such orders shall continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order, unless the same shall be suspended or modified or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction.

**(3) Establishment of through routes, joint classifications, joint rates, fares, etc.**

The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this chapter, or by carriers by railroad subject to this chapter and common carriers by water subject to chapter 12 of this Appendix, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancellation to show that it is consistent with the

public interest, without regard to the provisions of paragraph (4) of this section. With respect to carriers by railroad, in determining whether any such cancellation or proposed cancellation involving any common carrier by railroad is consistent with the public interest, the Commission shall, to the extent applicable, (a) compare the distance traversed and the average transportation time and expense required using the through route, and the distance traversed and the average transportation time and expense required using alternative routes, between the points served by such through route, (b) consider any reduction in energy consumption which may result from such cancellation, and (c) take into account the overall impact of such cancellation on the shippers and carriers who are affected thereby.

**(4) Through routes to embrace entire length of railroad; temporary through routes**

In establishing any such through route the Commission shall not (except as provided in section 3 of this Appendix, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however,* That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b) of this paragraph, give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs. In time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest.

**(5) Transportation of livestock in carload lots; services included**

Transportation wholly by railroad of ordinary livestock in carload lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee, or owner, except in cases where the unloading or reloading en route is at the request of the shipper, consignee, or owner, or to try an intermediate market, or to comply with quarantine regulations. The Commission may prescribe or approve just and reasonable rules governing each of such excepted services. Nothing in this paragraph shall be construed to affect the duties and liabilities of the carriers existing on February 28, 1920, by virtue of law respecting the transportation of other than ordinary livestock, or the duty of performing service as to shipments other than those to or from public stockyards.

(6) Commission to establishment just divisions of joint rates, fares, or charges; adjustments; procedures applicable

(a) Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares, and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare, or charge.

(b) Notwithstanding any other provision of law, the Commission shall, within 180 days after February 5, 1976, establish, by rule, standards and procedures for the conduct of proceedings for the adjustment of divisions of joint rates or fares (whether prescribed by the Commission or otherwise) in accordance with the provisions of this paragraph. The Commission shall issue a final order in all such proceedings within 270 days after the submission to the Commission of a case. If the Commission is unable to issue such a final order within such time, it shall issue a report to the Congress setting forth the reasons for such inability.

(c) All evidentiary proceedings conducted pursuant to this paragraph shall be completed, in a case brought upon a complaint, within 1 year following the filing of the complaint, or, in a case brought upon the Commission's initiative, within 2 years following the commencement of such proceeding, unless the Commission finds that such a proceeding must be extended to permit a fair and expeditious completion of the proceeding. If the Commission is unable to meet any such time requirement, it shall issue a report to the Congress setting forth the reasons for such inability.

(d) Whenever a proceeding for the adjustment of divisions of joint rates or fares (whether prescribed by the Commission or otherwise established) is commenced by the filing of a complaint with the Commission, the complaining carrier or carriers shall (i) attach thereto all of the evidence in support of their position, and (ii) during the course of such proceeding, file only rebuttal or reply evidence unless otherwise directed by order of the Commission. Upon receipt of a notice of intent to file a complaint pursuant to this paragraph, the Commission shall accord, to the party filing such notice, the same right to discovery that would be accorded to a party filing a complaint pursuant to this paragraph.

(7) Commission to determine lawfulness of new rates; suspension; refunds; nonapplicability to common carriers by railroad subject to chapter

Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate,

fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible. This paragraph shall not apply to common carriers by railroad subject to this chapter.

(8) Commission to determine lawfulness of new rates; applicability to common carrier by railroad; suspensions; accounts; hearing and basis of decision

(a) Whenever a schedule is filed with the Commission by a common carrier by railroad stating a new individual or joint rate, fare, or charge, or a new individual or joint classification, regulation, or practice affecting a rate, fare, or charge, the Commission may, upon the complaint of an interested party or upon its own initiative, order a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice. The hearing may be conducted without answer or other formal pleading, but reasonable notice shall be provided to interested parties. Such hearing shall be completed and a final decision rendered by the Commission not later than 7 months after such rate, fare, charge, classification, regulation, or practice was scheduled to become effective, unless, prior to the expiration of such 7-month period, the Commission reports in writing to the Congress that it is unable to render a decision within such period, together with a full explanation of the reason for the delay. If such a report is made to the Congress, the final decision shall be made not later than 10 months after the date of the filing of such schedule. If the final decision of the Commission is not made within the applicable time period, the rate, fare, charge, classification, regulation, or practice shall go into effect

## Federal Energy Regulatory Commission

## § 342.3

(a) Must establish its initial rates subject to such Act pursuant to § 342.2; and

(b) Must make any change in existing rates pursuant to § 342.3 or § 342.4, whichever is applicable, unless directed otherwise by the Commission.

### § 342.2 Establishing initial rates.

A carrier must justify an initial rate for new service by:

(a) Filing cost, revenue, and throughput data supporting such rate as required by part 346 of this chapter; or

(b) Filing a sworn affidavit that the rate is agreed to by at least one non-affiliated person who intends to use the service in question, *provided* that if a protest to the initial rate is filed, the carrier must comply with paragraph (a) of this section.

[Order 561, 58 FR 58779, Nov. 4, 1993, as amended at 59 FR 59146, Nov. 16, 1994]

### § 342.3 Indexing.

(a) *Rate changes.* A rate charged by a carrier may be changed, at any time, to a level which does not exceed the ceiling level established by paragraph (d) of this section, upon compliance with the applicable filing and notice requirements and with paragraph (b) of this section. A filing under this section proposing to change a rate that is under investigation and subject to refund, must take effect subject to refund.

(b) *Information required to be filed with rate changes.* The carrier must comply with Part 341 of this title. Carriers must specify in their letters of transmittal required in § 341.2(c) of this chapter the rate schedule to be changed, the proposed new rate, the prior rate, the prior ceiling level, and the applicable ceiling level for the movement. No other rate information is required to accompany the proposed rate change.

(c) *Index year.* The index year is the period from July 1 to June 30.

(d) *Derivation of the ceiling level.* (1) A carrier must compute the ceiling level for each index year by multiplying the previous index year's ceiling level by the most recent index published by the Commission. The index will be published by the Commission prior to June 1 of each year.

(2) The index published by the Commission will be based on the change in the final Producer Price Index for Finished Goods (PPI-FG), seasonally adjusted, as published by the U.S. Department of Labor, Bureau of Labor Statistics, for the two calendar years immediately preceding the index year. The index will be calculated by dividing the PPI-FG for the calendar year immediately preceding the index year, by the previous calendar year's PPI-FG.

(3) A carrier must compute the ceiling level each index year without regard to the actual rates filed pursuant to this section. All carriers must round their ceiling levels each index year to the nearest hundredth of a cent.

(4) For purposes of computing the ceiling level for the period January 1, 1995 through June 30, 1995, a carrier must use the rate in effect on December 31, 1994 as the previous index year's ceiling level in the computation in paragraph (d)(1) of this section. If the rate in effect on December 31, 1994 is subsequently lowered by Commission order pursuant to the Interstate Commerce Act, the ceiling level based on such rate must be recomputed, in accordance with paragraph (d)(1) of this section, using the rate established by such Commission order in lieu of the rate in effect on December 31, 1994.

(5) When an initial rate, or rate changed by a method other than indexing, takes effect during the index year, such rate will constitute the applicable ceiling level for that index year. If such rate is subsequently lowered by Commission order pursuant to the Interstate Commerce Act, the ceiling level based on such rate must be recomputed, in accordance with paragraph (d)(1) of this section, using the rate established by such Commission order as the ceiling level for the index year which includes the effective date of the rate established by such Commission order.

(e) *Rate decreases.* If the ceiling level computed pursuant to § 342.3(d) is below the filed rate of a carrier, that rate must be reduced to bring it into compliance with the new ceiling level; provided, however, that a carrier is not required to reduce a rate below the level deemed just and reasonable under section 1803(a) of the Energy Policy Act of

## § 342.4

1992, if such section applies to such rate or to any prior rate. The rate decrease must be accomplished by filing a revised tariff publication with the Commission to be effective July 1 of the index year to which the reduced ceiling level applies.

[Order 561, 58 FR 58779, Nov. 4, 1993, as amended by Order 561-A, 59 FR 40256, Aug. 8, 1994; 59 FR 59146, Nov. 16, 1994; Order 606, 64 FR 44405, Aug. 16, 1999; Order 650, 69 FR 53801, Sept. 3, 2004]

## § 342.4 Other rate changing methodologies.

(a) *Cost-of-service rates.* A carrier may change a rate pursuant to this section if it shows that there is a substantial divergence between the actual costs experienced by the carrier and the rate resulting from application of the index such that the rate at the ceiling level would preclude the carrier from being able to charge a just and reasonable rate within the meaning of the Interstate Commerce Act. A carrier must substantiate the costs incurred by filing the data required by part 346 of this chapter. A carrier that makes such a showing may change the rate in question, based upon the cost of providing the service covered by the rate, without regard to the applicable ceiling level under § 342.3.

(b) *Market-based rates.* A carrier may attempt to show that it lacks significant market power in the market in which it proposes to charge market-based rates. Until the carrier establishes that it lacks market power, these rates will be subject to the applicable ceiling level under § 342.3.

(c) *Settlement rates.* A carrier may change a rate without regard to the ceiling level under § 342.3 if the proposed change has been agreed to, in writing, by each person who, on the day of the filing of the proposed rate change, is using the service covered by the rate. A filing pursuant to this section must contain a verified statement by the carrier that the proposed rate change has been agreed to by all current shippers.

[Order 561, 58 FR 58779, Nov. 4, 1993, as amended at 59 FR 59146, Nov. 16, 1994]

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## PART 343—PROCEDURAL RULES APPLICABLE TO OIL PIPELINE PROCEEDINGS

Sec.

343.0 Applicability.

343.1 Definitions.

343.2 Requirements for filing interventions, protests and complaints.

343.3 Filing of protests and responses.

343.4 Procedure on complaints.

343.5 Required negotiations.

AUTHORITY: 5 U.S.C. 571-583; 42 U.S.C. 7101-7352; 49 U.S.C. 60502; 49 App. U.S.C. 1-85.

SOURCE: Order 561, 58 FR 58780, Nov. 4, 1993, unless otherwise noted.

### § 343.0 Applicability.

(a) *General rule.* The Commission's Rules of Practice and Procedure in part 385 of this chapter will govern procedural matters in oil pipeline proceedings under part 342 of this chapter and under the Interstate Commerce Act, except to the extent specified in this part.

### § 343.1 Definitions.

For purposes of this part, the following definitions apply:

(a) *Complaint* means a filing challenging an existing rate or practice under section 13(1) of the Interstate Commerce Act.

(b) *Protest* means a filing, under section 15(7) of the Interstate Commerce Act, challenging a tariff publication.

[Order 561, 58 FR 58780, Nov. 4, 1993, as amended by Order 578, 60 FR 19505, Apr. 19, 1995]

### § 343.2 Requirements for filing interventions, protests and complaints.

(a) *Interventions.* Section 385.214 of this chapter applies to oil pipeline proceedings.

(b) *Standing to file protest.* Only persons with a substantial economic interest in the tariff filing may file a protest to a tariff filing pursuant to the Interstate Commerce Act. Along with the protest, a verified statement that the protestor has a substantial economic interest in the tariff filing in question must be filed.

(c) *Other requirements for filing protests or complaints—(1) Rates established under § 342.3 of this chapter.* A protest or complaint filed against a rate proposed or

### § 342.4

1992, if such section applies to such rate or to any prior rate. The rate decrease must be accomplished by filing a revised tariff publication with the Commission to be effective July 1 of the index year to which the reduced ceiling level applies.

[Order 561, 58 FR 58779, Nov. 4, 1993, as amended by Order 561-A, 59 FR 40256, Aug. 8, 1994; 59 FR 59146, Nov. 16, 1994; Order 606, 64 FR 44405, Aug. 16, 1999; Order 650, 69 FR 53801, Sept. 3, 2004]

### § 342.4 Other rate changing methodologies.

(a) *Cost-of-service rates.* A carrier may change a rate pursuant to this section if it shows that there is a substantial divergence between the actual costs experienced by the carrier and the rate resulting from application of the index such that the rate at the ceiling level would preclude the carrier from being able to charge a just and reasonable rate within the meaning of the Interstate Commerce Act. A carrier must substantiate the costs incurred by filing the data required by part 346 of this chapter. A carrier that makes such a showing may change the rate in question, based upon the cost of providing the service covered by the rate, without regard to the applicable ceiling level under § 342.3.

(b) *Market-based rates.* A carrier may attempt to show that it lacks significant market power in the market in which it proposes to charge market-based rates. Until the carrier establishes that it lacks market power, these rates will be subject to the applicable ceiling level under § 342.3.

(c) *Settlement rates.* A carrier may change a rate without regard to the ceiling level under § 342.3 if the proposed change has been agreed to, in writing, by each person who, on the day of the filing of the proposed rate change, is using the service covered by the rate. A filing pursuant to this section must contain a verified statement by the carrier that the proposed rate change has been agreed to by all current shippers.

[Order 561, 58 FR 58779, Nov. 4, 1993, as amended at 59 FR 59146, Nov. 16, 1994]

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## PART 343—PROCEDURAL RULES APPLICABLE TO OIL PIPELINE PROCEEDINGS

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### § 343.1 Definitions.

For purposes of this part, the following definitions apply:

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[Order 561, 58 FR 58780, Nov. 4, 1993, as amended by Order 578, 60 FR 19505, Apr. 19, 1995]

### § 343.2 Requirements for filing interventions, protests and complaints.

(a) *Interventions.* Section 385.214 of this chapter applies to oil pipeline proceedings.

(b) *Standing to file protest.* Only persons with a substantial economic interest in the tariff filing may file a protest to a tariff filing pursuant to the Interstate Commerce Act. Along with the protest, a verified statement that the protestor has a substantial economic interest in the tariff filing in question must be filed.

(c) *Other requirements for filing protests or complaints—(1) Rates established under § 342.3 of this chapter.* A protest or complaint filed against a rate proposed or

established pursuant to §342.3 of this chapter must allege reasonable grounds for asserting that the rate violates the applicable ceiling level, or that the rate increase is so substantially in excess of the actual cost increases incurred by the carrier that the rate is unjust and unreasonable, or that the rate decrease is so substantially less than the actual cost decrease incurred by the carrier that the rate is unjust and unreasonable. In addition to meeting the requirements of the section, a complaint must also comply with all the requirements of §385.206, except §385.206(b)(1) and (2).

(2) *Rates established under §342.4(c) of this chapter.* A protest or complaint filed against a rate proposed or established under §342.4(c) of this chapter must allege reasonable grounds for asserting that the rate is so substantially in excess of the actual cost increases incurred by the carrier that the rate is unjust and unreasonable. In addition to meeting the requirements of the section, a complaint must also comply with all the requirements of §385.206, except §385.206(b)(1) and (2).

(3) *Non-rate matters.* A protest or complaint filed against a carrier's operations or practices, other than rates, must allege reasonable grounds for asserting that the operations or practices violate a provision of the Interstate Commerce Act, or of the Commission's regulations. In addition to meeting the requirements of this section, a complaint must also comply with the requirements of §385.206.

(4) A protest or complaint that does not meet the requirements of paragraphs (c)(1), (c)(2), or (c)(3) of this section, whichever is applicable, will be dismissed.

[Order 561, 58 FR 58780, Nov. 4, 1993, as amended by Order 602, 64 FR 17097, Apr. 8, 1999; Order 606, 64 FR 44405, Aug. 16, 1999]

### §343.3 Filing of protests and responses.

(a) *Protests.* Any protest pursuant to section 15(7) of the Interstate Commerce Act must be filed not later than 15 days after the filing of a tariff publication. If the carrier submits a separate letter with the filing, providing a telefax number and contact person, and requesting all protests to be telefaxed

to the carrier by a protestant, any protest must be so telefaxed to the pipeline at the time the protest is filed with the Commission. Only persons with a substantial economic interest in the tariff filing may file a protest to a tariff filing pursuant to the Interstate Commerce Act. Along with the protest, the protestant must file a verified statement which must contain a reasonably detailed description of the nature and substance of the protestant's substantial economic interest in the tariff filing.

(b) *Responses.* The carrier may file a response to a protest no later than 5 days from the filing of the protest.

(c) *Commission action.* Commission action, including any hearings or other proceedings, on a protest will be limited to the issues raised in such protest. If a filing is protested, before the effective date of the tariff publication or within 30 days of the tariff filing, whichever is later, the Commission will determine whether to suspend the tariff and initiate a formal investigation.

(d) *Termination of investigation.* Withdrawal of the protest, or protests, that caused the initiation of an investigation automatically terminates the investigation.

[Order 561, 58 FR 58780, Nov. 4, 1993, as amended by Order 561-A, 59 FR 40256, Aug. 8, 1994]

### §343.4 Procedure on complaints.

(a) *Responses.* The carrier must file an answer to a complaint filed pursuant to section 13(1) of the Interstate Commerce Act within 20 days after the filing of the complaint in accordance with Rule 206.

(b) *Commission action.* Commission action, including any hearings or other proceedings, on a complaint will be limited to the issues raised in the complaint.

[Order 561, 58 FR 58780, Nov. 4, 1993, as amended by Order 602, 64 FR 17097, Apr. 8, 1999]

### §343.5 Required negotiations.

The Commission or other decisional authority may require parties to enter into good faith negotiations to settle oil pipeline rate matters. The Commission will refer all protested rate filings

**Federal Energy Regulatory Commission**

**§ 357.2**

SCHEDULE OF RECORDS AND PERIODS OF RETENTION—Continued

Item No. and description	Retention period
(c) Statements of oil and oil products consumed as fuel including quantity value, and where consumed.	3 years.
(d) Statement of oil and other products lost by line breaks and leaks including quantity, value, and location of breaks and leaks.	3 years.
(e) Reports of power furnished by producers: monthly reports of the quantity of oil run in connection with which power was furnished by producers, and records of payment for such power.	3 years.
(f) Records of producers' property identifying ownership and location for producers' tanks or wells to which carrier's lines are connected.	3 years after disconnection.
(g) Division or other periodical inventory reports of oil and other products on hand.	3 years.
(h) Division orders: Directions received by carrier as to the division of interest and to whose account transported oil should be credited.	3 years after discontinuance.
(i) Directions received by the carrier for the transfer of division order interests from one interest owner to another.	3 years after discontinuance.
(j) Transfer orders for the transfer of ownership of oil or other products in carrier's custody.	3 years.
<b>Tariffs and Rates</b>	
20. Official file copies of tariffs, classifications, division sheets, and circulars relative to the transportation of property.	3 years after expiration or cancellation.
21. Authorities and supporting papers for transportation of property for free or at reduced rates.	3 years.
22. Copies of concurrences and powers of attorney .....	2 years after expiration or cancellation.
23. Correspondence and working papers in connection with the making of rates and compliance of tariffs, classifications, division sheets, and circulars affecting the transportation of property.	2 years after cancellation of tariff.
<b>Reports and Statistics</b>	
24. Reports to Federal Energy Regulatory Commission and other regulatory bodies, annual financial, operating and statistical reports, file copies, and supporting data.	5 years.

**PART 357—ANNUAL SPECIAL OR PERIODIC REPORTS: CARRIERS SUBJECT TO PART I OF THE INTERSTATE COMMERCE ACT**

Sec.

357.1 Common carriers.

357.2 FERC Form No. 6, Annual Report of Oil Pipeline Companies.

357.3 FERC Form No. 73, Oil Pipeline Data for Depreciation Analysis.

357.4 FERC Form No. 6-Q, Quarterly report of oil pipeline companies.

357.5 Cash management programs.

AUTHORITY: 42 U.S.C. 7101-7352; 49 U.S.C. 60502; 49 App. U.S.C. 1-85 (1988).

**§357.1 Common carriers.**

All common carriers by pipeline subject to the provisions of Part I of Interstate Commerce Act, as amended, are hereby required hereinafter to file in the office of the Commission on or before the 31st day of March in each year,

reports covering the period of 12 months ending with the 31st day of December preceding said date, giving the particulars heretofore called for in the annual reports required by the Commission of said carriers.

[Order 119, 46 FR 9051, Jan. 28, 1981]

**§357.2 FERC Form No. 6, Annual Report of Oil Pipeline Companies.**

(a) *Who must file.* (1) Each pipeline carrier subject to the provisions of section 20 of the Interstate Commerce Act whose annual jurisdictional operating revenues has been \$500,000 or more for each of the three previous calendar years must prepare and file with the Commission copies of FERC Form No. 6, "Annual Report of Oil Pipeline Companies," pursuant to the General Instructions set out in that form. Newly established entities must use projected

### § 357.3

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data to determine whether FERC Form No. 6 must be filed.

(2) Oil pipeline carriers exempt from filing Form No. 6 whose annual jurisdictional operating revenues have been more than \$350,000 but less than \$500,000 for each of the three previous calendar years must prepare and file pages 301, “Operating Revenue Accounts (Account 600),” and 700, “Annual Cost of Service Based Analysis Schedule,” of FERC Form No. 6. When submitting pages 301 and 700, each exempt oil pipeline carrier must include page 1 of Form No. 6, the Identification and Attestation schedules.

(3) Oil pipeline carriers exempt from filing Form No. 6 and pages 301 and whose annual jurisdictional operating revenues were \$350,000 or less for each of the three previous calendar years must prepare and file page 700, “Annual Cost of Service Based Analysis Schedule,” of FERC Form No. 6. When submitting page 700, each exempt oil pipeline carrier must include page 1 of Form No. 6, the Identification and Attestation schedules.

(b) *When to file.* (1) The annual report for the year ending December 31, 2004, must be filed on April 25, 2005.

(2) The annual report for each year thereafter must be filed on April 18 of the subsequent year.

(c) *What to submit.* (1) This report form must be filed as prescribed in § 385.2011 of this chapter and as indicated in the General Instructions set out in the report form, and must be properly completed and verified.

(2) A copy of the report must be retained by the pipeline carrier in its files. The conformed copies may be produced by any legible means of reproduction.

(3) The form must be filed in electronic format only pursuant to § 385.2011 of this chapter, beginning with report year 2002, due on or before March 31, 2003.

[Order 620, 65 FR 81344, Dec. 26, 2000, as amended by Order 628, 68 FR 269, Jan. 3, 2003; 69 FR 9044, Feb. 26, 2004]

### § 357.3 FERC Form No. 73, Oil Pipeline Data for Depreciation Analysis.

(a) *Who must file.* Any oil pipeline company requesting new or changed depreciation rates pursuant to part 347

of this title if the proposed depreciation rates are based on the remaining physical life of the properties or if directed by the Commission to file service life data during an investigation of its book depreciation rates.

(b) *When to submit.* Service life data is reported to the Commission by an oil pipeline company, as necessary, concurrently with a filing made pursuant to part 347 of this title or as directed during a depreciation rate investigation.

(c) *What to submit.* The format and data which must be submitted are prescribed in FERC Form No. 73, Oil Pipeline Data for Depreciation Analysis, available for review at the Commission’s Public Reference Section, Room 2A, 888 First Street, NE., Washington, DC 20426.

[Order 606, 64 FR 44405, Aug. 16, 1999]

### § 357.4 FERC Form No. 6–Q, Quarterly report of oil pipeline companies.

(a) *Prescription.* The quarterly financial report form of oil pipeline companies, designated as FERC Form No. 6–Q, is prescribed for the reporting quarter ending March 31, 2004, and each quarter thereafter.

(b) *Filing requirements—(1) Who must file.* Each oil pipeline company, subject to the provisions of section 20 of the Interstate Commerce Act, must prepare and file with the Commission FERC Form No. 6–Q.

(2) *When to file and what to file.* This quarterly financial report form must be filed as follows:

(i) The quarterly financial report for the period January 1 through March 31, 2004, must be filed on or before July 23, 2004.

(ii) The quarterly financial report for the period April 1 through June 30, 2004, must be filed on or before September 22, 2004.

(iii) The quarterly financial report for the period July 1 through September 30, 2004, must be filed on or before December 23, 2004.

(iv) The quarterly financial report for the period January 1 through March 31, 2005, must be filed on or before June 13, 2005.

(v) This report must be filed as prescribed in § 385.2011 of this chapter and

## § 385.204

each tariff or rate filing must include, as appropriate:

(1) If known, the reference numbers, docket numbers, or other identifying symbols of any relevant tariff, rate, schedule, contract, application, rule, or similar matter or material;

(2) The name of each participant for whom the filing is made or, if the filing is made for a group of participants, the name of the group, provided that the name of each member of the group is set forth in a previously filed document which is identified in the filing being made;

(3) The specific authorization or relief sought;

(4) The tariff or rate sheets or sections;

(5) The name and address of each person against whom the complaint is directed;

(6) The relevant facts, if not set forth in a previously filed document which is identified in the filing being made;

(7) The position taken by the participant filing any pleading, to the extent known when the pleading is filed, and the basis in fact and law for such position;

(8) Subscription or verification, if required;

(9) A certificate of service under Rule 2010(h), if service is required;

(10) The name, address, and telephone number of an individual who, with respect to any matter contained in the filing, represents the person for whom filing is made; and

(11) Any additional information required to be included by statute, rule, or order.

(b) *Requirement for any initial pleading or tariff or rate filing.* The initial pleading or tariff or rate filing submitted by a participant or a person seeking to become a party must conform to the requirements of paragraph (a) of this section and must include:

(1) The exact name of the person for whom the filing is made;

(2) The location of that person's principal place of business; and

(3) The name, address, and telephone number of at least one, but not more than two, persons upon whom service is to be made and to whom communications are to be addressed in the proceeding.

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(c) *Combined filings.* If two or more pleadings, or one or more pleadings and a tariff or rate filing are included as items in a single filing each such item must be separately designated and must conform to the requirements which would be applicable to it if filed separately.

(d) *Form of notice.* If a pleading or tariff or rate filing must include a form of notice suitable for publication in the FEDERAL REGISTER, the company shall submit the draft notice in accordance with the form of notice specifications prescribed by the Secretary and posted under the Filing Procedures link at <http://www.ferc.gov> and available in the Commission's Public Reference Room.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 647, 69 FR 32439, June 10, 2004; Order 663, 70 FR 55725, Sept. 23, 2005; 71 FR 14642, Mar. 23, 2006; Order 714, 73 FR 57538, Oct. 3, 2008]

### § 385.204 Applications (Rule 204).

Any person seeking a license, permit, certification, or similar authorization or permission, must file an application to obtain that authorization or permission.

### § 385.205 Tariff or rate filings (Rule 205).

A person must make a tariff or rate filing in order to establish or change any specific rate, rate schedule, tariff, tariff schedule, fare, charge, or term or condition of service, or any classification, contract, practice, or any related regulation established by and for the applicant.

### § 385.206 Complaints (Rule 206).

(a) *General rule.* Any person may file a complaint seeking Commission action against any other person alleged to be in contravention or violation of any statute, rule, order, or other law administered by the Commission, or for any other alleged wrong over which the Commission may have jurisdiction.

#### (b) *Contents. A complaint must:*

(1) Clearly identify the action or inaction which is alleged to violate applicable statutory standards or regulatory requirements;

(2) Explain how the action or inaction violates applicable statutory standards or regulatory requirements;

(3) Set forth the business, commercial, economic or other issues presented by the action or inaction as such relate to or affect the complainant;

(4) Make a good faith effort to quantify the financial impact or burden (if any) created for the complainant as a result of the action or inaction;

(5) Indicate the practical, operational, or other nonfinancial impacts imposed as a result of the action or inaction, including, where applicable, the environmental, safety or reliability impacts of the action or inaction;

(6) State whether the issues presented are pending in an existing Commission proceeding or a proceeding in any other forum in which the complainant is a party, and if so, provide an explanation why timely resolution cannot be achieved in that forum;

(7) State the specific relief or remedy requested, including any request for stay or extension of time, and the basis for that relief;

(8) Include all documents that support the facts in the complaint in possession of, or otherwise attainable by, the complainant, including, but not limited to, contracts and affidavits;

(9) State

(i) Whether the Enforcement Hotline, Dispute Resolution Service, tariff-based dispute resolution mechanisms, or other informal dispute resolution procedures were used, or why these procedures were not used;

(ii) Whether the complainant believes that alternative dispute resolution (ADR) under the Commission's supervision could successfully resolve the complaint;

(iii) What types of ADR procedures could be used; and

(iv) Any process that has been agreed on for resolving the complaint.

(10) Include a form of notice of the complaint suitable for publication in the FEDERAL REGISTER in accordance with the specifications in §385.203(d) of this part. The form of notice shall be on electronic media as specified by the Secretary.

(11) Explain with respect to requests for Fast Track processing pursuant to section 385.206(h), why the standard processes will not be adequate for expeditiously resolving the complaint.

(c) *Service*. Any person filing a complaint must serve a copy of the complaint on the respondent, affected regulatory agencies, and others the complainant reasonably knows may be expected to be affected by the complaint. Service must be simultaneous with filing at the Commission for respondents. Simultaneous or overnight service is permissible for other affected entities. Simultaneous service can be accomplished by electronic mail in accordance with §385.2010(f)(3), facsimile, express delivery, or messenger.

(d) *Notice*. Public notice of the complaint will be issued by the Commission.

(e) [Reserved]

(f) *Answers, interventions and comments*. Unless otherwise ordered by the Commission, answers, interventions, and comments to a complaint must be filed within 20 days after the complaint is filed. In cases where the complainant requests privileged treatment for information in its complaint, answers, interventions, and comments are due within 30 days after the complaint is filed. In the event there is an objection to the protective agreement, the Commission will establish when answers will be due.

(g) *Complaint resolution paths*. One of the following procedures may be used to resolve complaints:

(1) The Commission may assign a case to be resolved through alternative dispute resolution procedures in accordance with §§385.604–385.606, in cases where the affected parties consent, or the Commission may order the appointment of a settlement judge in accordance with §385.603;

(2) The Commission may issue an order on the merits based upon the pleadings;

(3) The Commission may establish a hearing before an ALJ;

(h) *Fast Track processing*. (1) The Commission may resolve complaints using Fast Track procedures if the complaint requires expeditious resolution. Fast Track procedures may include expedited action on the pleadings by the Commission, expedited hearing before an ALJ, or expedited action on requests for stay, extension of time, or other relief by the Commission or an ALJ.

**CERTIFICATE OF SERVICE**

In accordance with Fed. R. App. P.25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 9th day of December 2013, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system or via U.S. Mail, as indicated below:

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