

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-1018

September Term, 2018

FILED ON: APRIL 3, 2019

NORTH CAROLINA UTILITIES COMMISSION,
PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK AND TRANSCONTINENTAL GAS PIPE
LINE COMPANY, LLC,
INTERVENORS

Consolidated with 18-1019, 18-1020

On Petitions for Review of Orders of the
Federal Energy Regulatory Commission

Before: GARLAND, *Chief Judge*, and GRIFFITH and WILKINS, *Circuit Judges*.

J U D G M E N T

This appeal was considered on the record from the Federal Energy Regulatory Commission (“FERC”) and on the briefs of the parties and oral arguments of counsel. The court has accorded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). For the reasons stated below, it is

ORDERED and **ADJUDGED** that the petition for review be **DISMISSED** for lack of jurisdiction.

Petitioner North Carolina Utilities Commission (“NCUC”) and Intervenor New York State Public Service Commission (“NYSPSC”) ask this Court to set aside three FERC orders granting certificates to Transcontinental Gas Pipe Line Company, LLC (“Transco”) to construct and operate interstate natural gas pipeline projects – the Virginia Southside Expansion Project, the Dalton Expansion Project, and the Atlantic Sunrise Project – in the Eastern United States. NCUC and NYSPSC contend that the recourse rate used in FERC’s certification orders relies on an outdated and inflated pre-tax return. Thus, they argue, the agreed-upon negotiated rate is tainted, given

FERC's intention for recourse rates to constrain a company's ability to exercise market power during rate negotiations.

The Natural Gas Act instructs that only "aggrieved" persons may seek judicial review of a FERC order. 15 U.S.C. § 717r(b). "A party is aggrieved only 'if it can establish both the constitutional and prudential requirements for standing.'" *PNGTS Shipper's Grp. v. FERC*, 592 F.3d 132, 136 (D.C. Cir. 2010) (quoting *Exxon Mobil Corp. v. FERC*, 571 F.3d 1208, 1219 (D.C. Cir. 2009)). The "irreducible constitutional minimum" of standing requires that a petitioner allege an "an injury in fact" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-61 (1992). These standing requirements apply equally to intervenors. *Alabama Mun. Distributors Group v. FERC*, 300 F.3d 877, 879 n.2 (D.C. Cir. 2002) (per curiam).

Petitioner and Intervenor lack standing because they have failed to provide sufficient evidence to establish injury in fact. NCUC "assume[s]" that ratepayers in its state will use the facilities certificated on the Atlantic Sunrise Project. Appellant's Br. 31. NYSPSC, through declaration from the Deputy Director for Natural Gas and Water within the Office of Electricity, Gas, and Water at the New York State Department of Public Service, insists that the Atlantic Sunrise's project shippers will "almost certainly exercise their contractual rights to use the expansion capacity to ship at least some of their gas to New York." McCarran Declaration 7-8. But neither NCUC nor NYSPSC has shown a "substantial probability" that any capacity from the Atlantic Sunrise project will flow into their respective states, nor have they shown that any end-users in their states will pay higher rates as a result of the project. *Kansas Corp. Comm'n v. FERC*, 881 F.3d 924, 930 (D.C. Cir. 2018). Indeed, with respect to the Dalton Expansion or Virginia Southside Expansion Projects, they offer no evidence of injury. Any harm is therefore either non-existent or "conjectural or hypothetical," which does not suffice to demonstrate injury in fact. *Id.*

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

BY: /s/

Scott H. Atchue

Deputy Clerk