

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

Liquid Energy Pipeline Association,

Petitioner,

v.

Federal Energy Regulatory Commission and
United States of America,

Respondents.

Case No. 22-1045

Consolidated with
22-1103, 22-1104,
22-1105, 22-1110,
22-1257, 22-1258

MOTION TO INTERVENE

Under Federal Rule of Appellate Procedure 15(d) and Circuit Rule 15(b), the Energy Infrastructure Council (EIC) moves for leave to intervene in support of Petitioners in Nos. 22-1045, 22-1257, and 22-1258 in this Court's review of the *Five-Year Review of the Oil Pipeline Index*, Order on Rehearing, Docket No. RM20-14-001, 178 FERC ¶ 61,023 (Jan. 20, 2022), *published* 87 Fed. Reg. 4,476 (Jan. 28, 2022). Counsel for EIC has conferred with counsel for all other parties and their positions are as follows: Petitioners in Nos. 22-1103, 22-1104, 22-1105, and 22-1110 take no position on the motion. Enbridge Inc., Intervenor in Support of Petitioners in No. 22-1257, did not oppose the motion when counsel conferred about it May 2022, but counsel was unable to confirm prior to this filing whether Enbridge's position remains the same now. All other parties state that they do not oppose this motion.

EIC participated in the proceedings before the agency, and its interests are affected by the order under review and would be adversely affected by a decision in favor of Respondents. EIC's members would be adversely affected because affirmance of the order would jeopardize capital investment in energy infrastructure by undermining the stable and predictable rate-making environment that long term investors rely upon. Because EIC's membership includes a large segment of the pipeline investment community, it is uniquely positioned to represent the interests of that community in this Court.

Good cause exists under Federal Rule of Appellate Procedure 26(b) to permit EIC to intervene at this time because EIC's time to intervene had not expired when this Court transferred the petition filed by the Liquid Energy Pipeline Association to the Fifth Circuit (No. 22-1045), and this motion to intervene is timely under the Fifth Circuit rules that would have applied had petitions No. 22-1045, 22-1257, and 22-1258 not then been transferred to this Court. Intervention will not delay the proceedings because the administrative record has not yet been filed, notice of intervenors' intent to participate in briefing and motions to govern further proceedings are not yet due, and no briefing schedule has been set. Accordingly, EIC requests that the Court grant its motion to intervene in support of Petitioners in Nos. 22-1045, 22-1257, and 22-1258.

BACKGROUND

These consolidated cases concern FERC's five-year review of the index level used to determine annual changes to oil pipeline rate ceilings. In 2020, FERC established an index level equal to the Producer Price Index for Finished Goods plus 0.78%. *See Five-Year Review of the Oil Pipeline Index*, Docket No. RM20-14-001, 173 FERC ¶ 61,245 (Dec. 17, 2020), *published* 86 Fed. Reg. 9,448 (Feb. 16, 2021). In the January 2022 Order, FERC granted rehearing of the 2020 order in part and established a lower index level equal to the Producer Price Index for Finished Goods minus 0.21%.

Petitioners in Nos. 22-1045, 22-1257, and 22-1258 seek review of the January 2022 Order on the grounds that the decision to lower the index level is arbitrary, capricious, and an abuse of discretion under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*; violates the Interstate Commerce Act, 49 U.S.C. app. 1 *et seq.*, and the Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 (Oct. 24, 1992); is contrary to the Commission's own orders, including *Revisions to Oil Pipeline Regulations Pursuant to Energy Policy Act of 1992*, Order No. 561, 58 Fed. Reg. 58,753 (Nov. 4, 1993); is untimely under the Commission's regulations governing rehearing, 18 C.F.R. § 385.713(f); and is otherwise contrary to law.

EIC is a non-profit trade association dedicated to advancing the interests

of companies that develop and operate energy infrastructure. EIC represents not only approximately 30 companies whose business operations include gathering or transporting natural gas liquids, crude oil, and refined products in interstate commerce, with rates subject to the Commission's regulations, but also approximately 20 associate members representing a large segment of the pipeline investor community, who collectively invest billions of dollars in U.S. energy infrastructure. EIC is thus able to offer a unique perspective on how FERC policies impact not only pipeline companies that are directly regulated, but also the ability to attract and retain capital investments necessary for continued safe and reliable pipeline operations.

ARGUMENT

1. “[A]ssociations ... whose interests are affected by the order of the agency, may intervene in any proceeding to review the order.” 28 U.S.C. § 2348. Intervention requires only “a concise statement of the interest of the moving party and the grounds for intervention.” Fed. R. App. P. 15(d).

EIC participated in the FERC proceedings by filing comments related to the Five-Year Review. It has a substantial interest in the outcome of the petition for review because, as EIC explained to FERC, steady, long-term income streams from just and reasonable pipeline rates are essential to encourage the continued investment in energy infrastructure. Two important and

complementary factors have enabled the investments necessary to construct and operate pipeline facilities: (a) ready access to the capital markets; and (b) a predictable regulatory environment that reduces investment risks. An unexpected regulatory change in position, such as that reflected in the January 2022 Order, jeopardizes investment in energy infrastructure and imperils the benefits to U.S. consumers that flow from pipeline investment, which results in lower energy prices as new sources of supply reach new downstream markets. EIC's membership is adversely affected by the January 2022 order placing pipeline investment at risk, and it is uniquely able to represent the interests of the pipeline investment community in Nos. 22-1045, 22-1257, and 22-1258, because pipeline investors are not directly represented by the Petitioners and Intervenor in Support of Petitioners in those cases.

2. In the D.C. Circuit, a motion to intervene must be filed within 30 days of the petition for review. Fed. R. App. P. 15(d). There is good cause to extend that deadline here. *See* Fed. R. App. P. 26(b); *see Save Our Sebasticook v. FERC*, 2004 U.S. App. LEXIS 26433, *1 (D.C. Cir. Dec. 17, 2004) (granting motion to intervene in petition for review where party had “shown good cause excusing its failure to timely intervene”). Although the Liquid Energy Pipeline Association's petition for review (No. 22-1045) was originally filed in this Court, it was transferred to the Fifth Circuit before the 30-day deadline for intervention had

expired. *See Association of Oil Pipe Lines v. FERC*, No. 22-1045 (D.C. Cir. Mar. 24, 2022) (transferring petition for review nine days after petition was filed). The other two petitions challenging the decision in FERC's January 2022 Order to lower the index level (Nos. 22-1257 and 22-1258) were filed in the Fifth Circuit. The Fifth Circuit permits intervention when a motion is filed "not later than 14 days prior to the due date of the brief of the party supported by the intervenor." Fifth Circuit Rule 15.5. That time had not expired while the case was pending in the Fifth Circuit, as no briefing schedule had been set. The Fifth Circuit issued an order transferring the consolidated petitions to this Court on May 13. Because a petition for rehearing was filed, the Fifth Circuit did not issue its mandate transferring the case until October 4.

In May 2022, shortly before the Fifth Circuit issued its transfer order, FERC issued a new order, denying certain shippers' request for rehearing of the January 2022 order on issues related to the effective date of the lower index level and retroactive relief. *See Five-Year Review of the Oil Pipeline Index*, Order on Rehearing, Docket No. RM20-14-002, 179 FERC ¶ 61,100 (May 6, 2022). In June, four petitions for review were filed in this Court by Petitioners in Nos. 22-1103, 22-1104, 22-1105, and 22-1110, seeking review of that May 2022 Order and related portions of the January 2022 Order. Those petitions have since been consolidated with the petitions that were then pending in the Fifth Circuit. EIC

did not move to intervene in the petitions seeking review of the May 2022 Order because EIC did not file comments in the rehearing proceeding that resulted in the May 2022 Order.

EIC's interest and participation at the agency level relate to the issues in Nos. 22-1045, 22-1257, and 22-1258, in which time had to intervene had not run in the Fifth Circuit or in this Court when the cases were transferred. EIC filed this motion within 3 business days after the transferred cases were docketed in this Court. EIC's intervention will not alter or delay the course of proceedings in this Court because the administrative record has not yet been filed, intervenors' notice of intent to participate in briefing and motions to govern further proceedings are not yet due, and no briefing schedule has been set. Therefore good cause exists to extend the time to file EIC's motion for intervention, which would have been timely under the Fifth Circuit's rules.

CONCLUSION

For the foregoing reasons, the Court should grant EIC's motion to intervene in support of Petitioners in Nos. 22-1045, 22-1257, and 22-1258.

Dated: Oct. 12, 2022

Respectfully submitted,

/s/Hyland Hunt

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 1,503 words, excluding the parts exempted by Fed. R. App. P. 32(f).

2. This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word and 14-point font.

s/Hyland Hunt

Hyland Hunt

CERTIFICATE OF SERVICE

I hereby certify that on Oct. 12, 2022, I served the foregoing motion upon all counsel of record by filing a copy of the document with the Clerk through the Court's electronic docketing system.

s/ Hyland Hunt

Hyland Hunt