United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-1245 **September Term, 2017**

FILED ON: JULY 17, 2018

UNITED AIRLINES, INC. AND UPS FUEL SERVICES, INC.,
PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION AND UNITED STATES OF AMERICA,
RESPONDENTS

ENTERPRISE TE PRODUCTS PIPELINE COMPANY, LLC,
INTERVENOR

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

Before: GRIFFITH, SRINIVASAN, 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 (the "Commission") 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 standing.

Enterprise TE Products Pipeline Co. ("Enterprise") is a common-carrier pipeline that transports petroleum and natural gas products. Several petroleum shippers challenged a rate hike Enterprise announced in 2012. *See Enter. TE Prods. Pipeline Co. LLC*, 139 FERC ¶ 61,036 (2012). Enterprise eventually settled the dispute with the shippers by an agreement, approved by the Commission, that set rates for the period May 31, 2013, through May 31, 2015. *See Enter. TE Prods. Pipeline Co. LLC*, 143 FERC ¶ 61,197 (2013). Enterprise then filed a tariff with the Commission to implement the rates.

Citing commercial reasons for doing so, Enterprise also filed Tariff 55.28.0 to stop its interstate shipment of distillate and jet fuel as of June 1, 2013. The petroleum shippers from the settlement agreement responded by filing a protest with the Commission under section 15(8) of

the Interstate Commerce Act (the "Act"), 49 U.S.C. app. § 1 *et seq. See Enter. TE Prods Pipeline Co. LLC*, 143 FERC ¶ 61,191 (2013). United Airlines, Inc. and UPS Fuel Services, Inc. (collectively, "Petitioners"), who were not parties to the settlement but describe themselves as "past and/or potential future shippers" on the Enterprise pipeline, Pet'rs Br. 20, joined in that protest. Together they argued that refusing to transport these products violated the settlement agreement and the Act. *Id.* at PP 6-9.

The Commission rejected the protest and accepted Tariff 55.28.0. *Id.* at P 20. Explaining that Enterprise "abandoned" the interstate transportation of distillate and jet fuel, the Commission concluded it "has no jurisdiction to require an oil pipeline to continue to provide a service that it wishes to cancel in its entirety." *Id.* As to the alleged breach of the settlement agreement, the Commission explained that it could consider such a decision only in a proceeding under section 13(1) of the Act and not in a protest to a tariff abandoning distinct services. *Id.* at PP 26-27. No party requested rehearing or petitioned for review of the decision to accept Tariff 55.28.0.

The petroleum shippers from the settlement agreement, along with Petitioners, subsequently filed a complaint against Enterprise under section 13(1). *See CHS Inc. v. Enter. TE Prods. Pipeline Co., LLC*, 145 FERC ¶ 61,056 (2013), *on reh'g*, 155 FERC ¶ 61,178 (2016). The Commission agreed that stopping interstate shipment of distillate and jet fuel violated the settlement agreement, but maintained it lacks remedial authority to prevent an oil pipeline from abandoning distinct services. 145 FERC ¶ 61,056, at PP 37, 39. The Commission scheduled a hearing on damages and the complainants requested rehearing, arguing the Commission was wrong to characterize Enterprise's actions as abandonment and that the Commission has both regulatory and remedial authority over a decision to stop transporting distinct products. 155 FERC ¶ 61,178, at PP 7-11. The complainants also moved to suspend proceedings while they negotiated the possibility of another settlement.

The petroleum shippers from the initial agreement withdrew from the proceedings after once again reaching settlements with Enterprise. Petitioners, however, asked the Commission to act on the pending request for rehearing. The Commission denied rehearing and reiterated that "the decision by a common carrier oil pipeline to no longer provide transportation of a distinct product is an 'abandonment,'" *id.* at P 15, and abandonment is "beyond the Commission's jurisdiction to regulate," *id.* at P 34; *see also id.* at PP 12-45. The Commission also held, in the alternative, that damages were a sufficient remedy. *Id.* at P 45. Petitioners asked for review in this court on July 18, 2016.

Petitioners argue before us that the Commission was wrong to conclude that Enterprise abandoned distillate and jet fuel services, and that the Commission has both regulatory and remedial authority to prevent an oil pipeline from discontinuing the transportation of distinct products. Petitioners maintain the Commission should have awarded specific performance requiring Enterprise to comply with the initial settlement agreement. The Commission defends its order and claims, among other challenges to our jurisdiction, that Petitioners lack constitutional standing to raise these issues in a petition for review. We agree that Petitioners lack standing.

The requirements for Article III standing are well established: "[A] petitioner must show an actual or imminent injury in fact, fairly traceable to the challenged agency action, that will likely be redressed by a favorable decision." *N.Y. Reg'l Interconnect, Inc. v. FERC*, 634 F.3d 581, 586 (D.C. Cir. 2011) (quoting *Exxon Mobil Corp. v. FERC*, 571 F.3d 1208, 1219 (D.C. Cir. 2009)). At the very least, the breached settlement cannot be redressed by a favorable decision because the agreement Petitioners seek to enforce through specific performance expired on May 31, 2015. Although this may seem like an issue of mootness, the settlement agreement expired before the Petitioners sought review on July 18, 2016, so Petitioners never had standing to petition for review in the first place. *See Advanced Mgmt. Tech., Inc. v. FAA*, 211 F.3d 633, 636 (D.C. Cir. 2000); *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190-91 (2000).

Petitioners nevertheless argue they can still challenge the Commission's underlying "policy" that it lacks authority to prevent or delay an oil pipeline from abandoning distinct services. Pet'rs Br. 21. They allege an "imminent risk that Enterprise and other pipelines will unreasonably discontinue or threaten to discontinue transportation of specific refined petroleum products in the future unless certain demands are met." *Id.* But the Supreme Court has "repeatedly reiterated that threatened injury must be *certainly impending* to constitute injury in fact, and that allegations of *possible* future injury are not sufficient." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (quotation and alteration marks omitted). Whether another pipeline will someday abandon services to the alleged detriment of Petitioners—especially in breach of a settlement agreement—is purely speculative. *See id.* at 413 ("In the past, we have been reluctant to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment."). General uncertainty about the future is likewise insufficient to establish standing. *See id.* at 416 ("[A party's] contention that they have standing because they incurred certain costs as a reasonable reaction to a risk of harm is unavailing—because the harm [they] seek to avoid is not certainly impending."); *New Eng. Power Generators Ass'n v. FERC*, 707 F.3d 364, 369 (D.C. Cir. 2013) ("It would be a strange thing indeed if uncertainty were a sufficiently certain harm to constitute an injury in fact.").

In addition, Petitioners suggest they have standing because they either participated in the underlying agency proceedings or have an interest in the proper application of the Act. We have repeatedly rejected both of these grounds for standing. *See N.Y. Reg'l Interconnect*, 634 F.3d at 586 ("[A] party does not acquire such a direct stake in a litigation simply by participating in the antecedent administrative proceedings whence the litigation arises; it must establish its constitutional and prudential standing." (quotation marks omitted)); *Kan. Corp. Comm'n v. FERC*, 881 F.3d 924, 930 (D.C. Cir. 2018) ("[A] generalized interest in the proper application of the law. . . . is not enough [for constitutional standing]."). This petition is ultimately an impermissible "policy challenge disembodied from the . . . Commission orders" at issue on review. *Entergy Servs., Inc. v. FERC*, 391 F.3d 1240, 1246 (D.C. Cir. 2004). We cannot entertain it.

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(a)(l).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk