

# Report of The Committee on Oil Pipeline Regulation

The year 1985 provided several major developments in the area of oil pipeline regulation.<sup>1</sup> The Federal Energy Regulatory Commission ("FERC" or "Commission") made its second attempt to establish a rate-setting methodology for oil pipelines. The FERC also approved settlement proposals submitted in the Trans Alaska Pipeline System ("TAPS") proceeding and in Phase II of the Williams proceeding. The United States Supreme Court affirmed, without comment, a Ninth Circuit decision prohibiting states from charging pipelines "volumetric rent" on oil shipped over state lands. Meanwhile, Congress extended the ban on exporting Alaskan North Slope crude oil, while President Reagan permitted the export of a small quantity of Cook Inlet oil.

## I. WILLIAMS PIPE LINE CO. (OR79-1)

### A. Phase I

In *Farmers Union Central Exchange, Inc. v. FERC*,<sup>2</sup> remanding Commission Opinion No. 154,<sup>3</sup> the U.S. Court of Appeals for the D.C. Circuit directed the Commission to afford the case "high priority" on remand, and to issue a new order within twelve months (by March 9, 1985).<sup>4</sup> After the Mid-Continent Shippers Group twice petitioned the D.C. Circuit to compel issuance of a second Phase I decision, the court issued an order on June 3 providing the Commission one week to present a timetable for issuance of a Phase I order. Seven days later, the Commission informed the court that a draft order was scheduled for discussion and vote at the FERC's June 13 open meeting. Reviewing a Phase I draft order at its June 13 open meeting, all Commissioners felt that the order needed further work; accordingly, the Commission scheduled the order for a vote, on the merits, at the next open meeting.

At its open meeting on June 28, the Commission issued Opinion No. 154-B,<sup>5</sup> its second attempt to establish a ratemaking methodology for oil pipelines.<sup>6</sup> Major elements of Opinion No. 154-B include:

1. *Trended Original Cost*—Under this approach, all new pipeline assets are added to the rate base at their original cost and trended according to the inflation component included in the nominal rate of return determined for each pipeline. The inflation component would be determined from an index to be selected on a case-specific basis. The inflation factor is then applied to the equity portion of the rate base to produce the equity rate base writeup. This writeup is amortized over the life of the property.<sup>7</sup>

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1. Unless otherwise indicated, all dates are in 1985.

2. 734 F.2d 1486 (D. C. Cir.) *cert. denied sub nom. Williams Pipe Line Co. v. Farmer's Union Cent. Exch.*, 105 S. Ct. 507 (1984) [hereinafter *Farmer's Union II*].

3. 21 F.E.R.C. ¶61,260 (1982).

4. *Farmer's Union II*, 734 F.2d at 1530.

5. 31 F.E.R.C. ¶61,337 (1985).

6. Petitions for review of Opinion No. 154-B were dismissed on February 5, 1986.

7. The D.C. Circuit had preferred the net depreciated original cost method. However, the FERC

2. *Treatment of Existing Assets*—Under Opinion No. 154-B, a “starting rate base” for existing assets would be the sum of a pipeline’s debt ratio times net depreciated original costs and the equity ratio times the reproduction portion of the valuation rate base depreciated by the same percentage as the book original cost rate base has been depreciated.
3. *Capital Structure*—Opinion No. 154-B adopted the use of actual capital structure (as opposed to adopting the use of hypothetical capital structure). The actual capital structure may be that of either the pipeline or its parent, depending on which is responsible for raising debt capital.
4. *Equity Rate of Return*—This element would be determined on a case specific basis, with reference to the risks and corresponding costs of capital affecting each particular oil pipeline.
5. *Tax Matters*—Opinion No. 154-B directs pipelines to use their actual interest expense in calculating federal income taxes. Tax savings from use of accelerated depreciation are treated on a normalized rather than a flowthrough basis for ratemaking purposes.

On December 5, the Commission issued Opinion No. 154-C,<sup>8</sup> which denied rehearing on most points. Opinion No. 154-C also modified FERC’s earlier decision that pipelines use their actual interest expense in calculating income tax allowance for cost of service purposes. The Commission now found it appropriate to use the same actual capital structure for both the interest expense deduction and the allowed debt return. Accordingly, a pipeline could determine its interest expense deduction by multiplying its weighted cost of debt items times its net depreciated original cost rate base. The Commission further clarified Opinion No. 154-B regarding capital structure, rate of return, and depreciation. Finally, the FERC denied AOPL’s request for a stay of Opinion No. 154-B pending judicial review.

## B. Phase II

Acting on a petition brought by Mid-Continent in November, 1984, the D.C. Circuit issued an order on January 10 directing the FERC to show cause why the agency should not be required to vacate its July 2, 1984 order staying Phase II as in violation of the court’s decision in *Farmers Union II*. However, in light of a subsequent Phase II settlement proposal, the D.C. Circuit dismissed Mid-Continent’s petition to compel action in Phase II, conditioned on FERC approval of the settlement. The court’s February 21 *per curiam* order directed the FERC to advise the court by March 8 of any action taken regarding the settlement.

On January 31, Williams and Mid-Continent jointly filed a settlement agreement concerning Phase II issues. The settlement related only to Williams’ rates for petroleum product shipments from Group III origins in Kansas and Oklahoma, plus any tariff filings made subject to investigation. The settlement

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reasoned that the trended original cost method (“TOC”) and net depreciated original cost approaches were essentially the same. TOC reflects inflation through an automatic adjustment to rate base, while net depreciated original cost reflects estimated inflation in the nominal rate of return. This difference affects only the timing of recovery of the cost of equity capital; both approaches yield the same discounted value of the earning stream for the investor. The Commission also preferred TOC because it alleviates front-end load problems for newer pipelines by capitalizing the inflation factor into the rate base, thus deferring to later years a portion of the equity return which otherwise would be bunched in the early years of a property’s life.

8. 33 F.E.R.C. ¶ 61,327 (1985).

provided:

1. Payment of \$29.5 million in settlement of the claim for reparation;
2. Payment of \$1.25 million as partial reimbursement for Mid-Continent's litigation expenses;
3. A freeze on Williams' Group III petroleum products transmission rates at December 31, 1984 levels, through June 30, 1986, with subsequent rates through December 31, 1989 subject to escalation in accordance with a defined formula.
4. Continuation of Williams' present rate structure from Group III and related origins in settlement of allegations concerning unjust discrimination and undue preference and prejudice.
5. Use of the purchase price paid by Williams to acquire the Great Lakes Pipe Line System ("Great Lakes") for rate base and depreciation/amortization expense purposes in the event the FERC adopted a cost-based ratemaking methodology for oil pipelines.
6. Termination of all pending investigations concerning Williams' rates with prejudice, and dismissal of Mid-Continent's pending complaint with prejudice.
7. Grant of all pending applications of Williams for permanent relief under Section 4 of the Interstate Commerce Act ("ICA"), together with termination of related investigations.

The Department of Justice opposed the proposed settlement, objecting to the provision that would allow Williams to use the purchase price of the Great Lakes assets for rate base and depreciation purposes. Three shippers under Group III rates on Williams' system—Sinclair Oil Co., Total Petroleum, Inc., and Apex Oil Co.—also opposed the settlement. These shippers had not been parties to the Williams proceeding and had petitioned for late intervention on March 4, 1985. These shippers contended that the payment by Williams constituted a "rebate" prohibited under the ICA, and that Phase II should not have been terminated without refund obligations and further hearings. Had the Commission found Williams' Group III rates unreasonable and then awarded reparations to Mid-Continent, these shippers claimed that they also would have been able to seek reparations based on that finding.

On March 7, in a 3-2 vote, Commissioners Richard and Stalon dissenting,<sup>9</sup> the FERC approved the proposed Phase II settlement.<sup>10</sup> The majority found the settlement's terms just and reasonable, supported by substantial evidence, and "in the public interest as a negotiated settlement of a complicated and protracted proceeding."<sup>11</sup> The Commission dismissed DOJ's concern regarding the purchase price treatment of the Great Lakes assets, emphasizing the "uniqueness" of the circumstances, particularly that a ruling on the issue comes almost nineteen years after the purchase occurred, during a period when the Interstate Commerce Commission had no announced ratemaking policy on asset transfers. The FERC stressed that its decision on this issue would not be precedential in ratemaking treatment of other pipeline purchases or for general ratemaking issues.

In addition, the FERC denied the joint motion of Sinclair, Total, and

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9. Commissioner Richard later would concur in the settlement's approval. In a March 21 statement, he explained his original dissent as based on unwillingness to approve the settlement the same day he received it. Having since reviewed the record, Commissioner Richard concluded that the settlement was reasonable and should be approved.

10. Williams Pipe Line Co., 30 F.E.R.C. ¶ 61,262 (1985).

11. *Id.* at 61,546.

Apex for intervention out of time, finding that good cause to justify late intervention had not been shown. Apex and Total applied for rehearing of the Commission's decision on the Phase II settlement. These shippers again asked that their motion for late intervention be granted, and requested reversal of the FERC's earlier approval of the settlement. The Commission denied rehearing on May 1.<sup>12</sup> On review, the D.C. Circuit's October 1 *per curiam* opinion found the Commission's action a proper exercise of discretion, as the petitioners had failed to demonstrate good cause for late intervention.

## II. TRANS ALASKA PIPELINE SYSTEM (OR78-1)

### A. *The TAPS Settlement*

On April 30, the State of Alaska ("State"), DOJ, ARCO and BP Pipelines, Inc. submitted an offer of settlement that would resolve all outstanding TAPS Phase I and Phase II issues. The proposed agreement would remain in effect through 2011, and could be renegotiated after 2006.<sup>13</sup>

The settlement proposal rested on a modified cost-based methodology—the "TAPS Settlement Methodology" or "TSM"—that would provide a basis for determining both refund obligations of the TAPS owners through 1985 and maximum tariffs charged in the future. Major aspects of the settlement included:

1. *TSM*—This rate-setting methodology would provide a declining tariff profile. To achieve this result, both depreciation and dismantling, removal and restoration ("DR&R") charges would be accelerated, or "front-end loaded," in the early years. The settlement tariff of \$5.31/bbl. for 1985 was projected to drop to \$2.85/bbl. (1985 dollars) by 1992, and could fall as low as \$1.80/bbl. (1985 dollars).
2. *Total Revenue Requirement*—This component would consist of eight elements:
  - a. Operating expenses
  - b. DR&R allowance
  - c. Depreciation
  - d. Income tax allowances
  - e. After-tax margin
  - f. Recovery of deferred return
  - g. Nontransportation revenues
  - h. Net carryovers.

The settlement offer provided detailed accounting procedures for computing each of the eight elements.
3. *Refunds*—If all TAPS owners joined the settlement, the State estimated total re-

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12. *Williams Pipe Line Co.*, 31 F.E.R.C. ¶ 61,108 (1985).

13. Following submission of the settlement offer, the State and DOJ petitioned the FERC to sever those parties contesting the settlement offer for purposes of disposition of their complaints, and further requested that the settlement offer then be treated as uncontested as to all remaining parties. The June 17 motion also sought institution of procedures for the eventual imposition of the settlement on nonconsenting parties. The FERC Staff supported this severance motion, while Sohio Pipe Line Company ("Sohio Pipe"), its affiliate Sohio Alaska Petroleum Company ("Sohio Alaska"), Amerada Hess Pipeline Company ("Amerada Hess"), and the Arctic Slope Regional Corporation ("ASRC") opposed it. On July 26, the presiding judges denied the State/DOJ severance motion. The judges found no useful purpose served by severance, and noted that they lacked authority to convene a proceeding to determine whether the State's settlement offer should be imposed on nonconsenting parties. The judges concluded that the nonconsenting TAPS parties had a right to both a consideration of their comments on the merits and a Commission decision as to the lawfulness of the rates charged by the TAPS carriers.

funds of \$792 million, exclusive of interest. Interest would be added at an annual rate of 6.16 percent for January 1, 1982 through February 13, 1983, and thereafter at the refund interest rate prescribed by FERC regulations. No refunds would be required for crude oil delivered prior to January 1, 1982.

4. *Rate Base*—\$450 million would be excluded as of the end of 1976 to resolve construction and noncost of construction claims in Phase II. TAPS carriers could amortize the \$450 million investment as an expense over the years 1978-84 but would not be allowed to earn a return of that amount. Furthermore, rate base would be divided into two sections:
  - a. "Original" depreciable property—Pre-1985 investment plus subsequent "caretaker-type" investment that perpetuates, rather than expands or improves, the existing system.
  - b. "New" depreciable property—Post-1984 investment in excess of \$15 million per year (1984 dollars) plus the net proceeds from any "original" depreciable property retired as a consequence of that investment.Both segments would be adjusted for inflation, with annual depreciation subtracted before making the inflation adjustment.
5. *Real Rate of Return*—A 6.4 percent real rate of return would be applied to "original" rate base through 1988, and to "new" rate base throughout the life of the settlement. In 1989, an allowance of 35¢/bbl. (1983 dollars) would replace the return on "original" rate base.

On June 28, the parties to the first settlement offer, joined by Exxon Pipeline Co., Mobil Alaska Pipeline Co., Union Alaska Pipeline Co. and later by Phillips Alaska Pipeline Co., filed a second proposal with the Commission. This left only Sohio Pipe and Amerada Hess as TAPS carriers opposed to the settlements. The new proposal contained modifications to the original settlement agreement resulting from further negotiations with certain TAPS carriers. The second settlement offer included adjustments to actual tariffs charged by ARCO, BP and Exxon during the period 1982-85. Furthermore, to correct perceived inequities among TAPS carriers due to the greater ownership of Mobil, Union, and Phillips in the Valdez terminal facility than in the pipeline, the new agreement provided a limited reallocation of costs before 1990 to these three carriers from three other carriers in the reverse situation. After 1990, the problem would be corrected by providing for reallocation of certain costs on the basis of a carrier's actual use of TAPS. To further correct possible inequities should TAPS operate below mechanical capacity, beginning in 1990, the amended offer provided for allocation of costs based on the differential between a TAPS carrier's barrel-mile share and its composite ownership share.

Amerada Hess, Sohio Pipe, Alaska Oil Company,<sup>14</sup> Sohio Alaska,<sup>15</sup>

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14. A TAPS shipper between July 1980 and January 1982, Alaska Oil sought late intervention on April 25, 1985 to oppose the TAPS settlement offer, which provided no shipper refunds for oil delivered prior to 1982. Alaska Oil claimed that it originally had relied on the State to protect its interests, but that the proposed settlement indicated that the State had not protected those interests. On May 9, the presiding judges denied Alaska Oil's petition for late intervention; the FERC affirmed this decision on June 17. Alaska Oil then petitioned the D.C. Circuit for review. *Alaska Oil Co. v. FERC*, No. 85-1402. However, on October 29, Alaska Oil moved to dismiss its appeal and asked the FERC to withdraw Alaska Oil's comments from the TAPS record.

15. Both Sohio Alaska and Tosco Corporation ("Tosco") filed petitions for late intervention on June 17 along with their initial comments on the first settlement offer. The presiding judges denied both requests on July 10, and denied subsequent petitions for reconsideration on July 31. The judges relied on the recent denial of late intervention to Alaska Oil in the TAPS proceeding. Sohio Alaska sought Commission review of the judge's decision. The Commission affirmed the judges' action on August 22. Sohio Alaska then petitioned

ASRC, and the Alaska Public Interest Research Group (AkPIRG) filed comments opposing the amended settlement offer. In addition, Sohio Pipe and Sohio Alaska submitted their own unilateral offer of settlement. The Sohio Pipe/Sohio Alaska proposal contained three principal modifications to the TSM:

1. Adjust the depreciation component to an unfactored unit of throughput recovery basis.
2. Adjust the DR&R component to an unfactored unit of throughput basis.
3. Establish an eight percent rate of return for the life of the pipeline.

The Sohio Pipe/Sohio Alaska settlement offer also removed all references to the TSM operating as a private contract between the State and signatory carriers, and deleted provisions concerning disclosure of TAPS carrier information to the State or DOJ for verification purposes. No other TAPS party supported the Sohio Pipe/Sohio Alaska settlement proposal, and the judges eventually refused to certify it to the Commission.

Approximately six weeks after its submission, Judges Isaac D. Benkin and Max L. Kane certified the June 28 settlement offer to the FERC. Even though contested, the Judges thought it "irresponsible" not to certify the settlement. While acknowledging that the arguments raised by opponents of the TSM regarding the existence of issues of material fact had "a great deal of force," the judges concluded that it would be "undeniably in the public interest to short-circuit this lengthy and expensive process by disposing of the TAPS proceeding through a negotiated settlement . . .," and refused to reject certification of the settlement based on "a procedural technicality."

Despite a motion by ASRC for remand of the judges' certification, the FERC issued an order on October 23 that upheld the judges' certification action and accepted the settlement as to the signatory TAPS carriers. The Commission determined that the settlement was "fair and reasonable and in the public interest." The Commission also granted the settling carriers' request for approval of two settlement provisions, which concerned reallocation of certain costs and revenues, as a pooling agreement under the ICA. As to nonsettling parties, however, the Commission did not impose the settlement "at this time." Instead, the FERC remanded the proceedings to the presiding judges for expedited hearings on issues raised by the nonsettling parties "only as those issues apply to them." The judges were directed to issue an initial decision within six months. On December 19, the Commission denied ASRC's request for rehearing of its October 23 order.

### *B. The Remanded Proceedings*

Responding to the Commission's October 23 order, the presiding judges quickly suspended the Phase II briefing schedule<sup>16</sup> and established a procedural

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the D.C. Circuit for review of the Commission's action. *Sohio Alaska Petroleum Co. v. FERC*, No. 85-1678. Tosco also sought review in the D.C. Circuit. *Tosco Corp. v. FERC*, No. 85-1694. These appeals now are awaiting a decision by the court on motions for summary affirmance filed by the State on November 7.

16. The Phase II briefing schedule was suspended on October 24. The judges earlier had denied a motion by seven of the eight TAPS owners to defer the briefing of "noncost of construction" issues until the impact of the FERC's Opinion No. 154-B on the TAPS proceeding could be determined. Voluminous initial post-hearing briefs were filed in Phase II on September 3. Separate briefs were submitted on cost of construc-

schedule for the remanded hearings. At a subsequent prehearing conference, the judges made clear that the focus of the hearings would be whether the settlement should be imposed on the two non-settling carriers, Sohio Pipe and Amerada Hess.

Only ASRC and AkPIRG filed prepared evidence in the remanded proceeding, and cross-examination of this evidence was waived. Sohio Pipe declined to file direct evidence, stating that the remanded hearings were not "a meaningful opportunity for consideration of issues raised" and did not represent "an appropriate procedural context for such consideration."

The State, meanwhile, filed a statement in the remanded proceedings opposing imposition of the settlement. The State argued that an imposed settlement would not afford the State contractual rights and would reduce the certainty afforded by the agreement.

Sohio Pipe placed the issue of imposing the settlement squarely before the judges on December 10, moving for summary disposition on whether the TSM settlement should be imposed on it. While stating that it could not affirmatively endorse the settlement, and reserving "all of its rights otherwise," Sohio Pipe stated that it would not contest imposition of the settlement by the Commission as a resolution of the merits as to Sohio Pipe. Sohio Pipe requested that the judges certify its motion to the Commission for resolution. The State, ASRC, the Alaska Public Utilities Commission Staff, and the FERC Staff opposed the motion.

Judges Benkin and Kane denied Sohio's motion on December 23. The judges preferred to review the evidence and briefs, and address the issues in their initial decision. The motion, however, was certified to the Commission, the judges noting that the Commission might want to consider Sohio Pipe's motion now rather than after an initial decision. On January 22, 1986 the Commission affirmed the judges' denial of summary disposition. In view of the judges' denial of summary disposition, briefing in the remanded proceeding continued. Initial post-hearing briefs were filed on December 24, and reply briefs were submitted on January 13, 1986. Press reports issued in early February, 1986 indicated that Sohio Pipe and Amerada Hess would agree to the TAPS settlement.

### *C. Quality Bank Developments*

On January 8, the Oil Pipeline Board ("OPB") accepted the latest Quality Bank adjustments filed by the TAPS carriers in compliance with the FERC's October 31, 1984 order approving settlement of the Quality Bank issue in the TAPS proceeding. The OPB also denied the protest and request for suspension and investigation filed by Tesoro Alaska Petroleum Company. Tesoro subsequently withdrew its request for review of the FERC's order accepting the Quality Bank settlement.

On July 2, the Commission withdrew Opinion No. 206 from the Quality Bank proceeding record. The Commission also terminated all subdockets relating to the Quality Bank investigation. Opinion No. 206 had largely reversed

the initial decision in that proceeding and remanded the case to the presiding administrative law judge. The FERC had accepted a proposed settlement of the Quality Bank issue before it completed consideration of the issues raised on rehearing of Opinion 206. Accordingly, the Commission granted a request by seven TAPS respondents that Opinion 206 be withdrawn to remove any doubts as to the Commission's position regarding quality banks on crude oil pipelines.

### III. OTHER FERC PROCEEDINGS

#### A. *Kuparuk Transportation Co. (IS85-9, OR85-1)*

On January 3, the State of Alaska filed a protest and request for investigation concerning rates proposed by Kuparuk Transportation Company ("KTC") for transportation of crude oil from the Kuparuk Field to TAPS Pump Station 1 (IS85-9). The OPB suspended the proposed rates for one day, subject to "keep account" requirements and refund, and established an investigation. This case was consolidated with a complaint filed by the State of Alaska against KTC's initial rate of 69¢/bbl. for transportation from the Kuparuk Field to TAPS Pump Station 1 (OR85-1). KTC had charged this rate from October 3, 1984 through January 15, 1985. The proceedings are before Administrative Law Judge Paul J. Fitzpatrick with hearings scheduled to begin on September 30, 1986.

#### B. *Portal Pipe Line Co. (IS85-11)*

On January 17, Portal Pipe Line Company proposed a thirty cent reduction in its tariff rate of \$1.01/bbl. for transportation of crude oil from Alexander, North Dakota to Clearbrook, Minnesota. The new tariff, however, did not change Portal's existing 51¢/bbl. charge for transportation from Tioga, North Dakota to Clearbrook. Getty Trading & Transportation Co., which later became Texaco Trading & Transportation Co., protested the rate reduction as discriminatory against the Portal customers that shipped from Tioga to Clearbrook. The OPB suspended Portal's tariff for one day and ordered an investigation.

Portal sought summary dismissal of the Texaco complaint. Alternatively, Portal requested certification to the FERC of the policy question of whether Texaco should be allowed to use the FERC to protect its crude oil trading business and a pipeline subsidiary from competition. On August 8, Administrative Law Judge Samuel Z. Gordon issues an initial decision granting summary dismissal of the Texaco complaint. Judge Gordon concluded that, rather than suffering discrimination, Tioga to Clearbrook shippers paid less on a barrel-mile basis than Alexander to Clearbrook shippers. The judge also certified to the Commission the question of whether the case should still proceed to a hearing and decision as a "full-blown" rate case.

Texaco subsequently withdrew its protest of Portal's tariff. The FERC Staff then moved the Commission to vacate Judge Gordon's initial decision. Absent such action, the Staff would challenge the judge's determination that Texaco's Wesko pipeline was an intrastate, and therefore nonjurisdictional, pipeline. The FERC granted Staff's motion, vacating the initial decision and

dismissing the certified question as moot.

*C. Dome Pipeline Corp. (IS85-10)*

On February 19, ANR Pipeline Co., Michigan Gas Utilities Co. and Michigan Consolidated Gas Co. filed a protest with the OPB regarding new tariff rates proposed by Dome Pipeline Corp. for transportation of imported ethane from the Canadian border to the Detroit, Michigan area. The protestants charged that Dome's proposed rates were unreasonably low, unjustly discriminatory, and unduly preferential. Moreover, they alleged that Dome's rates were part of a plan by Dome and others to sell ethane in protestants' market area at a price below protestants' delivered cost of natural gas, resulting in loss of markets and injury to protestants.

For its part, Dome quickly requested that the OPB strike the protest, characterizing protestants' claims as nothing more than an attempt to prevent the development of competition in protestants' market areas. The OPB suspended Dome's new tariff rates for one day and ordered an investigation.

After a prehearing conference, the protestants decided not to pursue their protest. On August 2, Chief Administrative Law Judge Curtis L. Wagner, Jr. granted protestants' motion to withdraw their protest.

*D. Dome Petroleum Corp. (IS85-13)*

In early July, several Canadian shippers of light liquid products—CanStates Energy, Polysar Ltd., Koch Hydrocarbons Canada, ICG Liquid Gas Ltd., and PetroCanada, Inc.—protested a reduced contractual rate filed by Dome Petroleum Corp. The reduced rate applied to shipments of propane on Dome Petroleum's Cochin Pipeline System from the international boundary near Maxbass, North Dakota to the international boundary near Detroit, Michigan and to four intermediate terminals. Effective from July 7 through September 1 unless cancelled or extended, the new rate was available to shippers willing to sign "ship-or-pay" contracts providing for minimum shipments of 50,000 barrels per 30-day period. The Canadian shippers primarily contended that this new tariff would afford Dome Petroleum an exclusive forty-five percent tariff reduction. The OPB suspended Dome Petroleum's reduced rate for one day and initiated an investigation.

The OPB, which had allowed Dome Petroleum to file its new tariff on ten days notice, granted Dome on July 30 special permission to file a revised tariff on one day's notice. The revised rate would apply a forty-five percent base rate discount to all delivery points to any shipper that contracted to ship during any thirty-day period a certain minimum percentage of its five-year average volumes for that period, subject only to a 5,000 barrel minimum requirement.

Several days later, Dome filed an offer of settlement that incorporated the terms of this revised tariff filing. After FERC Staff, CanStates Energy, ICG Liquid Gas Ltd., Polysar Ltd., and Pan Canadian Petroleum Ltd. opposed this unilateral settlement offer, Dome Petroleum withdrew its offer of settlement on September 11. Administrative Law Judge Jon G. Lotis then denied Dome Petroleum's motion to limit or alternatively to define the scope of the investigation into the proposed discount rates. On January 8, 1986 the FERC Staff reported

to Judge Lotis that the parties were making progress toward a settlement, and that Staff supported an extension of the procedural schedule to allow more time for settlement discussions. Accordingly, Judge Lotis revised the procedural schedule, with hearings now set to begin on June 6, 1986.

*E. Southern Pacific Pipe Lines, Inc. (IS85-15)*

Responding to a protest lodged by the Navajo Refining Company, the OPB suspended for one day and instituted an investigation regarding a rate increase filed by Southern Pacific Pipe Lines, Inc. The rate increase applied to transportation on Southern Pacific's system from points in California and Texas to points in Arizona. A shipper on Southern Pacific's system from El Paso, Texas to Phoenix, Arizona, Navajo charged that shippers from El Paso to Phoenix and Tucson, Arizona were bearing a rate increase solely to subsidize Southern Pacific's expansion of its California to Phoenix system, an expansion from which Navajo and similarly situated shippers would receive no benefit.

On November 15, Southern Pacific and Navajo filed a settlement agreement. The settlement provided that Navajo would withdraw its protest and that Southern Pacific would not raise its current rates from El Paso to Phoenix and Tucson for five years. Southern Pacific further agreed not to increase those rates by more than ten percent each year in the sixth and seventh years.

The FERC Staff, however, opposed the settlement, stressing the lack of evidence supporting the proposed settlement rates. Administrative Law Judge Thomas L. Howe, in turn, certified to the Commission the policy question of whether cost of service data were required before a settlement could be certified for Commission decision. Judge Howe asked the Commission to dispose of the certified question quickly, and ordered Southern Pacific to file its direct case no later than ninety days from the date of certification, December 23, if the Commission did not approve the settlement and terminate the proceeding. The judge also recommended that "some showing" be required to justify the settlement, noting that without it there would be no way to determine the justness and reasonableness of the settlement.

*F. Milne Point Pipe Line Co. (IS86-1)*

On October 10, the OPB suspended for one day and instituted an investigation into an initial rate of \$1.91/bbl. filed by the Milne Point Pipe Line Company. The disputed tariff covered transportation of Alaskan North Slope crude oil from the Milne Point producing unit on the North Slope to a tie-in with the Kuparuk Transportation Company's system. The State of Alaska protested Milne Point's initial rate as excessive and unlawful.

At a November 11 prehearing conference, the parties were granted sixty days to pursue a settlement before conducting formal discovery.

*G. Phillips Pipe Line Co. (IS78-1 et al.)*

This investigation into Phillips' rates was revised following the FERC's Opinion No. 154-B in *Williams*. The investigation had been suspended indefi-

nately in December, 1979 pending Commission action in the Williams proceeding. The investigation had grown to encompass approximately twenty rate dockets, all of which had been superceded. The amount subject to refund in these dockets exceeded \$120 million, including principal and interest.

Administrative Law Judge David I. Harfeld set a prehearing schedule to allow parties to brief the initial issue of whether Opinion No. 154-B's methodology should apply to the long-superceded rates. Judge Harfeld also denied requests by Farmland Industries and Kerr-McGee Refining Corp. for reconsideration of an earlier order granting them only limited *amicus curie* status. The parties then appealed to the Commission, which granted them full intervenor status by order of January 23, 1986.

On December 27, Judge Harfeld suspended the procedural schedule. The judge's action came in response to a motion by FERC Staff, supported by Phillips, which reported that settlement negotiations had begun and that prospects for a settlement were good. The Staff said it would file a status report on the negotiations by January 24, 1986.

#### *H. Interstate Energy Co. (OR81-6)*

In this proceeding, the Commission considered whether two pipelines operated by the Interstate Energy Company were subject to FERC jurisdiction. One pipeline extended from Marcus Hook, Pennsylvania to Martins Creek, Pennsylvania. The second pipeline ran from Lower Saucon Township, Pennsylvania to Holland, New Jersey.

The Commission found both pipelines nonjurisdictional. Examining the "essential character of the commerce," the Commission concluded that the continuity of the interstate transportation ended when the oil came to rest in storage tanks at Marcus Hook. This, in turn, rendered shipments of the oil from Marcus Hook to Martins Creek intrastate commerce. As to the second pipeline, the Commission held that it lacked jurisdiction because Interstate transported oil from its own oil storage facility to its own generating plant over its own line. No other person had sought access to the pipeline, and there existed no other shippers who could make use of that line. In the Commission's view, this pipeline came under the "Uncle Sam Oil Co.," exception to federal jurisdiction established by the Supreme Court in *The Pipe Line Cases*.<sup>17</sup>

### IV. FEDERAL TRADE COMMISSION PROCEEDINGS

#### *A. Chevron Divestiture*

Pursuant to an October 1984 consent agreement resolving the FTC's anti-trust concern with The Chevron Corporation's acquisition of Gulf, the FTC approved Chevron's proposed divestiture of Gulf Oil Corporation's 16.78 percent interest in the Colonial Pipeline Company to Union Oil Company of California. On February 15, Chevron requested FTC approval of a proposed sale of fifty-one percent of Gulf's interest in the West Texas Gulf Pipeline to Union, Sohio, and Sun Pipe Line Company.

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17. 234 U.S. 548 (1914).

### B. *Texaco Divestiture*

On March 11, Texaco, Inc. requested FTC approval of a proposed sale of Texaco's forty percent interest in the Wyco Pipe Line Company to the Mobil Pipe Line Company. The FTC had required this divestiture as part of a July 1984 consent agreement approving Texaco's acquisition of Getty Oil Company.

Texaco had originally attempted to sell its interest in Wyco to Shell Pipe Line Company. After receiving Shell's offer, however, Texaco was contractually obligated to offer a "right of first refusal" to other Wyco shareholders. Mobil, a twenty percent Wyco shareholder, exercised this option to match Shell's offer. The FTC approved the Texaco-Mobil transaction on July 24.

## V. COURT DECISIONS

### A. *Kenneth Cory v. Western Oil and Gas Ass'n*

In *Cory*,<sup>18</sup> the United States Supreme Court affirmed, without comment, a Ninth Circuit decision<sup>19</sup> holding that the State of California cannot collect a rental fee based on the volume of oil shipped by pipelines over state lands. Several oil companies and their trade association, the Western Oil & Gas Association, had challenged the "volumetric rent" as an undue burden on interstate commerce, an unlawful charge on imports, and an unlawful duty on tonnage.

Both the district court and the court of appeals held for the oil companies. The Supreme Court affirmed on a 4-4 vote, with Justice Powell not participating.

### B. *Belle Fourche Pipeline Co. v. United States*

On October 7, the United States Supreme Court denied certiorari in *Belle Fourche Pipeline Co. v. United States*.<sup>20</sup> The Court's decision let stand a Tenth Circuit decision<sup>21</sup> that the district court had lacked jurisdiction to bar the enforcement of FERC subpoenas until the Commission actually had sought judicial enforcement.

## VI. LEGISLATIVE DEVELOPMENTS

### A. *H.R. 245*

Representative Berkley Bedell (D-Iowa) introduced H.R. 245, a bill to require the FERC to use a depreciated original cost methodology in setting rates for transportation through TAPS. H.R. 245 was identical to a prior bill, H.R. 4819, proposed by Mr. Bedell and Representative James Shannon (D-Mass.) in February, 1984.

H.R. 245 would require the FERC to determine:

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18. 105 S. Ct. 1859, *reh'g denied sub nom.* McCarthy v. Western Oil and Gas Ass'n, 105 S. Ct. 2349 (1985).

19. *Western Oil and Gas Ass'n v. Cory*, 726 F.2d 1340 (9th Cir. 1984).

20. 106 S. Ct. 64 (1985).

21. *Belle Fourche Pipeline Co. v. United States*, 751 F.2d 332 (1984).

1. An original cost rate base for TAPS based on regulatory methods used as of January 1, 1983 in determining rates for natural gas pipelines and electric utilities. This rate base would be reduced by the average of the claims of parties litigating cost of construction issues in the TAPS proceeding to reflect imprudent investment costs.
2. The actual capital structure of the investment of each TAPS owner.
3. A rate of return including an allowance for inflation, on the equity portion of the depreciated original cost rate base. The return would not exceed the average of the rates of return allowed by the Commission in rate decisions for existing interstate natural gas pipelines in 1983.
4. Other components of permissible tariff rates, including depreciation, operating expenses, actual embedded interest costs, and dismantling and restoration costs.

The Commission would set final TAPS rates no later than 180 days after the bill's effective date. Refunds would be made with interest at the prime rate. Currently, H.R. 245 is pending before the House Committee on Energy, Commerce and Public Works.

#### *B. H.R. 2269*

Representative John B. Breaux (D.-La.) introduced H.R. 2269, "The Oil Pipeline Regulatory Reform Act of 1985." The bill would eliminate FERC jurisdiction over oil pipeline rates. The Commission would retain authority to protect against discriminatory practices, and the DOJ would retain authority to implement antitrust safeguards. H.R. 2269 was similar to legislation introduced by Representative Breaux in 1982 and 1983. At year's end, H.R. 2269 was pending before the House Committee on Energy, Commerce and Public Works.

#### *C. S. 883 and H.R. 1174*

In March, Representative Stewart B. McKinney (R-Conn.) and Representative Howard Wolpe (D-Mich.) had introduced H.R. 1174, which proposed permanent restrictions on the export of Alaskan North Slope crude oil. At present, H.R. 1174 is pending before the House Committee on Foreign Affairs.

On June 27, the House of Representatives and the Senate passed a conference committee version of legislation (S. 883) reauthorizing the Export Administration Act of 1979. The legislation extended the ban on exports of Alaskan North Slope crude oil until September 30, 1990. The bill further required the Administration to study the continued need for the export ban and possible changes in incentives to Alaskan North Slope production. President Reagan signed this bill into law (P.L. 9964) on July 12.

### VII. EXECUTIVE DEVELOPMENTS

In contrast to Congress' extension of the ban on export of Alaskan North Slope crude oil through September, 1990, it was announced on October 28 that President Reagan had decided to permit the export of a "small quantity" of Alaskan oil produced from Cook Inlet reserves. Deputy Press Secretary Larry Speakes said that the decision was consistent with the Administration's policy of removing barriers to trade. President Reagan, acting on the recommendation

of his Economic Policy Council, concluded that U.S. interests would be served by this decision because of the reduced cost of transporting oil to Asia rather than to U.S. refineries.

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