REPORT OF THE OIL & LIQUIDS PIPELINE REGULATION COMMITTEE

This report summarizes policy developments and legal decisions that have occurred at the Federal Energy Regulatory Commission (the FERC or Commission) and the U.S. Courts of Appeals in the area of oil and liquids pipeline regulation. The time frame covered by this report is the period between July 1, 2010, and June 30, 2011.*

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I. SIGNIFICANT ADMINISTRATIVE ORDERS

A. Rulemaking Orders

1. *Five-Year Review of Oil Pricing Index*

Pursuant to the Energy Policy Act of 1992 (EPAct 1992)[1] and the Interstate Commerce Act (ICA),[2] the FERC established and periodically updates an oil pipeline pricing index (PPI). The PPI is used "to establish new annual rate ceiling levels for pipeline rate changes."[3] On June 15, 2010, the FERC proposed "to use the Producer Price Index for Finished Goods [(PPI-FG)] plus 1.3 percent" as the official PPI for the next five years.[4] The FERC derived this index by applying the Khan Methodology[5] to the middle 50 and 80% of pipelines' reported cost increases from the previous five years and, then, averaging the two numbers.[6]

After considering comments from interested persons, the FERC ultimately decided to set the 2011-2016 PPI based on the middle 50% of reported pipeline increases alone.[7] This approach, which the FERC believes will reduce the influence of outliers that were present in the middle 80% of the data, yielded a slightly higher index of PPI-FG plus 2.65% for the five-year period beginning July 1, 2011.[8] The FERC denied all requests for rehearing that contested the new PPI.[9]

B. Jurisdictional Issues

1. *Tesoro Refining and Marketing Co.*

On February 8, 2011, Tesoro Refining and Marketing Company (Tesoro Refining) and Tesoro Logistics Operations, LLC (Tesoro Logistics) (collectively, Tesoro) petitioned the FERC for a determination that five of its

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1. Energy Policy Act of 1992, Pub. L. 102-486, 106 Stat. 3057 (codified at 42 U.S.C. §§ 13401-13438 (2006)).

2. 49 U.S.C. app. §§ 1-2701 (1988).

3. *Five-Year Review of Oil Pipeline Pricing Index*, 133 F.E.R.C. ¶ 61,228 at P 1 (2010) (to be codified at 18 C.F.R. pt. 342) [hereinafter *Final PPI Order*], *reh'g denied*, 135 F.E.R.C. ¶ 61,172 (2011).

4. Notice of Inquiry, Five-Year Review of Oil Pipeline Pricing Index, 75 Fed. Reg. 34,959, 34,959 (June 21, 2010) (to be codified at 18 C.F.R. pt. 342); *Final PPI Order*, *supra* note 3, at P 1.

5. The Khan Methodology is a relatively straightforward method of statistical analysis that attempts to measure the central tendency in the pipeline cost increases reported in FERC Form No. 6 filings. The Methodology yields a composite index of historical cost increases (the Khan composite). After calculating the Kahn composite, the FERC compares this number to the PPI-FG for the same period and adjusts the PPI-FG by the appropriate percentage to derive a new five-year PPI. *Final PPI Order, supra* note 3, at P 3-9.

6. *Id.* Historically, the FERC has based the PPI either on the middle 50% of reported price increases, *see*, *e.g.*, *Five-Year Review of Oil Pipeline Pricing Index*, 93 F.E.R.C. ¶ 61,266 (2000), or on an average of the middle 50 and 80* of the data set, *see generally Five-Year Review of Oil Pricing Index*, 114 F.E.R.C. ¶ 61,293 (2006). *See also, Final PPI Order, supra* note 3, at P 9.

7. *Final PPI Order, supra* note 3, at P 48.

8. *Id.* at PP 21, 48.

9. *Five-Year Review of Oil Pipeline Pricing Index,* 135 F.E.R.C. ¶ 61,172 (2011).

spurs are not subject to FERC jurisdiction.[10] "In the alternative, Tesoro request[ed] that the Commission grant a temporary waiver of [the FERC's] tariff filing and reporting requirements [under sections 6 and 20 of the ICA] for these facilities."[11] The five pipeline spurs are owned and operated by Tesoro and connect to a Tesoro refinery in Salt Lake City, Utah.[12] Three of the pipelines carry crude oil directly from terminals owned by other companies to storage tanks owned by Tesoro.[13] Tesoro owns all of the oil transported by the three pipes, and Tesoro's tank farm and refinery are the only possible destinations for crude in the three pipes.[14] The other two pipelines carry finished petroleum products (diesel and gasoline) from the refinery to a terminal owned by Chevron Products Company (Chevron).[15] From Chevron's terminal, the products are distributed to the market via interstate pipelines.[16] The Tesoro refinery is the only point of origin for these two pipelines, and the Chevron terminal is the pipelines' only terminus.[17]

On May 5, 2011, the FERC issued an order granting Tesoro's request for jurisdictional determination and dismissing its request for a temporary waiver as moot.[18] The Commission held that under *TE Products Pipeline Co.*,[19] which states that "jurisdictional transportation is complete when the product enters the terminal facilities and these facilities are not integral or necessary to the transportation function,"[20] the five pipelines do not transport crude or petroleum products in interstate commerce and, therefore, are outside of FERC jurisdiction.[21] The FERC noted that "[n]o shippers other than Tesoro or its affiliates can use these lines and Tesoro has not held itself out as providing common carrier transportation on these lines."[22] According to the FERC, "the Commission's jurisdiction ends when the crude oil enters" the intermediate crude oil terminals from where it is transported directly and solely to Tesoro's refinery.[23] Likewise, "Commission jurisdiction does not begin until the petroleum products enter an interstate pipeline connecting to Chevron's [petroleum products] terminal."[24] Accordingly, the FERC concluded that the pipeline spurs were not within the Commission's ICA jurisdiction.[25]

10. Request of Tesoro Refining and Marketing Co. and Tesoro Logistics Operations, LLC for Jurisdictional Determination, or in the Alternative, Temporary Waiver of Tariff Filing and Reporting Requirements at 1, FERC Docket No. OR11-4-000 (Feb. 8, 2011).

11. *Tesoro Refining and Mktg. Co.*, 135 F.E.R.C. ¶ 61,116 (2011); 49 U.S.C. app. §§ 6, 20 (1988).

12. *Id*. at P 3.

13. *Id.* at P 4.

14. *Id.*

15. *Id.* at P 6.

16. *Id.*

17. *Id.*

18. *Id.* at P 1.

19. *TE Products Pipeline Co.*, 130 F.E.R.C. ¶ 61,257 (2010).

20. 135 F.E.R.C ¶ 61,116 at P 10 (citing 130 F.E.R.C. ¶ 61,257 at P 12).

21. *Id.* at P 17.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id*.

2. Order Dismissing Complaint, *ConocoPhillips Co. v. Enterprise TE Products Pipeline Co.*

In an order dated March 4, 2011, the Commission dismissed a complaint filed by ConocoPhillips Co. (ConocoPhillips) against Enterprise TE Products Pipeline Company LLC (Enterprise).[26] As summarized by the Commission, ConocoPhillips' complaint alleged that Enterprise violated the ICA by failing to provide transportation upon a reasonable request for such services.[27]

ConocoPhillips claimed that "for at least 10 years, Enterprise . . . has taken . . . propane under an exchange agreement or backhaul arrangement . . . , physically receiving it" from ConocoPhillips' Trainer, Pennsylvania refinery "and crediting ConocoPhillips for the propane via backhaul transportation, at the pipeline's Mont Belvieu, Texas origin."[28] ConocoPhillips alleged that in July 2010, Enterprise ceased its practice of crediting ConocoPhillips for the propane at Mont Belvieu.[29] ConocoPhillips thus requested that the Commission order Enterprise to file a tariff establishing Trainer as an origin point and "to recognize . . . exchange agreements or backhaul arrangements" that are already occurring in its tariff.[30]

In dismissing the complaint, the Commission held that the exchange agreement was merely a private contract to trade propane at different locations and was not jurisdictional transportation under the ICA.[31] The Commission did not require Enterprise to establish Trainer as an origin point, finding that Enterprise is a single directional pipeline and that Trainer is a destination point rather than an origin point.[32] According to the Commission, "it is physically impossible" to transport propane from Trainer to Mont Belvieu, such that the exchange agreement represented "a paper rather than a physical transaction."[33]

3. Temporary Waiver Orders: *Sinclair Pipeline Co.*; *Chevron Pipeline Co.*; *MV Purchasing, LLC*; *Bear Paw Energy, LLC*

These four orders concern requests for temporary waiver of the tariff filing and reporting requirements of sections 6 and 20 of the ICA.[34] The waivers were requested for pipelines owned and operated by the applicant (*Chevron*, *Bear Paw Energy, Sinclair*),[35] for a pipeline on which the applicant leased 100% of the capacity (*MV Purchasing*),[36] and for capacity leased by the applicant on a pipeline with the remaining capacity under a common carrier tariff (*Sinclair*).[37] The Commission grants such waivers when "(1) the pipelines (or their affiliates)

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26. *ConocoPhillips Co. v. Enterprise TE Products Pipeline Co.*, 134 F.E.R.C. ¶ 61,174 at P 1 (2011).
27. *Id*. at P 8.
28. *Id.* at P 3.
29. *Id.* at P 6.
30. *Id.* at P 8.
31. *Id*. at P 51.
32. *Id*. at P 52.
33. *Id.*
34. 49 U.S.C. app. §§ 6, 20 (1988).
35. *Sinclair Pipeline Co.*, 134 F.E.R.C. ¶ 61,077 at P 6 (2011); *Chevron Pipeline Co.*, 134 F.E.R.C. ¶ 61,073 at P 5 (2011); *Bear Paw Energy, LLC*, 132 F.E.R.C. ¶ 61,259 at P 5 (2010).
36. *MV Purchasing, LLC*, 133 F.E.R.C. ¶ 61,251 at PP 2, 5 (2010).
37. 134 F.E.R.C. ¶ 61,077 at P 7 (2011).

own 100 percent of the throughput on the line; (2) there is no demonstrated third-party interest in gaining access to or shipping upon the line; (3) no such interest is likely to materialize; and (4) there is no opposition to granting the waivers."[38] In each case, the applicant alleged that either it or its affiliates owned all of the throughput transported on the relevant facilities or capacity,[39] there are no interconnecting third-party pipelines, and no third party had requested or was likely to request service on the subject facilities or capacity.[40]

The Commission granted the requested temporary waivers in all four cases, subject to conditions. Each applicant was required to immediately report any change in circumstances upon which the temporary waivers were based, including, but not limited to, "(1) increased accessibility of other pipelines or refiners to [the] facilities; (2) changes in the ownership of the facilities; (3) changes in the ownership of the crude oil shipped; and (4) shipment tenders or requests for service by any person."[41] In addition, the Commission required the applicants to "maintain all books and records . . . consistent with the Uniform System of Accounts for Oil Pipelines . . . and make [those] books and records available to the Commission or its . . . agents upon request."[42]

C. Ratemaking Issues

1. Opinion No. 511

On February 17, 2011, the FERC issued Opinion No. 511, which provided comprehensive guidance on a large range of heavily litigated ratemaking issues.[43] Opinion No. 511 ruled upon a December 2, 2009 initial decision (2009 ID),[44] concerning SFPP, L.P.'s (SFPP) June 30, 2008 tariff filing. In that filing, SFPP had proposed cost-of-service "rate increases for all petroleum products movements on SFPP's West Line between Watson Station, Los Angeles County, California and Phoenix, Arizona."[45] SFPP argued that the proposed rate change was justified due to a "decline in volumes on SFPP's West Line."[46] Protesting shippers alleged that SFPP failed to "demonstrate a substantial divergence between SFPP's actual costs and its current ceiling rates such that the ceiling rates would preclude SFPP from being able to charge just and reasonable rates."[47]

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38. *Id.* at P 6*; Chevron*, 134 F.E.R.C. ¶ 61,073 at P 4; *MV Purchasing*, 133 F.E.R.C. ¶ 61,251 at P 5; *Bear Paw Energy*, 132 F.E.R.C. ¶ 61,259 at P 4.

39. *Sinclair*, 134 F.E.R.C. ¶ 61,077 at P 4; *Chevron* 134 F.E.R.C. ¶ 61,073 at P 2; *MV Purchasing*, 133 F.E.R.C. ¶ 61,251 at P 2; *Bear Paw Energy*, 132 F.E.R.C. ¶ 61,259 at P 2.

40. *Sinclair*, 134 F.E.R.C. ¶ 61,077 at P 4; *Chevron*, 134 F.E.R.C. ¶ 61,073 at P 3; *MV Purchasing*, 133 F.E.R.C. ¶ 61,251 at P 4; *Bear Paw Energy*, 132 F.E.R.C. ¶ 61,259 at PP 2-3.

41. *Sinclair,* 134 F.E.R.C. ¶ 61,077 at P 10; *Chevron*, 134 F.E.R.C. ¶ 61,073 at P 7; *MV Purchasing,* 133 F.E.R.C. ¶ 61,251 at P 8; *Bear Paw Energy,* 132 F.E.R.C. ¶ 61,259 at P 7.

42. *Sinclair,* 134 F.E.R.C. ¶ 61,077 at P 10 (internal citation omitted); *Chevron*, 134 F.E.R.C. ¶ 61,073 at P 7 (internal citation omitted); *MV Purchasing,* 133 F.E.R.C. ¶ 61,251 at P 8 (internal citation omitted); *Bear Paw Energy,* 132 F.E.R.C. ¶ 61,259 at P 7 (internal citation omitted).

43. Opinion No. 511, *SFPP, L.P.*, 134 F.E.R.C. ¶ 61,121 (2011) [hereinafter Opinion No. 511].

44. *SFPP, L.P.*, 129 F.E.R.C. ¶ 63,020 (2009).

45. *Id.* at P 1.

46. *Id*. at P 3.

47. *Id.* at P 5.

Opinion No. 511 "generally affirm[ed] the 2009 ID's conclusions regarding good-will, the allocation of costs among SFPP's affiliates and between SFPP's jurisdictional and non-jurisdictional services, and most capital structure, cost of capital and income tax allowance [(ITA)] issues."[48] Opinion No. 511 "also modifie[d] the 2009 ID's findings regarding throughput, purchase accounting adjustments, the allocation of litigation costs, and some rate base and secondary cost-of-service issues."[49]

Opinion No. 511 dealt extensively with various challenges raised in this and other proceedings to the FERC's ITA Policy Statement[50] and with that policy's application to SFPP, a pipeline owned through a master limited partnership (MLP). Opinion No. 511 rejected the claim that there is a double recovery of the ITA in SFPP's allowed return, and ruled instead that legal precedent had established "the legality of allowing an [ITA] for pipelines organized as general partnerships, limited partnerships, MLPs, or other [tax] pass-through entities."[51] The FERC likewise rejected requests that its ITA Policy Statement be revised to eliminate the [ITA] for public utilities organized as partnerships.[52] Citing the legislative history of Section 7704 of the Internal Revenue Code, which provides favorable tax treatment to MLPs, the FERC concluded that Congress intended to encourage pipeline investment by authorizing favorable tax treatment for MLPs and found that providing an ITA to MLP-owned pipelines achieves this legislative intent.[53]

In addressing a number of cost of capital issues, Opinion No. 511 found that purchase accounting adjustments should not be removed from the capital structure of SFPP's parent, Kinder Morgan Energy Partners (KMEP), and that the current portion of long-term debt should be included.[54] Additionally, Opinion No. 511 found the 2009 ID's provision for the pipeline's recovery of its actual regulatory litigation expenses to be inadequate, directing the pipeline to implement a surcharge to recover all of its costs in litigating the rate case.[55]

As to the assignment and allocation of KMEP corporate overhead expenses, Opinion No. 511 largely affirmed the 2009 ID, upholding SFPP's methodology.[56] Recognizing the inherent complexity of a large corporate entity such as Kinder Morgan, Inc. (KMI), owner of the general partner of KMEP, the FERC endorsed the use of multi-tiered shared cost assignments and allocations to KMEP's various business segments and the exclusion of various joint ventures and KMI-owned or operated subsidiaries as yielding a more accurate allocation of overhead costs to the pipeline and a better matching of cost allocation with cost causation.[57] In so doing, Opinion No. 511 elaborated a

48. Opinion No. 511, *supra* note 43, at P 1.

49. *Id*.

50. *Inquiry Regarding Income Tax Allowances*, 111 F.E.R.C. ¶ 61,139 (2005), *aff'd,* ExxonMobil Oil Corp. v. FERC, 487 F.3d 945 (D.C. Cir. 2007).

51. Opinion No. 511, *supra* note 43, at PP 235-236.

52. *Id.* at P 238.

53. *Id.* at PP 253-58.

54. *Id*. at PP 175, 180-184.

55. *Id.* at PP 33-35.

56. *Id.* at P 94.

57. *Id*.

materiality standard for determining whether a pipeline's affiliates should be included in the Massachusetts Formula allocation.[58]

The FERC directed SFPP to submit a compliance filing reflecting additional information regarding certain overhead cost recovery matters, revised tariffs, and estimated refunds.[59] SFPP made such filing on April 25, 2011, as supplemented, which filing drew several shipper protests.[60] On April 11, 2011, SFPP, along with three sets of shipper-litigants, requested rehearing of Opinion No. 511,[61] and a tolling order was issued on May 11, 2011.[62] On July 5, 2011, SFPP made a preliminary offer of settlement in several SFPP rate disputes, including FERC Docket No. IS08-390 to resolve issues raised in Opinion No. 511.[63]

2. *Tesoro Refining and Marketing Co. v. Calnev Pipe Line LLC*

On March 17, 2011, the FERC issued an Order Consolidating Certain Complaint Proceedings and Establishing Hearing Procedures in Docket Nos. OR07-7, et al. (the Tesoro v. Calnev Order).[64] "This order addresse[d] and consolidate[d] four complaints against Calnev Pipe Line LLC (Calnev)[, which] were filed in 2007 (the 2007 Calnev Complaints) and which raise[d] substantially changed circumstances [(SCC)] issues" under section 1803(b) of EPAct 1992.[65] In the Tesoro v. Calnev Order, the FERC "address[ed] methodological and technical issues involved in the 2007 Calnev Complaints and [set] them for hearing."[66] The FERC did not decide in the Order "whether there has been a substantial change to the economic circumstances that were the basis for Calnev's grandfathered rates"[67] but, instead, made certain clarifications regarding the legal framework for a SCC analysis.[68] The FERC's SCC analysis marks a significant expansion upon prior orders on the subject, including the FERC's 2007 *America West* ruling.[69]

The Tesoro v. Calnev Order also addressed a request for rehearing of the 2007 Calnev Orders,[70] clarifying that the FERC would not, when assessing SCC, make cost-of-service adjustments, such as excluding ITA, that "are wholly

58. *Id*. at P 109.

59. *Id.* at P 111.

60. Compliance Filing Implementing Opinion No. 511, FERC Docket No. IS08-390-006 (Apr. 25, 2011), *supplemented by*, Supplement to Compliance Filing of SFPP, L.P. Implementing Opinion No. 511, FERC Docket No. IS08-390-006 (May 16, 2011): *see also, e.g.,* Motion to Intervene and Protest of ConocoPhillips Co., FERC Docket Nos. IS11-304-000, IS08-390-006 (May 10, 2011).

61. Request for Rehearing of SFPP, L.P., FERC Docket No. IS08-390-002 (Apr. 11, 2011).

62. Order Granting Rehearing for Further Consideration, FERC Docket No. IS08-390-004 (May 11, 2011).

63. Request of SFPP, L.P. for Initiation of Settlement Process and Preliminary Offer of Settlement, FERC Docket Nos. IS08-390-002, et al. (July 5, 20110).

64. *Tesoro Refining and Mktg. Co. v. Calnev Pipe Line LLC*, 134 F.E.R.C. ¶ 61,214, *order denying reh'g and clarification*, 136 F.E.R.C. ¶ 61,083 (2011).

65. 134 F.E.R.C. ¶ 61,214 at P 1.

66. *Id*.

67. *Id.*

68. *Id*. at P 2.

69. *America W. Airlines, Inc. v. Calnev Pipe Line, L.L.C.*, 121 F.E.R.C. ¶ 61,241 (2007).

70. *Id.*; *BP W. Coast Products, LLC v. Calnev Pipe Line, L.L.C.*, 121 F.E.R.C. ¶ 61,242 (2007).

inconsistent with prior [FERC] decisions."[71] In addition, the FERC dismissed "BP West Coast Product, LLC's amendment of its 2007 Calnev complaint to include Calnev's Las Vegas vapor recovery terminaling charges."[72] Additionally, the FERC "address[ed] the procedural status of two [other] complaints that were filed against Calnev's rates in late 2009 [(the 2009 Complaints)]."[73] The FERC "conclude[ed] that it [would] expedite resolution of all current complaints against Calnev's base rates if the 2009 Calnev Complaints [were] set for hearing and consolidated alongside the 2007 Calnev Complaints."[74]

On the issue of SCC, the FERC made the following determinations regarding

> the framework to be followed when analyzing whether there are substantially changed circumstances to the grandfathered portion of a pipeline's base rates. First, that in measuring a change in return for purposes of determining [SCC], the [FERC] considers the pipeline's change in profitability, which is measured by the change in the rate of return on equity [(RROE)] from that embedded in the grandfathered rate.[75]

This is a significant narrowing of the SCC gauge from the "broad measure" of change advocated by SFPP, adopted by the FERC in its Docket No. OR96-2 orders and affirmed by the United States Court of Appeals for the District of Columbia Circuit in *ExxonMobil*.[76]

> Second, when calculating the change in return on equity, the change should be quantified in terms of actual dollar amounts of the pipeline's revenues and expenses. Third, when analyzing whether there are substantially changed circumstances the analysis must use total jurisdictional revenues. Fourth, the [FERC] acknowledge[d] that in considering whether there are substantially changed circumstances, increases in revenues resulting from the pipeline's annual indexing should be considered. Fifth, any change in the embedded [RROE] must occur after the enactment date of [EPAct 1992].[77]

Sixth, recognizing that this narrower gauge measure will lead more readily to findings of substantial change, the FERC "set[] 25 percent as the minimum percentage change in return on equity necessary to establish [SCC]."[78] "If the change in return on equity is 25 percent or greater, the [FERC] may consider other factors to confirm that the change is not anomalous or unrepresentative."[79] The FERC noted "this 25 percent threshold is not a bright-line standard such that any change in the rate of return greater than 25 percent is a conclusive determination that substantial change in circumstances exists."[80] The FERC will instead "carefully examine any evidence submitted in support of a complaint to

71. 134 F.E.R.C. ¶ 62,214 at P 71.

72. *Id.* at PP 1, 72.

73. *Id.* at P 1; *see also* Complaint of Tesoro Refining and Marketing Co. Against the Base Rate of Calnev Pipe Line, L.L.C., FERC Docket No. OR09-15-000 (June 30, 2009); Third Original Complaint of BP West Coast Products LLC Against Calnev Pipe Line, L.L.C., FERC Docket No. OR09-20-000 (July 31, 2009).

74. 134 F.E.R.C. ¶ 62,214 at P 1.

75. *Id.* at P 2.

76. *Id.* at PP 57-58.

77. *Id.* at P 2.

78. *Id.*

79. *Id.*

80. *Id.* at P 61.

assure that the change in the rate of return is in fact 'substantial.'"[81] "Last, the [FERC] confirm[ed] that a change in return on equity must be measured using the current version of the rate methodology that is applicable to the particular year under analysis."[82]

The hearing was suspended and the parties were sent to settlement, with the 2009 Complaints consolidated in part to streamline the settlement process.[83] By order dated March 23, 2011, the Chief Judge appointed Judge H. Peter Young as the settlement judge in this case.[84] Calnev sought clarification, or in the alternative rehearing, of the Tesoro v. Calnev Order on April 18, 2011.[85]

3. Order on Interlocutory Appeal, *Magellan Pipeline Co.*

On February 16, 2011, the Commission issued its Order on Interlocutory Appeal, addressing a significant issue regarding discovery matters in the proceeding in which Magellan Pipeline Company, L.P. (Magellan) sought authority to charge market-based rates in certain markets.[86] That case subsequently was the subject of a settlement offer,[87] but the ruling on discovery should be of broad significance.

The issue was first addressed in an order by the Administrative Law Judge (ALJ), issued on January 13, 2011,[88] in which the ALJ denied a motion by a shipper intervenor, Frontier Oil and Refining (Frontier), to compel the pipeline to provide cost of service data regarding the services for which the pipeline sought authority to charge market-based rates.[89] Frontier argued that the ability of the pipeline to charge excessive rates (on a cost of service basis) was relevant to whether it had market power.[90] Magellan had responded that "it should not be compelled to produce the cost-of-service information" because that information would be "beyond the scope of the proceeding and irrelevant to the issues set for hearing."[91] Magellan also argued that use of this information "would merely serve to unreasonably expand the scope of the [case] beyond" the limits that the Commission and the judiciary "have [found] necessary to determine whether [the pipeline] lacks market power" in the relevant markets.[92]

81. *Id*.

82. *Id.* at P 2.

83. *Id.* at p. 62,160.

84. Order of Chief Judge Appointing Settlement Judge at P 2, FERC Docket Nos. OR07-7-000, et al. (Mar. 23, 2011).

85. Request for Clarification or, in the Alternative, for Rehearing of Calnev Pipe Line LLC, FERC Docket Nos. OR07-7-000, et al. (Apr. 18, 2011).

86. *Magellan Pipeline Co.*, 134 F.E.R.C. ¶ 61,117 at P 1 [hereinafter *Interlocutory Order*], *notice of denial of reh'g*, 135 F.E.R.C. ¶ 61,006 (2011).

87. Certification of Contested Settlement, FERC Docket No. OR10-6-000 (Sept. 1, 2011).

88. Order Denying Motion to Compel, FERC Docket. No. OR10-6-000 (Jan. 13, 2011) [hereinafter January 2011 Order].

89. Motion of Frontier Oil and Refining Co. to Compel Responses to Its Data Requests to Magellan Pipeline Co. at, FERC Docket No. OR10-06-000 (Dec. 22, 2010).

90. January 2011 Order, *supra* note 88, at P 2.

91. *Id*. at P 7.

92. *Id.*

The ALJ agreed with the pipeline that the scope of a market-based rate proceeding excluded cost of service data and testimony and focused instead on competitive data, adopting

> the position that Magellan has advanced with respect to the interpretation and application of Order No. 572 on the scope of the issues in this case [and concluded that,] cost-of-service information is beyond the scope of and irrelevant to the issues set for hearing in this case because the justness and reasonableness of a market-based rate is to be determined on the basis of the Commission's established market power inquiry, not an inquiry into costs.[93]

The ALJ noted the specific matters set for hearing as to specific market power related facts and concluded that "[d]iscovery [as to] cost-of-service would not appear to be germane to those issues."[94] The ALJ also relied on the statement that "[t]he only predicate that the courts and the Commission have determined is required is a showing that the regulated company lacks market power or specific conditions will sufficiently mitigate that power."[95] Frontier subsequently sought interlocutory appeal of this order to the Commission[96] – which the ALJ supported.[97]

The Commission accepted the interlocutory appeal and, in the Interlocutory Order, agreed with the ALJ and denied Frontier's interlocutory appeal.[98] The Commission relied upon several grounds, including: procedure (Magellan did not bring up profitability as part of its case in chief);[99] relevance (market power analysis is "a substitute for cost-of-service" analysis in determining just and reasonable rates);[100] that the requested data would unduly enlarge the scope of the proceeding;[101] and that Magellan did not have the type of data requested.[102] The Commission further stated that the two types of proceedings – cost and market-power – are fundamentally different.[103] Further, the Commission concluded that "[t]he ALJ correctly found that 'cost-of-service information [would be] beyond the scope of and irrelevant to the issues set for hearing . . . because the justness and reasonableness of a market-based rate is to be determined on the basis of the Commission's established market power inquiry, not an inquiry into costs.'"[104] Despite Order No. 572's statement that "profitability [could be] considered in a market-based rate application," the Commission concluded that "Frontier makes an unsupported leap of logic to suggest that the reference to profitability means it can seek information on costs, revenue and rate of return."[105] Instead, the Commission found that "under Order

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93. *Id.* at P 8.

94. *Id.*

95. *Id.* at P 9 (quoting *K N Interstate Gas Transmission Co.*, 76 F.E.R.C. ¶ 61,134, at p. 61,726 (1996)).

96. Motion of Frontier Oil and Refining Co. to Permit Interlocutory Appeal of Order Denying Motion to Compel; or, in the Alternative, Request for Reconsideration, FERC Docket No. OR10-6-000 (Jan. 18, 2011).

97. *Magellan Pipeline Co.*, 134 F.E.R.C. ¶ 63,009 at P 14 (2011).

98. *Interlocutory Order*, *supra* note 86, at P 17.

99. *Id*. at P 14.

100. *Id.* at P 15.

101. *Id.* at P 16.

102. *Id.*

103. *Id.* at PP 15-17.

104. *Id*. at P 12 (quoting January 2011 Order, *supra* note 88, at P 8).

105. *Id*. at P 13.

No. 572, to the extent that profitability is a factor to be considered," it must be "raised by the pipeline in its application" – which Magellan had not done.[106] The Commission reasoned that "the burden is on the pipeline to show the relevance of the additional factors" and "that it lacks market power;" thus, "[t]he burden of proof is on the pipeline to support its application and not on the opponents of the application."[107] The Commission went on to conclude that cost-based and market-based inquiries are quite different, stating:

> As the ALJ correctly held, an inquiry into costs has nothing to do with the issue of whether a pipeline can establish a lack of market power for the purposes of charging market-based rates instead of cost-of-service rates. Market-based rates are a substitute for cost-of-service rates because a showing of a lack of market power would mean that sufficient competition exists to ensure a just and reasonable rate. In fact, the underpinning of the approval of market-based rates is that sufficient competition exists such that shippers can find alternatives to the pipeline if the pipeline attempts to raise rates above a certain threshold. Frontier seems to have conflated market-based rate concepts and cost-of-service concepts when it argues that above-average returns are evidence of market-power.[108]

The Commission also found that Magellan did not possess a cost-of-service for the relevant segment of its system, as a matter of historical record transmission, and that "its page 700 information [aggregated] all of Magellan's pipeline systems."[109] Thus, the Commission concluded that granting the interlocutory appeal would cause a major expansion of the proceeding, as Magellan would need to create and allocate costs for the requested system break-out.[110] The Commission concluded "that such an expansion of the scope of the proceeding [would be] contrary to the Commission's regulations governing market power determinations for oil pipelines and . . . would not provide the Commission with any relevant information that would assist it in determining whether Magellan possesses market power in its origin market."[111]

Frontier filed a request for rehearing on this order,[112] but on April 6, 2011, the Commission issued a one-page order giving notice of the denial of rehearing by operation of law.[113]

4. Order Accepting and Suspending Tariff, Consolidating Proceedings and Granting Rehearing, *Enbridge Pipelines (Southern Lights) LLC*

On January 31, 2011, the Commission issued an order addressing its "substantial economic interest" standard for standing of an oil pipeline shipper to protest an oil pipeline's tariff filing.[114] On June 11, 2010, two affiliated oil companies, Imperial Oil (Imperial) and ExxonMobil Oil Corporation (EMOC) (together, Indicated Shippers), had "move[d] jointly and severally . . . to

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106. *Id*. at P 14.

107. *Id.*

108. *Id.* at P 15 (footnote omitted).

109. *Id*. at P 16.

110. *Id*.

111. *Id.*

112. Request for Rehearing Frontier Oil and Refining Co. of Order Denying Interlocutory Appeal, FERC Docket No. OR10-6-003 (Mar. 8, 2011).

113. *Magellan Pipeline Co.*, 135 F.E.R.C. ¶ 61,006 (2011).

114. *Enbridge Pipelines (Southern Lights) LLC*, 134 F.E.R.C. ¶ 61,067 at P 11 (2011).

intervene and protest[ed] the tariff filing submitted by Enbridge Pipelines (Southern Lights) LLC" (EPSL) for its new diluent pipeline that runs across the US-Canada border from Illinois to Alberta.[115] Amongst other things, Enbridge challenged Imperial's standing to protest the filing on grounds essentially that Imperial would not be the shipper of record on the pipeline.[116] Under the arms-length affiliate arrangement, EMOC would ship diluent on the US side of the border, and, thereafter, Imperial would purchase the diluent, including a direct pass through of the costs of transportation, from EMOC and become the shipper on the Canadian side of the border.[117]

On June 29, 2010, the Commission accepted and suspended the tariffs, subject to refund, investigation and hearing, "and to EPSL filing cost, revenue and throughput data pursuant to Part 346 of the Commission's regulations to support its initial rates" but denied Imperial standing both as a protestant and as an intervenor.[118]

On July 16, 2010, Indicated Shippers requested rehearing on the issue of standing.[119] In response to Indicated Shipper's protest to Enbridge's second annual tariff increase filing for Southern Lights, EPSL challenged not only Imperial's standing but also EMOC's standing to protest on grounds that EMOC had not shipped any volumes of diluent on the pipeline since the pipeline went into service on July 1, 2010.[120]

On January 31, 2011, the Commission rejected EPSL's assertion that EMOC lacked standing to protest[121] and granted rehearing on the issue of Imperial's standing.[122] The Commission found that "[t]he fact that ExxonMobil indicated an intention and ability to be a future shipper on the newly operating Southern Lights' system is enough to convey standing for purposes of filing a protest as well as for party status by means of an intervention."[123] The Commission went on to say "there is no requirement that a future shipper's plan to ship must be imminent."[124]

With respect to Imperial's standing to protest, the Commission held that although Imperial would not itself be a shipper on Southern lights, nevertheless it had a substantial economic interest in the rate by virtue of the pass through of transportation costs from EMOC.[125] The Commission stated that while whether an entity is or is not a shipper is relevant, it is not the only consideration in determining whether an entity has a substantial economic interest in an oil

115. Motion to Intervene and Protest Imperial Oil and ExxonMobil Oil Corporation at 1, FERC Docket No. IS10-399-000 (June 11, 2010).

116. 134 F.E.R.C. ¶ 61,067 at P 7.

117. *Id.* at P 4.

118. *Enbridge Pipeline (Southern Lights) LLC*, 131 F.E.R.C. ¶ 61,288 at PP 1, 17 (2010).

119. Request for Rehearing and/or Clarification of Imperial Oil and ExxonMobil Oil Corp. and Request for Expedited Action by Chief Judge Granting Motion of Imperial Oil to Intervene Solely for Purposes of Settlement Proceedings, FERC Docket No. IS10-399-001 (July 16, 2010).

120. 134 F.E.R.C. ¶ 61,067 at P 7.

121. *Id.* at P 10.

122. *Id.* at P 11.

123. *Id.* at P 10.

124. *Id.*

125. *Id.* at P 11.

pipeline tariff filing.[126] The Commission also reversed its earlier denial of Imperial's intervenor status, finding that even if Imperial had not been found to have standing for purposes of a protest, Imperial "certainly has an interest which is directly affected pursuant to the less stringent standard for interventions."[127] The Commission reiterated

> that the "'substantial economic interest' standard is "intended to assure that parties protesting a filing have sufficient interest in the matter to warrant the commitment of agency and pipeline resources to a review of the merits,' [and] standing is therefore based on all the facts and circumstances of the particular proceeding."[128]

5. Order on Initial Decision, *Mobil Pipeline Co.*

In August 2007, Mobil Pipe Line Company (Mobil) filed an application seeking authority to charge market-based rates on its existing Pegasus pipeline system "for the transportation of crude oil from Patoka, Illinois to . . . Nederland, Texas."[129] The Commission, in a December 2007 order determined that Mobil lacked significant market power in its destination market; however, there was insufficient evidence to determine whether Mobil lacked market power in its origin market, and, therefore, the matter was set for hearing.[130] Following the hearing, the presiding ALJ issued an Initial Decision which concluded Mobil had not shown it lacked significant market power in the origin market and had not shown the origin market was sufficiently competitive such that authority to charge market-based rates would result in just and reasonable rates.[131]

On December 1, 2010, the Commission issued an order affirming the Initial Decision "recommending [Mobil's] application for market-based rates be denied."[132] The Commission found Pegasus had significant market power as to transportation of crude petroleum from Alberta to Texas.[133] The Commission specifically rejected arguments, which it considered the core of the position of both the pipeline and Staff, that the pipeline should recover scarcity rents associated with transportation to Texas.[134]

"[B]ecause of the oil price differential between the Upper Midwest and the Gulf Coast and the scarcity of pipeline capacity on Pegasus, there is the opportunity to profit through arbitrage," and in this case, "the economic or scarcity rent [was] the price to the shipper after all costs of delivery, *i.e.*, the netback differential."[135] Mobil had argued "the pipeline should capture the economic rent" by charging market-based rates.[136] According to the Commission, "[t]he problem with this theory is it simply focus[ed] on allocation of economic rent between the pipeline and the shippers without analyzing the

126. *Id.*

127. *Id.*

128. *Id.* (quoting *Shell Pipeline Company, LP*, 104 F.E.R.C. ¶ 61,021 at P 6 (2003)).

129. Application of Mobil Pipe Line Co. for Authority to Charge Market-Based Rates at 1, FERC Docket No. OR07-21-000 (Aug. 24, 2007).

130. *Mobil Pipe Line Co.*, 121 F.E.R.C. ¶ 61,268 at P 3 (2007).

131. *Mobil Pipe Line Co.*, 128 F.E.R.C. ¶ 63,008, at P 1 (2009).

132. *Mobil Pipe Line Co.*, 133 F.E.R.C. ¶ 61,192 at P 1 (2010).

133. *Id.* at P 48.

134. *Id.* at PP 8-9.

135. *Id.* at P 8.

136. *Id.*

relevant market to determine the causes of the scarcity rent, *i.e.*, whether Mobil possesses significant market power."[137] Therefore, the Commission, in the December 2010 Order, analyzed the relevant market to determine whether Mobil had significant market power.[138]

Market power is "the ability profitably to maintain prices above competitive levels for a significant period of time."[139] "To evaluate whether an oil pipeline has market power, the Commission . . . consider[s] whether the pipeline, if granted market-based rate authority, could profitably sustain a 'small but significant and nontransitory increase in price.'"[140] "The ALJ determined that the proper benchmark for the market power analysis . . . [was] the long-run competitive price and that Pegasus' prevailing tariff rate [was] a reasonable approximation of the long-run competitive price."[141] "The ALJ also determined that the 15 percent threshold price increase test" was appropriate as applied to "Pegasus' prevailing rate and not to the entire transportation chain of pipelines that move crude oil from Alberta to the Gulf Coast."[142]

On exception, the Commission stated that "Mobil and Staff assert the ALJ erred in determining that Pegasus' tariff rate was the appropriate competitive benchmark for purposes of performing the market analysis" and advocated for a hypothetical competitive rate to be used as a benchmark.[143] The Commission affirmed the ALJ's "determination that Pegasus' prevailing tariff rate was the . . . appropriate estimate on the record of the long-run competitive price,"[144] affirmed the use of the "15 percent threshold price increase for purposes of the market power analysis,"[145] and affirmed "the 15 percent price increase [should] only apply to Pegasus' transportation rates and not to all [of the rates] in the transportation chain.[146]

Regarding the relevant product market the ALJ found, and the Commission affirmed, "the relevant product market . . . should be limited to the transportation of Western Canadian heavy sour crude oil."[147] Mobil and Staff argued that "the relevant product market . . . should have included the transportation of all types of crude oil."[148] In affirming the ALJ, the Commission pointed out "nearly all of the crude transported on Pegasus since . . . 2006 was Western Canadian heavy sour crude oil."[149] The Commission explained that "[t]o include other types of crude oil in the relevant product market would not provide Pegasus' shippers

137. *Id.*
138. *Id.*
139. *Id.* at P 12 (quoting 1992 DOJ-FTC Merger Guidelines).
140. *Id.* (quoting 1992 DOJ-FTC Merger Guidelines).
141. *Id.* at P 13.
142. *Id.* at P 15.
143. *Id.* at P 17.
144. *Id.* at P 22.
145. *Id.* at P 24.
146. *Id.* at P 25.
147. *Id.* at P 27.
148. *Id.* at P 28.
149. *Id.*

with meaningful transportation or refining alternatives in the event Pegasus were to raise its rates."[150]

Regarding the relevant geographic market, "after analyzing the various origin markets proposed by the parties," the ALJ focused "the analysis on Mobil's defined Upper Midwest origin."[151] "The ALJ concluded there are no alternatives to Pegasus that are good alternatives . . . , and that Pegasus' origin market was . . . limited to only Pegasus."[152] Regarding the exceptions, the Commission stated that "Mobil and Staff disagree[d] with the ALJ's determination with respect to the relevant geographic market and her determination that Mobil has market power."[153] The Commission affirmed the ALJ, noting the ALJ was correct to exclude "certain proposed origin markets because they were not comprised of good alternatives in terms of availability."[154] Moreover, the Commission determined the ALJ was correct to use the "netback analysis to determine whether an alternative was comparable in terms of price and rejecting Mobil and Staff's approach of used alternatives, i.e., alternative suppliers of the same product that are available to and used by Pegasus' shippers."[155]

"The final issue on exceptions with respect to the geographic market [was] Mobil's disagreement with the ALJ's calculations of the netback differentials between the Upper Midwest origin market and the Gulf Coast."[156] The Commission affirmed "the ALJ's calculation of the prices of crude oil in the Upper Midwest and Gulf Coast, and the resulting netback differential."[157] According to the Commission, "[t]he ALJ appropriately made certain downward adjustments to the price . . . shippers of Western Canadian crude oil would receive on the Gulf Coast to take into account[, *inter alia*,] the price risk and time value of money."[158]

6. Order on Application for Market Power Determination and Establishing Hearing Procedures, *Magellan Pipeline Co.*

In January 2010, "Magellan Pipeline Company, L.P. (Magellan) filed an application for authority to charge market-based rates for . . . transportation of refined petroleum products from its origins at McPherson and El Dorado, Kansas . . . to its destination at Aurora, Colorado."[159] In a July 7, 2010 order the Commission determined "Magellan lack[ed] significant market power in the Aurora . . . destination market and permit[ted] Magellan to charge market-based

150. *Id.* at P 29.
151. *Id.* at PP 30-32.
152. *Id.* at P 35.
153. *Id.* at P 37.
154. *Id.* at P 38.
155. *Id.* at P 41.
156. *Id.* at P 44.
157. *Id.* at P 45.
158. *Id*.
159. *Magellan Pipeline Co.,* 132 F.E.R.C. ¶ 61,016 at P 1 (2010); *see also* Application of Magellan Pipeline Company, L.P. for Authority to Charge Market-Based Rates, FERC Docket No. OR10-6-000 (Jan. 15, 2010).

rates on [that] segment."[160] However, because material issues of fact existed "regarding the composition of the origin market and quality of alternative options for shippers," the Commission set these issues for hearing.[161]

In the July 7, 2010 Order, the Commission concluded "that Magellan does not have significant market power over the designated destination market."[162] "Under the various scenarios submitted by Magellan," according to the Commission, "the market share is always less than 20 percent and the [Herfindahl-Hirschman Index (HHI)] for the destination market is always less than 2,000."[163] The Commission concluded "the results from all of the [Aurora destination market] scenarios compare favorably with HHI initial screening figures[,] and market share percentages" were acceptable.[164] Moreover, "significant excess capacity in the destination market suggest[ed to the Commission] that Magellan's competitors can capture business from Magellan quickly if it raised rates above competitive levels."[165]

The Commission, in the July 7, 2010 Order, expressed its concern that "Magellan may have market power in the origin market."[166] According to the Commission,

> protesters . . . raised material issues of fact regarding the origin market, including, but not limited to . . . : (1) the construction of the origin market area as a single market, not two individual markets . . . ; (2) the appropriate netback analyses for ascertaining the level of competition in the origin market or markets; and (3) the viability of alternative options available to shippers and local refineries in the origin market for distribution of petroleum products.[167]

The Commission explained "the burden is on the proponent of any particular [geographic market] definition" and "[i]f protesters raise reasonable doubt about a particular geographic market, the applicant must provide a detailed justification of the relevant market, including a demonstration that all alternatives within the market are good alternatives."[168] The Commission noted that "Magellan's effective capacity-based HHI of 2,117 and 28.6 percent market share calculations indicate[d] a lack of market power in the origin market."[169] However, "[t]he protestors assert that Magellan overstates the good alternatives" and "that when only 'good alternatives' are considered, the resulting HHI calculation is 4,459 with a 48 percent market share."[170]

In the July 7, 2010 Order, the Commission explained that precedent does "not require that good alternatives be justified in any particular way;" the

160. 132 F.E.R.C. ¶ 61,016 at P 1.

161. *Id.*

162. *Id.* at P 31.

163. *Id.*

164. *Id.* (citing *Buckeye Pipe Line Co.*, 53 F.E.R.C. ¶ 61,473 (1990) and *Williams Pipe Line Co.*, 68 F.E.R.C. ¶ 61,136 (1994)).

165. *Id.*

166. *Id.* at P 32.

167. *Id.*

168. *Id.* at P 33.

169. *Id.*

170. *Id.*

Commission has suggested "that comparative costs could be an effective means of justifying good alternatives to the pipeline's service."[171] Moreover,

> the focus is on good alternatives to the shipper for getting the product out of a particular location or disposing of the product elsewhere. Thus, for origin markets the Commission determined it is the netback to the shipper (price to shipper after all costs of delivery) that should be compared in determining whether proposed alternatives are good alternatives in terms of price.[172]

The Commission, in the July 7, 2010 Order, concluded that "in order to justify its origin market, Magellan must show that each alternative outlet is an alternative in terms of price for each shipper in the market."[173] The Commission determined the evidence presented was insufficient "to determine whether Magellan lacks market power in the defined origin market" and set the matter for hearing.[174]

D. Orders Relating to Rules and Regulations

1. Order Accepting Tariff, *Bridger Pipeline LLC*

On May 27, 2011, the Commission accepted Bridger Pipeline LLC's (Bridger) April 29, 2011 tariff filing "to implement penalties for over-nominations on its . . . pipeline system," which transports Bakken Shale crude throughout Montana and Wyoming.[175] In its filing, Bridger stated that production of Bakken crude has risen significantly in recent years and has led to increased demand for transportation on Bridger's pipeline.[176] Bridger further stated that its system has been subject to "near-continuous prorationing over the past several years."[177] As a result, Bridger "proposed a three-tier penalty structure for over-nominations on its system . . . to prevent shippers nominating barrels [that] they have no intention of delivering and to ensure that capacity on all parts of the system can be used by shippers who have an intention to ship oil."[178]

As noted by the Commission in the May 27, 2011 Order, a shipper protested Bridger's tariff filing stating "while it supports the imposition of reasonable penalties to prevent abusive nomination practices and to promote the efficient use of Bridger's system, certain aspects of the proposal are in its view discriminatory and preferential."[179] The shipper specifically opposed the "one-month flat prohibition on any transportation nominations for the third over-nomination infraction [that allegedly] will unduly disadvantage New Shippers and is preferential to Existing Shippers not subject to the over-nomination

171. *Id.* at P 34.

172. *Id.* at P 35.

173. *Id.* at P 36.

174. *Id.* On July 1, 2011, an offer of settlement was filed to fully resolve all issues in Docket No. OR10-6-000. Joint Explanatory Statement Regarding Offer of Settlement in Satisfaction of Protests and Conditional Notice of Withdrawal of Protest, FERC Docket No. OR10-6-000 (July 1, 2011). The offer of settlement is pending before the Commission.

175. *Bridger Pipeline LLC*, 135 F.E.R.C. ¶ 61,188 at PP 1-2 (2011).

176. Oil Pipeline Tariff Filing at 1, FERC Docket No. IS11-313-000 (Apr. 29, 2011).

177. 135 F.E.R.C. ¶ 61,188 at P 2.

178. *Id*. at P 15.

179. *Id*. at P 9.

penalty."[180] Bridger filed an answer to the protest arguing that the penalty system should be upheld because it "reasonably balance[d] the competing interests of Bridger's shippers."[181] Bridger dismissed the shipper's proposal of a Monetary Penalty as an ineffective deterrent given the difficulty in establishing an appropriate valuation for constrained capacity in the region.[182]

The Commission approved the proposed tariff change and found that "Bridger's proposed penalty structure for over-nominations on its system [was] a reasonable response to an ongoing situation and [was] designed to prevent certain shippers from gaming the system through over-nominations to gain valuable capacity."[183] The shipper's concern regarding the disparate treatment of New Shippers was rejected on the basis that the "penalty structure simply reflect[ed] the differences between Existing Shippers and New Shippers under the approved prorationing policy and provid[ed] each category of shippers with appropriate incentives to comply with the nomination procedures."[184] The FERC accepted Bridger's tariff filing effective June 1, 2011.[185]

2. Order on Petition for Declaratory Order, *Enbridge Pipelines (North Dakota) LLC*

On August 26, 2010, Enbridge Pipelines (North Dakota) LLC (EPND) and Enbridge Pipelines (Bakken) L.P. (Enbridge Bakken U.S.) (collectively, Enbridge) filed a petition for declaratory order in Docket No. OR10-19-000, seeking approval of "(1) the [proposed] tariff and priority service structure for the EPND portion of the Bakken Expansion Program (Program); and (2) the overall tariff and rate structure for the Enbridge Bakken U.S. portion of the Program."[186] The Bakken Expansion Program included the looping of Enbridge's existing system between Beaver Lodge, North Dakota and Berthold, North Dakota (Beaver Lodge Loop) as well as the reversal and expansion of the Portal Link pipeline, which extended from Berthold to the international border near Portal, ND.[187]

As explained by the Commission in its November 22, 2010 Order, Enbridge's proposed tariff structure for the Beaver Lodge Loop consisted of an open season offering committed shippers the option to sign Transportation Service Agreements (TSA) requiring a minimum volume take-or-pay commitment in exchange for priority access to the pipeline during times of apportionment.[188] The committed shippers agreed to pay a premium rate, (*i.e.*, a

180. *Id*. at P 10.

181. *Id.* at P 11.

182. *Id*. at P 14.

183. *Id*. at P 16.

184. *Id*.

185. *Id*.

186. Petition for Declaratory Order of Enbridge Pipelines (North Dakota) LLC and Enbridge Pipelines (Bakken) L.P. at 2, FERC Docket No. OR10-19-000 (Aug. 26, 2010) [hereinafter August 26 Petition]; *see also Enbridge Pipelines (North Dakota) LLC,* 133 F.E.R.C. ¶ 61,167 at P 1 (2010).

187. The third portion of the Program included the reversal, refurbishment, and expansion of the Canadian portion of the Portal Link pipeline, extending from the International Border near Portal, Saskatchewan, to Steelman, Saskatchewan, combined with a new 16-inch pipeline from Steelman to Cromer, Manitoba. 133 F.E.R.C. ¶ 61,167 at P 16.

188. *Id.* at P 9.

rate greater than the uncommitted rate) in exchange for the enhanced shipper status.[189] EPND proposed to provide priority service for 80% of the expanded pipeline capacity, which was equivalent to approximately 40% of the total available pipeline capacity between Beaver Lodge and Berthold.[190] The remaining 20% of the expanded capacity would be available for uncommitted shippers.[191]

In support of its proposal to offer priority service, Enbridge cited the FERC's decisions in *CCPS*[192] and *Mid-America*.[193] In *CCPS*, the FERC approved an offer of priority service finding that the premium rate firm shippers forego a level of flexibility available to uncommitted shippers in exchange for a reprieve from apportionment.[194] In *Mid-America*, the FERC approved an offer of priority service on the basis that "neither historical shippers nor new shippers [would] be denied access even if they [did] not sign long-term volume dedications."[195]

Enbridge's proposed tariff structure for the Enbridge Bakken U.S. portion of the Program consisted of an open season offering committed shippers the option to sign TSAs in which shippers agreed "to ship-or-pay for a minimum volume over a five or 10-year term."[196] This portion of the Program did "not immunize committed shippers from apportionment;"[197] however, for operational reasons, shippers would not be allocated space on the US portion of the pipeline in excess of their allotment on the Bakken Pipeline Canadian segment.[198] Flint Hills Resources, LP and Hess Corporation intervened in the proceeding, but neither company opposed the proposal.[199] PowerMark, LLC filed a motion to intervene and a limited protest but, subsequently, withdrew the protest.[200]

The FERC approved Enbridge's proposal as "just and reasonable and not unduly discriminatory."[201] The FERC stated "the proposal appropriately distinguish[ed] committed and uncommitted shippers and provid[ed] for rates consistent with the obligations of each class of shipper."[202] The tariff proposals

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189. *Id.*

190. *Id.*

191. *Id.*

192. *CCPS Transp., LLC*, 121 F.E.R.C. ¶ 61,253 (2007) [hereinafter *CCPS*], *order on reh'g*, 122 F.E.R.C. ¶ 61,123 (2008).

193. *Mid-America Pipeline Co.*, 116 F.E.R.C. ¶ 61,040 (2006) [hereinafter *Mid-America*].

194. *CCPS*, *supra* note 192, at P 19.

195. *Mid-America*, *supra* note 193, at P 24.

196. 133 F.E.R.C. ¶ 61,167 at P 17; *see also* August 26 Petition, *supra* note 186, at 15.

197. *Id.*

198. *Id.*

199. *Id*. at 20; *see also* Motion to Intervene of Flint Hill Resources, LP, FERC Docket No. OR10-19-000 (Sept. 27, 2010); Motion to Intervene of Hess Corporation and Comments in Support of Petition, FERC Docket No. OR10-19-000 (Sept. 27, 2010).

200. 133 F.E.R.C. ¶ 61,167 at P 20; *see also* Motion of PowerMark, LLC to Intervene and Limited Protest, FERC Docket No. OR10-19-000 (Sept. 27, 2010); Notice of Withdrawal of Protest of PowerMark, L.L.C., FERC Docket No. OR10-19-000 (Oct. 18, 2010).

201. 133 F.E.R.C. ¶ 61,167 at P 37.

202. *Id*. at P 40.

also provided a "significant amount of capacity for uncommitted shippers," as previously required in *CCPS* and *Mid-America*.[203]

3. Order Accepting Tariff, Subject to Conditions, *Enbridge Pipelines (North Dakota) LLC*

On August 30, 2010, Enbridge Pipelines (North Dakota) LLC (Enbridge) filed a revision to its rules and regulations tariff to "implement[] a temporary freeze on the creation of Regular Shippers" to address the proliferation of new shippers on Enbridge's system.[204] Enbridge proposed the change to its proration policy in response to the continued "erosion of capacity available [to Enbridge's] historical shippers."[205] Enbridge also cited the growing administrative difficulties and the continued incentive for shippers to create new shipping companies to maintain or increase shipper allocations under the existing apportionment rules.[206]

Protests were filed by Suncor Energy Marketing, Inc. (Suncor),[207] the Indicated Shippers[208] and the Centerpoint Parties.[209] Suncor challenged the lawfulness of the change, claiming that the new rule "effectively eliminate[d] [a New Shipper's] opportunity to become a Regular Shipper," thereby denying New Shippers access to 90% of the pipeline's capacity.[210] Suncor argued that the proposal was "unlawful under the Interstate Commerce Act (ICA) as it violat[ed] the common carrier's obligation to provide service upon reasonable request."[211] The Centerpoint parties also argued that the new policy was in violation of the ICA because it provided "undue or unreasonable preference" to Regular Shippers.[212] Indicated Shippers "state[d] that [Enbridge] failed to sufficiently establish that the proposed [policy did] not show undue preference to some shippers over others."[213]

Enbridge responded to the numerous protests by pointing out that only eleven of its 180 shippers intervened and only six shippers protested, therefore the proposal represented a fair solution and the overall response was indicative

203. *Id.*

204. *Enbridge Pipelines (North Dakota) LLC*, 132 F.E.R.C. ¶ 61,274 at P 1 (2010); *see also* Enbridge Pipelines (North Dakota) LLC Local Proportional Tariff Rules and Regulations Governing the Gathering and Transportation of Crude Petroleum by Pipeline, FERC Docket No. IS10-614-000 (Aug. 30, 2010).

205. 132 F.E.R.C. ¶ 61,274 at P 8.

206. *Id.*

207. Motion to Intervene and Protest of Suncor Energy Marketing Inc., FERC Docket No. IS10-614-000 (Sept. 14, 2010).

208. Indicated Shipper parties included PowerMark, LLC, and Downstream Petroleum Placement Consultants, Inc. 132 F.E.R.C. ¶ 61,274 at P 9; *see also* Motion to Intervene and Protest of Indicated Shippers, FERC Docket No. IS10-614-000 (Sept. 14, 2010).

209. The Centerpoint Parties included Centerpoint Access, LLC, Durham Transport, LLC, and Rosedale Capital Partners, LLC. 132 F.E.R.C. ¶ 61,274 at P 9; *see also* Protest and Motion to Intervene of Centerpoint Access, LLC; Durham Transport, LLC; and Rosedale Capital Partners, LLC, FERC Docket No. IS10-614-000 (Sept. 14, 2010).

210. 132 F.E.R.C. ¶ 61,274 at P 10.

211. *Id.*

212. *Id*. at P 11 (quoting ICA, 49 U.S.C. app. §§ 1(6), 3(1) (1988)).

213. *Id*. at P 12.

of general shipper support for the proposal.[214] Enbridge argued that the proposal did not grant a permanent undue preference to certain shippers because the freeze was temporary and no permanent restriction in granting Regular Shipper status would be imposed.[215]

The FERC accepted Enbridge's proposed tariff change on September 30, 2010 as just and reasonable.[216] The FERC acknowledged that the "proposal create[d] a preference but . . . not . . . an 'unreasonable preference'" given that Enbridge would continue to provide New Shippers with "access to 10 percent of the capacity and . . . the ability to establish a shipping history" that would allow the shippers "to convert to a Regular Shipper at the end of the 24 month period."[217] The FERC found that the "policy [did] not create an 'unreasonable advantage'" for shippers given the temporal nature of the change and because Enbridge expected to offer additional expansion capacity at approximately the same time the twenty-four month freeze would be lifted.[218] Furthermore, the FERC noted that the twenty-four month freeze would allow the carrier and its shippers to devise a longer term solution to the continuing apportionment issues.[219]

4. Order Following Technical Conference, Consolidating Proceedings, Denying Complaints, Rejecting Tariff, and Requiring Adoption of New Prorationing Procedure, *Platte Pipe Line Co*.

On September 17, 2010, the Commission issued its Order Following Technical Conference, Consolidating Proceedings, Denying Complaints, Rejecting Tariff, and Requiring Adoption of New Prorationing Procedure with regard to Platte Pipe Line Company (Platte).[220] This order was the most recent in several following the onset of prorationing on the Platte system and should be viewed in light of the regulatory background. The Platte Pipe Line Company system experienced prorationing problems commencing in late 2005 – largely stemming from increasing volumes of crude petroleum being produced from North Dakota and Montana, coupled with continuing strong volumes from Canada.[221] In 2006, Platte changed its prorationing system from pro rata allocation of nominations to prorationing for most of its mainline[222] based on historical volumes over a rolling six-month period, with a set-aside of 10% of capacity to "New Shippers."[223] That filing was contested but ultimately largely approved.[224] In that proceeding, the FERC also established the principle that

214. *Id.* at P 13; *see also* Response of Enbridge Pipelines (North Dakota) LLC to Protests of Tariff Filing at 2-3, FERC Docket No. IS10-614-000 (Sept. 20, 2010) [hereinafter Enbridge Response].

215. 132 F.E.R.C. ¶ 61,274 at P 14; Enbridge Response, *supra* note 214, at PP 4-5.

216. 132 F.E.R.C. ¶ 61,274 at P 34.

217. *Id*. at P 26.

218. *Id.*

219. *Id*.

220. *Suncor Energy Mktg., Inc. v. Platte Pipe Line Co.*, 132 F.E.R.C. ¶ 61,242 (2010) [hereinafter 2010 Order].

221. *Id.* at PP 4, 8.

222. Platte retained a pro rata allocation for the initial segment of its system within Wyoming. *Platte Pipe Line Co.*, 115 F.E.R.C. ¶ 61,215 at PP 1-2 (2006).

223. *Platte Pipe Line Co*., 117 F.E.R.C. ¶ 61,296 at P 10 (2006).

224. 117 F.E.R.C. ¶ 61,296 at P 41.

shippers needed to be on notice of a change to historical volume-based prorationing to give them an opportunity to build a history of shipments in light of the proposed rules.[225] Prorationing issues persisted on the Platte system, however, and in the spring of 2009, two shippers filed complaints regarding Platte's' application of the prorationing procedure in March and April 2009 and in the alternative challenging its lawfulness, seeking damages and revised procedures.[226]

After extended negotiations regarding the complaints failed to result in a settlement, Platte filed a revised proration procedure in January 2010, proposing to implement a prorationing system based on the collective historical volumes transported to particular destinations; nominations to destinations would be allocated pro rata.[227] Platte argued that this approach was a reasonable response to problems arising from the current system, in which the New Shipper category appeared to be manipulated by historic shippers and speculative entities, and because the incumbent Historic Shippers were arbitraging their capacity, with unhelpful effects both on other shippers and on Platte's competitive position.[228] The proposal was opposed by all but one of the system's shippers, who argued that the proposal would unlawfully constrain their use of the pipeline and would place undue control in the hands of refiners, among other points.[229] The opposing shippers proposed an alternative proration procedure, which was generally similar to the procedure adopted in 2006 but addressed the relationship of the pipeline's two segments differently, among other changes.[230]

The Commission's Staff held a technical conference in July 2010 to consider the parties' positions and, on September 17, 2010, issued its 2010 Order.[231] The 2010 Order consolidated the complaint and tariff proceedings, denied the complaints, rejected Platte's 2010 proposed procedure, directed Platte to adopt the shippers' prorationing proposal, and required that there be a review of that procedure one year after the date on which the shippers' proposal were to be implemented.[232]

Regarding the complaints seeking damages, "[t]he Commission conclude[d] that it was reasonable for Platte to interpret and apply the [2006 procedure] as it did in March and April 2009," and that the complainants failed to carry their burden of proof.[233] However, the Commission found that one aspect of the complaints – the need for a single method of prorationing for both segments of the system – appeared to be supported by both the complainants and by the pipeline.[234]

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225. *Platte Pipe Line Co*., 115 F.E.R.C. ¶ 61,215 at P 31 (2006).

226. Complaint and Request for Expedited Action of Suncor Energy Marketing Inc. and Suncor Energy (U.S.A.) Inc. at ¶¶ 7, 8, FERC Docket No. OR09-6-000 (Apr. 10, 2009).

227. 2010 Order, *supra* note 220, at PP 66-68.

228. *Id.* at PP 76-77.

229. *Id.* at PP 82-96.

230. *Id.* at PP 123-125.

231. *Id.* at PP 1-2.

232. *Id.* at P 2.

233. *Id.* at P 48.

234. *Id.*

On the merits of the proposed destination-based methodology, the Commission sharply disagreed with Platte regarding the permissible basis for implementing prorationing methods. The Commission found that

> Platte's efforts to justify this replacement of its [2006 procedure was] based largely on irrelevant and generally unsupported claims that the pipeline's competitive position is being jeopardized by the alleged arbitrage of current shippers' transportation entitlements and that it seeks to protect potential shippers that do not have historical allocations on the pipeline.[235]

The Commission went on to find that the "[p]roposal would violate [Platte's] ICA section 1(4) common carrier obligation to provide transportation upon reasonable request, . . . the prohibition against any undue or unreasonable preference established in ICA section 3(1),"[236] and the prohibition of ICA section 1(6) against "unjust and unreasonable classifications, regulations, and practices."[237] The Commission further found that Platte's proposal, "based on the history of transportation to certain defined Destinations, [was] unprecedented, cumbersome, and vague, and it afford[ed] the Destinations unwarranted and improper control over transportation on Platte's pipeline system."[238] The Commission rejected Platte's evidence regarding both the impact on its competitive position and on the impact and level of shipper arbitrage and further concluded that those impacts would not be relevant, that their use to support a tariff change contravened the ICA, that its operation would be uncertain, and that it would replace one flawed method with another flawed method.[239]

The FERC then concluded that the Shipper Proposal – which largely extended the historical volume allocation method to both segments of the pipeline – would be just and reasonable and therefore required its adoption.[240] Although the shipper proposal would not have been imposed in a proceeding involving only Platte's own tariff filing, the Commission consolidated the tariff filing proceeding with the complaint proceedings and ordered the relief as part of the complaint.[241] A further review of the Platte prorationing procedure is due in October 2011, "one year from the date on which Platte implement[ed]" the prescribed proposal.[242]

II. SIGNIFICANT COURT DECISIONS

A. Western Refining Southwest, Inc. v. FERC

In *Western Refining Southwest, Inc. v. FERC*, the U.S. Court of Appeals for the 5th Circuit held that the FERC lacked jurisdiction to hear a dispute over a lease capacity agreement under the ICA.[243]

235. *Id.* at P 22.
236. *Id.*
237. *Id.* at P 24.
238. *Id.* at P 22.
239. *Id.*
240. *Id.* at P 145.
241. *Id.* at P 137.
242. *Id.* at P 2.
243. Western Ref. Sw., Inc. v. FERC, 636 F.3d 719, 727 (5th Cir. 2011).

The agreement in question provided, in relevant part, (1) that Western Refining Pipeline Company (Western Pipeline)[244] would receive the right to transport up to 15,000 barrels per day of crude oil in Enterprise Crude Pipeline, LLC's (Enterprise)[245] Hobbs, New Mexico to Midland, Texas pipeline, with notification of the required capacity to be provided on or before the 25th day of the preceding month and for a monthly payment of at least a fixed base capacity amount;[246] (2) that Enterprise would build a new pipeline from Hobbs, New Mexico, to Lynch, New Mexico, where an interconnection would be established with Western Pipeline's Jal, New Mexico to Bisti, New Mexico pipeline;[247] (3) that Western Pipeline would have the right to transport an additional quantity of crude oil in the new Enterprise pipeline; and (4) that Western Pipeline would maintain a minimum quantity of crude oil in the Enterprise pipeline systems to serve as line fill.[248] A separate crude oil purchase agreement stated that Western Refining Southwest, Inc. would "purchase a minimum of 10,000 barrels of crude oil per day from Enterprise for the first two years," with declining purchase amounts during subsequent years.[249]

In June 2008, after Western Pipeline failed to provide timely notice of its intent to use any of its capacity under the lease agreement, Enterprise reversed the flow of the Midland to Hobbs pipeline, emptied 26,000 barrels of Western Pipeline's line fill into a storage tank, and began transporting crude oil in that line for its own purposes.[250] In response, Western Pipeline asked Enterprise to release 46,200 barrels of its crude oil inventory.[251] Enterprise replied by releasing 20,200 barrels but stated that the remaining volume of crude oil had to remain in its pipeline system to maintain the minimum inventory required under the lease agreement.[252] On February 9, 2009, Western Pipeline filed a complaint with the FERC.[253] The complaint alleged that Enterprise had violated the ICA and the terms of the lease agreement by summarily reversing the flow of its Hobbs to Midland pipeline and retaining the crude oil that Western Pipeline had

244. Giant Pipeline Company was the original party to the lease capacity agreement. In May 2007, Western Refining, Inc., the parent company of Western Pipeline, acquired Giant Industries, the parent company of Giant Pipeline Company. *Western Ref. Pipeline Co. v. TEPPCO Crude Pipeline, LLC*, 127 F.E.R.C. ¶ 61,288 at P 2 (2009). For simplicity, Giant Pipeline Company is referred to as Western Pipeline in this summary.

245. Enterprise was known as TEPPCO Crude Pipeline, LLC at the time of the original agreement. *Western Ref. Sw.*, 636 F.3d at 720.

246. *Id.* at 721.

247. 127 F.E.R.C. ¶ 61,288 at P 3.

248. *Id.* at 27.

249. *Western Ref. Sw.*, 636 F.3d at 721. Giant Industries Arizona was the party that originally entered into to the crude oil purchase agreement. Western Refining Southwest, Inc. assumed its obligations under the agreement as a result of Western Refining, Inc.'s May 2007 acquisition of Giant Industries, the parent company of Giant Industries Arizona. 127 F.E.R.C. ¶ 61,288 at P 2.

250. *Western Ref. Sw.*, 636 F.3d at 721; 127 F.E.R.C. ¶ 61,288 at P 9.

251. *Western Ref. Sw.*, 636 F.3d at 721; 127 F.E.R.C. ¶ 61,288 at P 9.

252. *Western Ref. Sw.*, 636 F.3d at 721; 127 F.E.R.C. ¶ 61,288 at P 9.

253. On that same date, Western Pipeline also "notified [Enterprise] that it was terminating the . . . lease [capacity] agreement." 127 F.E.R.C. ¶ 61,288 at P 11.

provided as line fill.[254] The complaint sought damages as relief from Enterprise under the ICA.[255]

In June 2009, the FERC issued an order dismissing the complaint for lack of jurisdiction.[256] Specifically, the FERC found that the ICA did not apply to the conduct in question, *i.e.*, that the lease agreement had created a private contractual relationship between Western Pipeline and Enterprise and that any dispute over that agreement had to be heard in state court.[257] The FERC also found, in the alternative, that dismissal would be appropriate under the doctrine of primary jurisdiction.[258] Western Pipeline sought judicial review of that order after the FERC denied its request for rehearing.[259]

In a March 4, 2011 decision, the 5th Circuit affirmed the order of dismissal on jurisdictional grounds.[260] The Court began its analysis on the merits by stating that the FERC's ruling on the extent of its authority under the ICA was subject to *Chevron*'s two-step analysis: Did Congress speak directly in the statute to the precise question at issue? If so, that unambiguously expressed intent must be given effect. If not, was the agency's interpretation of the statute permissible and entitled to deference?[261]

In analyzing the first step, the Court explained by way of background that "common carriers engaged in . . . [t]he transportation of oil . . . by pipeline" were brought within the scope of the ICA in the Hepburn Act of 1906.[262] Further, the FERC received the right to use that statutory authority seven decades later in the Department of Energy Organization Act.[263] The Court noted, however, that oil pipelines were not subject to all of the common carrier provisions in the ICA.[264] The Court further noted that, the FERC's authority under the ICA was far narrower than its authority under the Federal Power Act and Natural Gas Act, particularly with respect to leases.[265]

After stating that the text of the ICA was clear, the Court opined that "the question of whether the [FERC] has jurisdiction over the dispute between the

254. *Western Ref. Sw.*, 636 F.3d at 721-22.

255. *Id.* at 722.

256. 127 F.E.R.C. ¶ 61,288 at P 1.

257. *Id.* at P 27.

258. *Western Ref. Sw.*, 636 F.3d at 722.

259. *Id.*

260. Before addressing the merits, the Court rejected the FERC's argument that the case was not ripe for federal appellate review as a result of a pending state court proceeding between Western Pipeline and Enterprise. Specifically, the Court explained that the extent of the FERC's jurisdiction under the ICA was fit for a judicial decision, *i.e*., that issue had been decided by the FERC in the order on review and was not being considered by the state court. The Court also explained that Western Pipeline would suffer hardship by withholding court consideration. Accordingly, the Court concluded that the matter was ripe for federal appellate review. *Id.* at 722-723 (citing Abbott Labs. v. Gardner, 387 U.S. 136, 149 (1967), *abrogated on other grounds by* Califano v. Sanders, 430 U.S. 99 (1977)).

261. *Western Ref. Sw.*, 636 F.3d at 723 (citing Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984)).

262. *Id.* (citing Hepburn Act of 1906, Pub.L. No. 59–337, § 1, 34 Stat. 584).

263. *Id.* at 723-24 (citing Department of Energy Organization Act, Pub.L. No. 95–91, § 402(b), 91 Stat. 565 (1977) (codified at 49 U.S.C. § 60502)).

264. *Id.* at 724.

265. *Id.* at 724 (citing Federal Power Act § 203(a)(1)(A), 16 U.S.C. § 824b(a)(1)(A)(2005); Natutal Gas Act § 7(b), (c), 15 U.S.C. §§ 717f(b), (c) (1938)).

parties turns on whether, under these facts, Enterprise was acting as a common carrier when it leased capacity on its pipeline to Western [Pipeline]."[266] The Court then answered that question in the negative, noting that Western Pipeline was identified as the sole common carrier in the lease agreement;[267] that Western Pipeline, not Enterprise, had obtained a waiver from the FERC of the ICA's tariff filing and reporting requirements;[268] that Western had subsequently filed tariffs with the FERC that included the capacity leased from Enterprise;[269] and that all of Western's monthly payments had been made in accordance with the terms of the lease agreement, rather than on the basis of Enterprise's tariff filings with the FERC.[270] Citing the U.S. Court of Appeals for the Tenth Circuit's opinion in *Phillips Pipe Line Co. v. Diamond Shamrock Refining & Marketing. Co.* as persuasive authority,[271] the Court stated that "Western [Pipeline] is not a shipper paying tariff rates to a common carrier, Enterprise, in order to transport oil through the pipeline, but a common carrier and a lessee."[272]

The Court concluded its analysis by rejecting Western's attempt to expand the extent of the FERC's authority based on the definition of transportation in the ICA and noting that its interpretation was consistent with the intent of Congress.[273] The Court also rejected Western's two remaining procedural arguments, *i.e.,* that the FERC erred in dismissing its complaint without holding an evidentiary hearing and by resolving disputed factual issues in determining the extent of its subject-matter jurisdiction.[274]

B. Flint Hills Resources Alaska, LLC v. FERC (2011)

On January 18, 2011 the U.S. Court of Appeals for the District of Columbia Circuit, issued a decision vacating and remanding a Commission Order concerning the Trans Alaska Pipeline System (TAPS).[275] As explained by the Court, shippers on TAPS tender crude oil of varying qualities (and economic value) to the pipeline, all of which is commingled into a common stream.[276] The TAPS quality bank is an accounting mechanism pursuant to which shippers who tender lower quality crude oil make payments to shippers who tender higher quality crude oil, so that no shipper is unjustly harmed or enriched by the commingling of the oil in the pipeline.[277] The quality bank uses reference prices for different components of the crude oil stream – referred to as "cuts" – and a recent FERC proceeding concerned the appropriate valuation of the West Coast

266. *Id.* at 725.
267. *Id.* at 726.
268. *Id.* at 725.
269. *Id.*
270. *Id.*
271. *Id.* at 726 (citing Phillips Pipe Line Co. v. Diamond Shamrock Ref. & Mktg. Co., 50 F.3d 864, 867-68 (10th Cir. 1995)).
272. *Id.*
273. *Id.* at 726-27.
274. *Id.* at 727-28.
275. Flint Hills Res. Alaska, LLC v. FERC, 631 F.3d 543 (D.C. Cir. 2011).
276. *Id.* at 544.
277. *Id.*

Heavy Distillate cut.[278] After accepting and suspending tariff filings that contained a proposed valuation of the West Coast Heavy Distillate cut,[279] the Commission ordered a hearing, which ultimately led to an administrative law judge decision that rejected certain aspects of the tariff filings.[280] The Commission upheld that decision in Opinion No. 500[281] and "directed the TAPS Carriers to make a 'compliance filing.'"[282] The Commission later accepted the compliance filing, making it effective June 1, 2006 (*i.e.*, the date as of which the former reference price was no longer published).[283]

A 2005 statute, "Section 4412 of the Motor Carrier Safety Reauthorization Act[,] . . . impose[d] a limit on the retroactivity of [FERC] orders changing 'quality bank adjustments' paid" by shippers.[284] In particular, Section 4412(b)(2) provided "that for proceedings starting after the date of enactment such orders cannot reach back more than 15 months before 'the earliest date of the first order of the [FERC] imposing quality bank adjustments in the proceeding.'"[285] In the orders under review, the FERC determined that its "first order" for these purposes was its 2006 order setting the case for hearing.[286] Flint Hills Resources Alaska, LLC and Petro Star Inc. filed petitions for review in the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit), contending that the first order should be the 2008 order accepting the compliance filings.[287]

In an order dated January 18, 2011, the D.C. Circuit found the FERC's interpretation of Section 4412 to be inconsistent with the statute and vacated and remanded the FERC's orders.[288] The court disputed that an order accepting and suspending tariff filings constituted an order of the FERC "imposing quality bank adjustments," since such an order merely permitted the tariffs to take effect pending the outcome of further proceedings.[289] The Court was also troubled by the Commission's selection of June 1, 2006 as the effective date for the new valuation, finding that this reach back was not supported by the ICA.[290] In remanding the case to the Commission to determine the appropriate "first order," the Court declined to articulate its view as to which of Commission's orders constituted the "first order."[291]

278. *Id.* at 544-45; *BP Pipelines (Alaska) Inc.*, 116 F.E.R.C. ¶ 61,291 at P 11 (2006), *aff'd on reh'g*, Opinion No. 500, 122 F.E.R.C. ¶ 61,236 (2008).

279. 116 F.E.R.C. ¶ 61,291 at P 11.

280. *BP Pipelines (Alaska) Inc.*, 120 F.E.R.C. ¶ 63,018 (2007).

281. 122 F.E.R.C. ¶ 61,236.

282. *Flint Hills*, 631 F.3d at 545.

283. *Id.*; *BP Pipelines (Alaska) Inc.*, 125 F.E.R.C. ¶ 61,254 (2008).

284. *Flint Hills*, 631 F.3d at 544.

285. *Id.* (emphasis omitted).

286. *Id.*

287. *Id.* at 545.

288. *Id.* at 544.

289. *Id.* at 546.

290. *Id.*

291. *Id.* at 549.

C. Flint Hills Resources Alaska, LLC v. FERC (2010)

In Opinion No. 502, the Commission ruled that the 2005 and 2006 rates for the Trans Alaska Pipeline System (TAPS), which were set pursuant to the TAPS Settlement Methodology (TSM), were unjust and unreasonable.[292] In place of the TSM, the Commission applied its generally applicable ratemaking methodology set forth in *Williams Pipe Line Co.*[293] Multiple petitions for review of Opinion No. 502 were filed with the court of appeals by the TAPS Carriers,[294] and the D.C. Circuit upheld the Commission, finding that the Commission's rulings were not arbitrary and capricious or that the petitioners' challenges were unripe.[295]

The Court upheld the Commission's use of rate base balances from the TSM to determine the rate base remaining to be recovered under rates subsequent to December 31, 2004.[296] The Commission had rejected the Carriers' contention that rates should be based on "straight-line depreciation figures" from their FERC Form 6 filings, finding that "the [C]arriers had recovered accelerated depreciation under TSM" and permitting the Carriers to utilize straight-line depreciation would allow recovery of "accumulated depreciation more than one time."[297] The Carriers asserted that there would be "no double recovery [if] Opinion No. 154-B is consistently applied" and that the Commission's "ruling violated their right not to have the [TAPS Settlement Agreement] used . . . against them."[298] The Court rejected these arguments, determining that "[t]he past is what it was."[299] Because the Carriers based rates charged to shippers on accelerated depreciation, it was not arbitrary and capricious for the Commission to rely on that justification.[300]

The Court likewise rejected the Carriers' similar claims concerning (1) their recovery of "$450 million in . . . costs that the [C]arriers amortized under the TSA" and (2) recovery of "deferred return."[301] The Court found the Carriers' arguments on these issues were "functionally equivalent" to their arguments on accelerated depreciation discussed above.[302]

The Carriers also argued that they were entitled to a starting rate base write-up under Opinion No. 154-B.[303] To facilitate the transition from the old

292. Opinion No. 502, *BP Pipelines (Alaska) Inc.*, 123 F.E.R.C. ¶ 61,287 at PP 1-2 [hereinafter Opinion No. 502], *order on reh'g*, 125 F.E.R.C. ¶ 61,215 (2008), *reh'g denied*, 127 F.E.R.C. ¶ 61,317 (2009), *aff'd*, *Flint Hills*, 627 F.3d 881 (D.C. Cir. 2010). The TSM was a component of the 1985 TAPS Settlement Agreement (TSA). Opinion No. 502 at P 4.

293. 123 F.E.R.C. ¶ 61,287 at P 28 (citing Opinion No. 154-B, *Williams Pipe Line Co.*, 31 F.E.R.C. ¶ 61,377, *reh'g denied in part and modified by*, 33 F.E.R.C. ¶ 61,327 (1985)).

294. The State of Alaska also petitioned for review of one portion of Opinion No. 502 concerning alleged discrimination. The Court rejected this challenge. Flint Hills Res. Alaska, LLC v. FERC, 627 F.3d 881, 884 (D.C. Cir. 2010).

295. *Id.* at 885.

296. *Id.* at 884-885.

297. *Id.* at 885; Opinion No. 502, *supra* note 292, at P 76.

298. *Flint Hills*, 627 F.3d at 885.

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.* at 886.

valuation rate base methodology to the trended original cost rate base methodology implemented by Opinion No. 154-B "and to protect the reasonable expectations of their investors," the Commission allowed pipelines to take "a one-time 'write-up' of . . . rate base."[304] The Court upheld the Commission's determination that the Carriers were not entitled to such a "write-up" because the "FERC never approved valuation-based rates for TAPS" and the rates adopted for TAPS were based on the TSM.[305] Therefore, "neither the transition theory nor the interest in protecting investor expectations" applied to TAPS.[306]

The Court also rejected the Carriers' challenge to the Commission's computation of the "starting rate base balance for 2006."[307] The Carriers alleged that the Commission miscalculated the unrecovered rate base for 2006.[308] The Court found that any miscalculation had no "impact on 2006 refunds . . . and [that] the Commission . . . made no final ruling on rates to be in effect" after 2006.[309]

Furthermore, the Court ruled against the Carriers on their claim that the Commission could not "order refunds when its calculation of just and reasonable rates [utilized] a methodology different from the one employed for the pre-existing . . . rate."[310] The Court found that this argument misinterpreted *Sea Robin Pipeline Co. v. FERC*.[311] Recognizing that Opinion No. 502 merely "limit[ed] the 2005 and 2006 charges to those prevailing in 2004,"[312] the Court found no violation of *Sea Robin*.[313] On the State's "claim for refunds for alleged discriminatory rates," the Court held that the State failed to show competitive injury.[314] The Court noted that it was "not sure how a non-shipper complainant, . . . such as . . . the State, . . . would show competitive injury."[315] As to the Commission's rulings on dismantlement, removal, and restoration (DR&R), the Court found the Carriers' challenges unripe.[316] The Court reasoned that it was unclear whether there would be any DR&R monies to refund when TAPS was ultimately dismantled and any order of refunds would raise additional issues which should not be decided piecemeal.[317] However, the Court upheld the Commission's order requiring the Carriers to account for DR&R collections.[318]

Finally, the Court held that challenges to the Commission's requirement of a "uniform" TAPS rate and pooling mechanism were not ripe because both issues were being litigated before the FERC.[319]

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304. *Id.*
305. *Id.*
306. *Id.*
307. *Id.* at 886.
308. *Id.*
309. *Id.* (citation omitted).
310. *Id.* at 886-887.
311. *Id.* at 887 (discussing Sea Robin Pipeline Co. v. FERC, 795 F.2d 182 (D.C. Cir. 1986)).
312. *Id.*
313. *Id.* at 888.
314. *Id.*
315. *Id.*
316. *Id.* at 889.
317. *Id.* at 889-890.
318. *Id.* at 890.
319. *Id.*

D. United States v. BP Exploration (Alaska), Inc.

On May 3, 2011, the U.S. Department of Justice (DOJ), U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration (PHMSA), and the U.S. Environmental Protection Agency (EPA) announced a settlement with BP Exploration Alaska, Inc. (BPXA) of certain claims related to 2006 oil spills from BP pipelines on the Alaskan North Slope.[320] On July 13, 2011, the presiding judge approved and entered a consent decree embodying the settlement.[321]

Under the terms of the settlement, BPXA will pay a $25 million civil penalty and implement certain injunctive relief, including a system-wide integrity management program covering some 1600 miles of transportation and production pipelines.[322] "The purpose of the [integrity management] program is to reduce the likelihood and" consequences of spills from BP's crude oil pipeline system.[323] The program is expected to cost $60 million over the next three years.[324]

The settlement addresses civil claims made in a March 31, 2009 complaint filed by the DOJ on behalf of the PHMSA and the EPA in U.S. District Court for the District of Alaska, including allegations that BPXA illegally discharged over 5,000 barrels of oil from its pipelines. failed to prepare and implement certain spill prevention measures in violation of the Clean Water Act, failed to timely comply with a PHMSA Corrective Action Order in violation of the Pipeline Safety Act, and failed to properly remove asbestos containing materials from its pipeline in violation of the Clean Air Act.[325] The civil settlement follows a 2007 plea agreement in which BP was sentenced to three years probation and paid a $20 million criminal penalty related to one of the 2006 spills.[326] The injunctive relief is applicable to both oil transportation and production facilities and is based on the combined jurisdiction of EPA and PHMSA. The case is the first instance in which PHMSA has pursued a judicial remedy for a violation of a Corrective Action Order, and the first time PHMSA and EPA have pursued a joint compliant related to a pipeline accident.

320. Notice of Lodging of Consent Decree and Request for Stay, United States v. BP Exploration (Alaska), Inc., No. 3:09-cv-000064 (D. Alaska May 3, 2011).

321. Consent Decree, United States v. BP Exploration (Alaska), Inc., No. 3:09-cv-000064 (D. Alaska July 13, 2011), *available at* http://www.epa.gov/compliance/resources/decrees/civil/cwa/bpnorthslope-cd.pdf.

322. *Id.* at 8, 11-39.

323. *Id.* at 19.

324. Press Release, U.S. Dep't of Justice, BP Exploration Alaska to Pay $25 Million Penalty for Alaskan North Slope Oil Spill (May 3, 2011), *available at* http://www.justice.gov/opa/pr/2011/May/11-enrd-560.html.

325. Amended Complaint at 2, 11 U.S. v. BP Exploration (Alaska), Inc., No. 3: 09-cv-000064 (D. Alaska May 5, 2011).

326. *Id.* at 8; Judgment, United States v. BP Exploration (Alaska), Inc., No. 3:07-CR-00125 (D. Alaska Dec. 13, 2007).

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