

REPORT OF THE OIL & LIQUIDS COMMITTEE

This report summarizes policy and legal developments that have occurred at the Federal Energy Regulatory Commission (FERC), Pipeline and Hazardous Materials Safety Administration (PHMSA), and in the federal courts. This report covers the period between July 1, 2014 and June 30, 2015.*

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I. SIGNIFICANT FERC ADMINISTRATIVE ORDERS

A. Rulemaking

1. Order No. 783-A: Revisions to Page 700 of FERC Form No. 6

On July 18, 2013, the FERC issued a final rule modifying the information required to be reported on Page 700 of Form No. 6 in order to facilitate calculation of an oil pipeline's actual return on equity.¹ The modifications to Page 700 adopted by the FERC in Order No. 783 require oil pipelines to provide "additional information regarding rate base, rate of return, return rate base, and income taxes."² Requests for rehearing of Order No. 783 were filed on August 19, 2013.³

All requests for rehearing of Order No. 783 were denied by the FERC on September 26, 2014, in Order No. 783-A.⁴ The FERC denied the request of the Association of Oil Pipelines (AOPL) for clarification regarding the calculation of Rate of Return-Adjusted Capital Structure Ratio for Stockholder's Equity (line 6b) on Page 700 as unnecessary, stating that the value on line 6b should be calculated consistent with Opinion No. 351-A.⁵ In addition, the FERC denied AOPL's request for rehearing of an aspect of the formula adopted in Order No. 783 to calculate Actual ROE Percentage, affirming the inclusion of the current year's Deferred Earnings in the numerator of that formula.⁶ The FERC also rejected as untimely AOPL's proposed alternative for addressing the inflationary component of return reflected in the current year's Deferred Earnings.⁷ AOPL's rehearing request that the FERC permit parties to advocate alternatives to Actual ROE

1. Order No. 783, *Revisions to Page 700 of FERC Form No. 6*, 144 F.E.R.C. ¶ 61,049 at P 1 (2013); 78 Fed. Reg. 44,424 (2013) (to be codified at 18 C.F.R. pt. 357).

2. Order No. 783-A, *Revisions to Page 700 of FERC Form No. 6*, 148 F.E.R.C. ¶ 61,235 at P 2 (2014).

3. *Id.* at P 4.

4. *Id.* at P 1.

5. *Id.* at P 6.

6. *Id.* at P 10.

7. 148 F.E.R.C. ¶ 61,235 at P 12.

Percentage formula during the preliminary screening stage was also denied as unnecessary.⁸

The FERC next denied the request for rehearing of the Joint Shippers, which argued that Order No. 783 had failed to adequately address comments proposing to amend Page 700 reporting requirements to specify that the Total Interstate Operating Revenues (line 10) must include the jurisdictional portion of the revenues from Oil Allowance Revenue (Account 230), Storage and Demurrage Revenue (Account 240), Rental Revenue (Account 250), and Incidental Revenue (Account 260).⁹ The Joint Shippers' request that the FERC reconsider its rejection of their proposals to modify Account 301 to require oil pipelines to report additional information was also denied as it was outside the scope of the rulemaking.¹⁰ The FERC also denied the Liquids Shippers Group's request for rehearing, which had argued that the FERC erred by failing to consider proposals to require oil pipelines to provide Page 700 work papers to interested parties upon request, and file separate Page 700 data for each segment of the pipeline.¹¹ These proposals were found to be outside the "limited nature" of the proceeding.¹²

B. Jurisdictional Issues

1. Palmetto Products Pipe Line LLC

In January 2015, Palmetto Products Pipe Line LLC (Palmetto) filed a Petition for Declaratory Order (Petition) for a new pipeline system that would transport refined petroleum products and denatured fuel ethanol from origin points in Louisiana, Mississippi, and South Carolina to destination points in South Carolina, Georgia, and Florida (Pipeline).¹³ Since the FERC had not, to date, ruled on whether its jurisdiction under the Interstate Commerce Act (ICA) extends to interstate transportation of ethanol by pipeline, Palmetto requested in the Petition that the FERC find it has jurisdiction over the interstate transportation of denatured fuel ethanol by pipeline and therefore has authority to approve the proposed terms and conditions of service related to the Pipeline's transportation of ethanol.

Palmetto submitted that jurisdiction resides with the FERC under section 306 of the Department of Energy Organizational Act of 1977 (DOE Act), based on the analysis set forth in *Gulf Central Pipeline Co.*, 50 F.E.R.C. ¶ 61,381 (1990), *aff'd CF Industries Inc. v. FERC*, 925 F.2d 476 (1991).¹⁴ The FERC agreed. It

8. *Id.* at P 15.

9. The Joint Shippers consisted of Valero Marketing and Supply Company, Airlines for America, and the National Propane Gas Association; 148 F.E.R.C. ¶ 61,235 at PP 16, 26.

10. *Id.* at P 30.

11. For purposes of the request for rehearing, the Liquid Shippers Group included Anadarko Energy Services Company, Apache Corporation, ConocoPhillips Company, Devon Gas Services, L.P., Encana Marketing (USA) Inc., Marathon Oil Company, Murphy Exploration & Production Company-USA, and Noble Energy, Inc.; 148 F.E.R.C. ¶ 61,235 at P 32.

12. *Id.* at P 33.

13. Order on Petition for Declaratory Order, *Palmetto Products Pipe Line LLC*, 151 F.E.R.C. ¶ 61,090 at P 1 (2015).

14. Department of Energy Organizational Act of 1977 (DOE Act) § 306, 42 U.S.C. § 7155 (1999), *repealed by* Revised Interstate Commerce Act of 1994, Pub. L. No. 103-272, § 7(b), 108 Stat. 1379; 151 F.E.R.C. ¶ 61,090 at P 17.

reiterated the test set forth in *Gulf Central* of whether a commodity falls under the definition of “oil” under the DOE Act, such that the FERC would have jurisdiction over the transportation of the commodity by pipeline.¹⁵ That test entails assessing: “(1) whether the commodity is a fuel source in that it has heating value and is used for energy-related purposes; (2) whether the cost of transportation will have an impact on energy markets; and (3) whether the commodity will compete with oil or other refined products for capacity in the pipeline.”¹⁶

Applying those principles to denatured fuel ethanol, the FERC ruled that it has jurisdiction over its transportation under the ICA.¹⁷ It found that ethanol is a fuel source, is used for energy-related purposes, and is a direct substitute for gasoline.¹⁸ It noted that “the Energy Information Administration has recognized that ethanol has its own energy content and has classified it as a fuel source.”¹⁹ It also found that the cost of the transportation of ethanol would have an impact on energy markets because “ethanol accounts for ten percent of the total volume of motor gasoline, and that volume is likely to increase given federal renewable fuel standards.”²⁰ Therefore, “[a]s ethanol consumption increases, more pipeline capacity would be required causing the cost to transport other liquids to change.” Finally, the FERC found that “ethanol [would] compete for the same pipeline capacity as . . . oil and other refined products regulated by the [FERC].”²¹ Based on these facts, the FERC found that ethanol falls under the definition of “oil” as used in the DOE Act, and thus, it has jurisdiction over the transportation of this product by pipeline.

C. *Tariff and Ratemaking Issues*

1. *Calnev Pipe Line LLC*

On July 10, 2014, the FERC issued an Order Denying Rehearing in *Calnev Pipe Line LLC (Calnev)*, wherein it denied intervening shippers’ rehearing request seeking a FERC order directing how revenues received from a joint transportation rate between two affiliated pipelines (*Calnev Pipe Line LLC (Calnev)* and *SFPP, L.P. (SFPP)*) would be reflected on each pipeline’s FERC Form No. 6, Page 700.²²

The *Calnev* proceeding was initiated when *Calnev*, in conjunction with *SFPP*, filed a joint tariff with the FERC providing for joint transportation service from Watson or East Hynes, California, to McCarran International Airport or North Las Vegas, Nevada. Several shippers intervened and filed comments in response to the joint tariff filing, requesting that the FERC prescribe the appropriate procedures that *Calnev* should follow in dividing the revenues obtained through

15. 151 F.E.R.C. ¶ 61,090 at P 30.

16. *Id.*

17. *Id.* at P 31.

18. *Id.*

19. *Id.*

20. 151 F.E.R.C. ¶ 61,090 at P 31.

21. *Id.*

22. Order Denying Rehearing, *Calnev Pipe Line LLC*, 148 F.E.R.C. ¶ 61,016 (2014).

the joint tariff.²³ In response, the FERC issued a letter order on December 31, 2013 (Letter Order), requiring Calnev and SFPP to maintain records of all revenues obtained under the joint rate.²⁴ The FERC did not, however, dictate how the pipelines were to divide revenues arising under the joint rate.²⁵

The intervening shippers filed a request for clarification or, in the alternative, rehearing of the Letter Order on January 29, 2013 (Request), asserting a new argument that the FERC should require Calnev and SFPP to report in their respective Page 700s the actual revenue generated from the joint tariff in connection with their respective facilities, without giving effect to or application of the division of joint tariff revenue.²⁶ The FERC denied the Request, finding that (1) the Request unreasonably expanded the scope of the proceeding, (2) the shippers failed to explain why the protections set forth in the Letter Order were not adequate, and (3) the arguments concerning Page 700 were irrelevant because SFPP's portion of the joint rate was already subject to refund in an ongoing proceeding and no shipper had protested Calnev's portion of the joint rate.²⁷ The FERC also stated that, were there a future challenge of either the rates of Calnev or SFPP, there are adequate protections in place to ensure the justness and reasonableness of the joint rate based on the aggregate circumstances of the joint rate and not on the individual circumstances of the local rate or the division of revenues between the relevant pipelines.²⁸

2. Chaparral Pipeline Company, LLC

On July 31, 2014, the FERC approved Chaparral Pipeline Company, LLC's (Chaparral) amendment to its tariff changing the pipeline's treatment of off-specification (off-spec) product, among other tariff provisions.²⁹ Chaparral's tariff added new language that would allow the pipeline to treat any off-spec product at the product shipper's sole expense. The tariff also included a charge for the actual shipping and handling of the off-spec product plus an additional 104 cents per barrel (cpb) penalty charge.³⁰ One shipper protested that Chaparral had not adequately justified its 104 cpb penalty charge.³¹ The protesting shipper argued further that the penalty charge may improperly incentivize Chaparral to accept more off-spec product than it had accepted in the past in order to charge shippers the new penalty.³²

Chaparral answered that the penalty was designed to deter nomination and shipment of off-spec product.³³ Chaparral asserted further that, during 2013,

23. *Id.* at P 4. The shippers urged that this was necessary to ensure that the appropriate refunds would be calculated upon the conclusion of SFPP's West Line rate proceeding because movements on SFPP's West Line comprised a portion of the joint movement under the joint tariff with Calnev.

24. *Id.* at P 5.

25. *Id.*

26. *Id.* at P 8.

27. 148 F.E.R.C. ¶ 61,016 at PP 15-17.

28. *Id.* at P 17.

29. Order Accepting Tariff Filing, *Chaparral Pipeline Co., LLC*, 148 F.E.R.C. ¶ 61,080 (2014).

30. *Id.* at P 2.

31. *Id.* at P 5.

32. *Id.* at P 6.

33. *Id.* at P 8.

approximately 32% of the volumes shipped on the pipeline were off-spec product and, citing elevated levels of hydrogen sulfide, that the off-spec product volumes jeopardized the safety and quality of other shippers' volumes.³⁴ Finally, Chaparral disputed the assertion that it would actively seek out off-spec volumes, stating that doing so would devalue other shippers' products, causing harm to the pipeline's reputation that would in turn deter shippers from shipping their products on the pipeline.³⁵

In approving Chaparral's proposed tariff changes, the FERC cited the 32% of total volumes that were off-spec during 2013 and also noted that hydrogen sulfide posed immediate risk to pipeline workers and harmed sensitive pipeline infrastructure.³⁶ The FERC concluded that Chaparral provided adequate justification for its tariff revisions addressing off-spec product.

3. Mid-American Pipeline, LLC

On July 31, 2014, the FERC approved Mid-American Pipeline, LLC's (MAPL) proposal to adjust its off-spec product penalty provisions.³⁷ Specifically, MAPL proposed to "collect its actual treating and handling charges" plus an additional penalty charge increase from 100 to 104 cpb for off-spec product delivered to MAPL.³⁸ As in *Chaparral* above, one shipper argued that MAPL had not demonstrated that the change to the penalty charge was necessary to address quality issues.³⁹ MAPL argued that the penalty provision is not new, and that the tariff filing brought the tariff in line with MAPL's normal practices.⁴⁰ The FERC agreed with MAPL and determined that the existing tariff language provided for a penalty for off-spec product and was not only a shipping and handling charge.⁴¹ The FERC noted that the penalty provision in question had "existed unchallenged for over a decade" and concluded that MAPL's proposed four cent increase to the off-spec penalty was acceptable because it was in line with penalty provisions for other pipelines and that Commission policy allows for penalty increases to preserve the penalty's effectiveness as a deterrent.⁴²

4. Enbridge Energy, Limited Partnership

On July 31, 2014, the FERC issued a Letter Order accepting Enbridge Energy, Limited Partnership's (Enbridge) June 24, 2014 Supplement to its Facilities Surcharge Settlement (First Supplement) with the Canadian Association of Petroleum Producers (CAPP).⁴³ The First Supplement filed by Enbridge sought

34. 148 F.E.R.C. ¶ 61,080 at PP 9-10.

35. *Id.* at PP 13-14.

36. *Id.* at P 15.

37. Order Accepting Tariff Filing, *Mid-American Pipeline, LLC*, 148 F.E.R.C. ¶ 61,079 (2014).

38. Tariff Filing, *Mid-American Pipeline, LLC*, FERC Docket No. IS14-587-000 (July 1, 2014).

39. 148 F.E.R.C. ¶ 61,080 at PP 4-7 (2014); 148 F.E.R.C. ¶ 61,079 at P 3 (2014).

40. 148 F.E.R.C. ¶ 61,079 at PP 4-5.

41. *Id.* at P 7. The protesting shipper attempted to answer MAPL's assertion that the previous tariff language allowing a treating and handling charge operated as a penalty for off-spec product, arguing that the existing language served as a charge for service, not a penalty intended to deter specific conduct. But it appears that FERC did not consider the arguments of the shipper's answer to MAPL's answer.

42. *Id.* at PP 7-8.

43. Letter Order, *Enbridge Energy, Ltd. P'ship*, 148 F.E.R.C. ¶ 61,082 at P 1 (2014).

to recover previously unrecovered costs from a 1998 Settlement Agreement regarding capacity expansion of Enbridge's Lakehead System, as well as all unrecovered legacy integrity-related costs and 50% of future integrity-related costs.⁴⁴

No parties intervened or protested the First Supplement, with the exception of CAPP's intervention in support thereof.⁴⁵ The FERC pointed favorably to the First Supplement's support of pipeline integrity while lowering the per-barrel surcharge by 28 cents per barrel (from 31 cents per barrel down to 3 cents per barrel), as well as its elimination of risk for over-collection from shippers due to Enbridge's annual true-up.⁴⁶ The FERC also made note of the collaborative efforts of Enbridge and CAPP to identify appropriate projects independently, thereby supporting the FERC's policy of favoring settlements as a means to avoid litigation and lessen regulatory burdens.⁴⁷

On February 2, 2015, the FERC again issued a Letter Order accepting Enbridge's December 1, 2014 filing of a Supplement to its Facilities Surcharge Settlement (Second Supplement) with CAPP.⁴⁸ Enbridge sought FERC approval of the Second Supplement to add certain costs to the Facilities Surcharge Settlement for further capacity expansion of its Lakehead System, referred to as Project 24 therein.⁴⁹ During negotiations concerning Project 24, Enbridge sought to expand capacity to a greater volume than initially negotiated by both Enbridge and CAPP in a previous agreement.⁵⁰ To help gain CAPP's approval for this increase to capacity above that volume previously negotiated by the parties, Enbridge elected to exclude 12.2% of the capital costs of building a portion of the capacity upgrade from the facilities surcharge calculation.⁵¹

Suncor Energy Marketing, Inc. (Suncor) filed a protest to the Second Supplement, and Flint Hills Resources Canada, LP (Flint Hills) filed a request for clarification, and in the alternative, a protest.⁵² CAPP again intervened in support of the Second Supplement.⁵³ Suncor argued that the additional storage tank capacity chosen by Enbridge was excessive and an indication that the additional storage tanks would not be break-out tanks, but rather receipt and delivery tanks serving other Enbridge pipelines.⁵⁴ Additionally, Suncor contended that the proposed pipeline capacity would not be used and useful, as it would increase the capacity of a downstream section to a greater volume than the section immediately upstream from it (1,200,000 bpd to 800,000 bpd, respectively).⁵⁵

CAPP acknowledged the issues raised by Suncor and Flint Hills in its intervention, but indicated these issues would be resolved and accounted for in

44. *Id.* at P 1.

45. *Id.* at PP 9, 11.

46. *Id.* at PP 10-11.

47. *Id.* at P 11.

48. Letter Order, *Enbridge Energy, Ltd. P'ship*, 150 F.E.R.C. ¶ 61,069 at PP 1-2 (2015).

49. *Id.* at P 3.

50. *Id.* at PP 3-4.

51. *Id.* at PP 5-6.

52. *Id.* at P 13.

53. 150 F.E.R.C. ¶ 61,069 at P 13.

54. *Id.* at P 16.

55. *Id.* at P 17.

Enbridge's tariff rates and were not sufficient to deny the Second Supplement.⁵⁶ Enbridge echoed this sentiment, and noted that the Second Supplement does not deprive any potentially affected party of its ability to challenge tankage costs at the time those costs are actually included in tariff rates.⁵⁷ Enbridge also reasoned that even if the issues raised by Suncor and Flint Hills were not resolved prior to the disputed tanks entering service, any discrepancy would be resolved by the annual true-up of the Facilities Surcharge Settlement.⁵⁸

The FERC approved the Second Supplement "on grounds that it appeared fair, reasonable, and in the public interest."⁵⁹ However, in accepting the Second Supplement, the FERC noted that approval "did not constitute pre-approval of any costs associated with [the project]" covered, and "all parties [would] retain the ability to challenge costs related to Project 24 when Enbridge filed rates that included those costs."⁶⁰

On March 31, 2015, the FERC issued an Order accepting Enbridge's Tariff No. 43.16.0 in Docket No. IS15-203-000.⁶¹ The filing of the tariff by Enbridge implemented the specified facilities surcharge for a one-year period commencing April 1, 2015.⁶² The tariff reflected the true-up of the difference between the estimated and actual costs and throughput data from the prior year, as well as the projected costs and throughput for 2015, and included each of the 23 projects previously approved by shippers, plus parts of Project 24.⁶³ With respect to Project 24, Enbridge excluded from its filing the costs of the project previously protested by Suncor and Flint Hills from 150 F.E.R.C. ¶ 61,069, as well as a portion of the project that would not be in service in 2015.⁶⁴

Suncor filed a motion to intervene and protest in response to the tariff, and claimed that Enbridge used outdated capacities from expired agreements in calculating its surcharge, which would result in over-collection of \$94.6 million per year.⁶⁵ Enbridge rebuffed Suncor's claim by asserting that Suncor could not protest an unchanged element of a pipeline's tariff, and that it had not deviated from the previously accepted methodology in its present tariff.⁶⁶

The FERC approved the tariff on the basis that it had previously accepted the methods of calculation utilized by Enbridge and explained that the only issue they could resolve was whether or not Enbridge had appropriately applied the existing methodology in its calculations the FERC said that there was no reason to find a misapplication by Enbridge.⁶⁷ Furthermore, the FERC noted that any over-

56. *Id.* at PP 22-23.

57. *Id.* at PP 24-25.

58. 150 F.E.R.C. ¶ 61,069 at P 25.

59. *Id.* at PP 28-29.

60. *Id.* at P 28.

61. Order Accepting Tariff Filing, *Enbridge Energy, Ltd. P'ship*, 150 F.E.R.C. ¶ 61,253 (2015).

62. *Id.* at P 1.

63. *Id.* at P 3.

64. *Id.*

65. *Id.* at P 4.

66. 150 F.E.R.C. ¶ 61,253 at P 5.

67. *Id.* at P 7.

collection by Enbridge under the applied methodology would be returned to shippers at the next true-up.⁶⁸

5. Zydeco Pipeline Company LLC

On August 14, 2014, the FERC accepted and suspended, subject to refund and conditions, four tariffs filed by Zydeco Pipeline Company, LLC (Zydeco) related to its acquisition of the Houston to Houma (Ho-Ho) System from Shell Pipeline Company (Shell).⁶⁹ The FERC established a new hearing to determine whether Zydeco's rates are just and reasonable, while terminating the hearing, which was established prior to Zydeco's acquisition of the facilities, which focused on whether Shell's initial uncommitted rates for the Ho-Ho System were just and reasonable.⁷⁰

In January 2014, the FERC issued an order accepting two of these Shell tariffs, subject to refund, and established a hearing to determine whether the rates were just and reasonable.⁷¹ The FERC found that the Liquids Shippers Group's (LSG) members had standing to protest the rates in the tariffs filed by Shell in Docket Nos. IS14-104-000 and IS14-105-000 but was unable to determine whether the LSG members had standing to protest the third tariff filing (filed in Docket No. IS14-106-000) reflecting rates for transportation service from Erath, Louisiana.⁷² Therefore, the FERC directed the presiding administrative law judge (ALJ) to determine whether the LSG members had standing to protest the Erath rates (as discussed below).⁷³

Following Zydeco's acquisition of the Ho-Ho System, Zydeco submitted four tariff filings with FERC. In three of them, Zydeco adopted Shell's rate tariffs for transportation on the Ho-Ho System between Texas and Louisiana, which the LSG protested on the same grounds as they protested Shell's prior rates.⁷⁴ In the fourth tariff, Zydeco established initial non-contract rates for transportation service from Nederland, Texas to St. James, Clovelly and Lake Charles, Louisiana, which the LSG also protested as unjust and unreasonable.⁷⁵ For the three tariffs filed by Zydeco that adopted the rates established by Shell, the FERC ruled as it had on Shell's filings—*i.e.*, that the LSG had standing to challenge two of the filings, but for the tariff establishing rates from Erath, whether the LSG had standing would depend on the outcome of the ALJ's decision.⁷⁶ The FERC also found that the LSG had standing to protest the new initial rates from Nederland, Texas, because, consistent with its findings in the Shell proceedings, the LSG members had a substantial economic interest in the tariff.⁷⁷ The FERC stated that the LSG's

68. *Id.* at P 8.

69. Order Accepting and Suspending Tariffs Subject to Refund and Conditions, *Zydeco Pipeline Co.*, 148 F.E.R.C. ¶ 61,124 at P 1 (2014) [hereinafter *Zydeco Order*].

70. *Id.*

71. Order Accepting and Suspending Tariffs Subject to Refund and Conditions and Establishing Hearing, *Shell Pipeline Co. LP*, 146 F.E.R.C. ¶ 61,009 (2014).

72. *Id.* at PP 15, 17.

73. Partial Initial Decision, *Shell Pipeline Co. LP*, 147 F.E.R.C. ¶ 63,002 at PP 6-7 (2014).

74. *Zydeco Order*, *supra* note 69, at P 9.

75. *Id.*

76. *Id.* at P 14.

77. *Id.*

members are potential shippers or potential suppliers to shippers on the Zydeco system and two of its members have production behind the Nederland origin point.⁷⁸ The FERC also reaffirmed “that there is no requirement that a future shipper’s plan to ship must be imminent so long as there is an intention and ability to be a future shipper at reasonable rates.”⁷⁹ It found that the LSG “meets this standard and should not be held to a higher standard.”⁸⁰ The FERC therefore directed Zydeco to file cost, revenue, and throughput data supporting the initial non-contract rates in that tariff.⁸¹

In addition, the FERC granted Shell’s request to terminate the hearing on its Ho-Ho System rates in Docket Nos. IS14-104-000 and IS14-105-000.⁸² Due to the asset sale to Zydeco, Shell’s rates for service on the Ho-Ho System were for a locked-in period of approximately six months.⁸³ The members of the LSG were not shippers on the Ho-Ho System during the relevant time period and thus were not eligible for any refunds, and because no other protests were filed, the only remaining issue in the hearing would have been the level of refunds, so there was no reason to continue the hearing.⁸⁴

6. Shell Pipeline Company LP

On September 18, 2014, the FERC issued its Order on Partial Initial Decision, affirming the holding in a Partial Initial Decision issued on April 10, 2014, regarding whether the members of the Liquids Shippers Group (LSG) had standing to protest one of three tariffs filed by Shell Pipeline Company LP (Shell) to establish the initial uncommitted rates for the Ho-Ho System.⁸⁵

In an order issued on January 2014, the FERC found that it was unclear whether the LSG members had standing to protest a tariff filed by Shell establishing initial uncommitted rates for segmented transactions from Erath, Louisiana to Houma, Clovelly and St. James, Louisiana.⁸⁶ The FERC directed the ALJ to make a determination with respect to the LSG members’ standing to challenge the Erath rates and to either establish hearing procedures for those rates if it is determined that they do have a substantial economic interest or dismiss the protest in that docket if it is determined that they do not.⁸⁷

In the Partial Initial Decision, the ALJ found that the LSG had demonstrated a substantial economic interest in the Erath rates based on the facts and circumstances of the proceeding and thus had met the burden for standing to protest.⁸⁸ The ALJ found that the LSG could be “potential future shippers” or “potential suppliers to shippers” on the Erath Segment because production

78. *Id.*

79. Zydeco Order, *supra* note 69, at P 16.

80. *Id.*

81. *Id.* at P 15.

82. *Id.* at P 17.

83. *Id.*

84. Zydeco Order, *supra* note 69, at P 17.

85. 147 F.E.R.C. ¶ 63,002; Order on Partial Initial Decision, *Shell Pipeline Co. LP*, 148 F.E.R.C. ¶ 61,208 (2014).

86. 146 F.E.R.C. ¶ 61,009 at P 17.

87. *Id.*

88. 147 F.E.R.C. ¶ 63,002 at P 27.

locations vary over time due to purchases, sales, and new discoveries.⁸⁹ Next, the ALJ found that because the LSG had standing to protest the other two, related filings, it had standing to contest the rates along a segment within this pipeline flow.⁹⁰ The ALJ also found that the LSG had a substantial economic interest in the Erath rates because the cost and revenues would need to be allocated among all origin and destination shipments on the system to establish just and reasonable rates for shipments sourced at Houston.⁹¹ Shell was therefore directed to file cost, revenue, and throughput data supporting the Erath rates.⁹²

The FERC adopted the ALJ's finding, affirming that the LSG had demonstrated a "substantial economic interest" and therefore met the burden for establishing standing to protest the Erath rates.⁹³ Citing *Enbridge (Southern Lights) LLC*, the FERC held "that standing in oil pipeline proceedings 'is based on all of the facts and circumstances of the particular proceeding'" and that "there is no requirement that a future shipper's plan to ship must be imminent."⁹⁴ The FERC found that "there is not a bright line test for determining that a person has standing to protest."⁹⁵ The substantial economic interest standard is intended to assure that protesting parties have a sufficient interest to warrant the commitment of agency and pipeline resources to a review on the merits.⁹⁶ The FERC noted that, although the ALJ's rationale in the Partial Initial Decision regarding production areas varying over time would not alone establish standing, taken in the context of the LSG's standing in the two, related Shell tariff filings and the interconnected rate design aspects of the pipeline segments, the FERC affirmed the ALJ's determination that the LSG had sufficient economic interest for standing to protest the Erath rates.⁹⁷

7. High Prairie Pipeline, LLC v. Enbridge Energy, Limited P'ship

On October 1, 2014, the FERC issued an Order Denying Rehearing, denying High Prairie Pipeline, LLC's (High Prairie) rehearing requests challenging the FERC's dismissal of High Prairie's complaint against Enbridge Energy Limited Partnership (Enbridge).⁹⁸ On March 22, 2013, the FERC had dismissed High Prairie's complaint against Enbridge, which alleged violations of numerous sections of the Interstate Commerce Act (ICA) and sections 341.0 and 341.8 of the FERC's regulations.⁹⁹ Specifically, High Prairie had planned to construct a pipeline from the Bakken to Minnesota that would interconnect with Enbridge's

89. *Id.* at P 23.

90. *Id.* at P 24.

91. *Id.* at P 26.

92. *Id.* at P 28.

93. 148 F.E.R.C. ¶ 61,208 at P 31.

94. Order Accepting and Suspending Tariff, *Enbridge Pipelines (S. Lights) LLC*, 134 F.E.R.C. ¶ 61,067 at PP 11, 10 (2011); 148 F.E.R.C. ¶ 61,208 at P 30.

95. 148 F.E.R.C. ¶ 61,208 at P 31.

96. *Id.*

97. *Id.*

98. Order Denying Rehearing, *High Prairie Pipeline, LLC v. Enbridge Energy, Ltd. P'Ship*, 149 F.E.R.C. ¶ 61,004 (2014).

99. Order Dismissing Complaint, *High Prairie Pipeline, LLC v. Enbridge Energy, Ltd. P'Ship*, 142 F.E.R.C. ¶ 61,199 (2013).

pipeline at Clearbrook, but the parties never agreed on terms.¹⁰⁰ On May 17, 2012, High Prairie filed a complaint against Enbridge, alleging that Enbridge had failed to establish an interconnection policy in its tariff, that the terms and conditions Enbridge offered were not just and reasonable, and that Enbridge was unduly discriminating against High Prairie and its shippers.¹⁰¹

The FERC dismissed High Prairie's complaint on the basis that negotiations between the parties were ongoing and therefore High Prairie's claims were premature.¹⁰² Further, the FERC found that because Enbridge did not currently offer any interconnection service, it was not required to publish an interconnection policy, and there could be no claim of discriminatory treatment.¹⁰³

High Prairie requested rehearing of the FERC's dismissal on numerous grounds.¹⁰⁴ With respect to the interconnection issue, the FERC upheld its original finding that Enbridge does not offer interconnection service at Clearbrook, with the only current interconnection having been established "decades ago."¹⁰⁵ The FERC noted that even if Enbridge had once provided interconnection service, just as a pipeline can abandon a service, it can "discontinue a service previously provided at any time."¹⁰⁶ In addition, the FERC reiterated that Enbridge had not "denied" High Prairie interconnection service simply because High Prairie failed to "achieve every one of its goals during the negotiation process," but even if it had denied such service, there would be no cause of action under the ICA or FERC regulations.¹⁰⁷ High Prairie had attempted to analogize its complaint and ongoing negotiations to cases before the FERC that ultimately settled, but the FERC disagreed with this characterization, saying that High Prairie's complaint was distinguishable from a "cognizable claim."¹⁰⁸ High Prairie objected to the implication that it had to agree to terms before it could challenge them as "unjust and unreasonable," but the FERC ruled that because it could not force a pipeline to offer a particular service, it was only "[o]nce the pipeline provides the service" that "it must be offered on just and reasonable terms, and in a non-discriminatory manner."¹⁰⁹

The FERC also denied rehearing on its ruling that its regulations do not require publication of an interconnection policy, saying that the requirement that a pipeline publish its terms of service "presupposes that the pipeline offers the service in question."¹¹⁰ The FERC went on to clarify that pipelines are not required to publish in their tariffs "every possible adjunct to transportation service," including non-jurisdictional service or services included in other rates.¹¹¹ Finally, the FERC held that High Prairie had failed to allege discrimination

100. 149 F.E.R.C. ¶ 61,004 at P 2.

101. *Id.* at P 3.

102. *Id.*

103. *Id.*

104. *Id.* at P 5.

105. 149 F.E.R.C. ¶ 61,004 at P 13.

106. *Id.* at P 14.

107. *Id.* at P 18.

108. *Id.* at P 20.

109. *Id.* at P 22.

110. 149 F.E.R.C. ¶ 61,004 at PP 23, 25.

111. *Id.* at P 25.

because it “did not establish the fundamental element of such an allegation, evidence of a disparity in rates, terms, or conditions.”¹¹² Because Enbridge was not offering interconnection service, there were no rates, terms, or conditions for such service through which it could discriminate. As to the discrimination High Prairie alleged against its shippers, the FERC found that High Prairie had failed to demonstrate that its shippers were “similarly situated” to Enbridge’s existing shippers.¹¹³ Therefore, because it would be far too speculative to compare potential rates, terms, and conditions raised in negotiations for purposes of determining whether discrimination occurred, the FERC denied rehearing and upheld the dismissal of High Prairie’s complaint as “premature.”¹¹⁴

8. Guttman Energy, Inc., et al. v. Buckeye Pipe Line Co., L.P., et al.

On May 2, 2014, the FERC dismissed a complaint against Laurel Pipe Line Company, L.P. (Laurel) and established a hearing to examine whether Buckeye Pipe Line Company L.P. (Buckeye) possesses market power in certain Pennsylvania markets.¹¹⁵ The original complainants, Guttman Energy, Inc. (Guttman) and PBF Holding Company, LLC (PBF) sought rehearing. On November 6, 2014, the FERC granted rehearing in part and denied rehearing in part.¹¹⁶

Upon further consideration, the FERC determined that there were material issues of fact concerning whether Guttman’s shipments on Buckeye’s pipeline were interstate transportation subject to Buckeye’s interstate tariff rate (rather than Laurel’s intrastate rate). Specifically, the FERC found that the following details required further exploration:

(1) how Buckeye fulfills its obligation under the [Interstate Commerce Act] to properly classify shipments, (2) the nature of the contractual relationship between PBF and Guttman and whether the contract can be construed as a device to defeat interstate jurisdiction, (3) the physical flow of the oil transported and the nature of the facilities through which the oil is transported, (4) the operation of the T-4 nomination system, (5) how the respective parties are charged and billed, and (6) how the treatment of the Complainants compares to other shippers on Buckeye’s pipeline for purposes of classifying interstate or intrastate shipments.¹¹⁷

The FERC stated that the only issue to be set for hearing was whether the complainants’ shipments are interstate or intrastate transportation. No further proceedings were needed concerning other issues, such as whether Laurel should be a party and whether Buckeye’s interstate rate was too high when compared to Laurel’s intrastate rate. The FERC left it to the Chief Administrative Law Judge to decide whether to consolidate this issue with the ongoing investigation into whether Buckeye possesses market power in certain Pennsylvania markets.¹¹⁸

112. *Id.* at P 30.

113. *Id.* at P 31.

114. *Id.* at PP 32, 40.

115. Order Dismissing Complain in Part and Establishing Hearing, *Guttman Energy, Inc. v. Buckeye Pipe Line Co.*, 147 F.E.R.C. ¶ 61,088 (2014).

116. Order on Rehearing and Establishing Hearing, *Guttman Energy, Inc. v. Buckeye Pipe Line Co.*, 149 F.E.R.C. ¶ 61,103 (2014).

117. *Id.* at P 8.

118. *Id.* at P 10.

PBF and Guttman also sought rehearing concerning the scope of the market power investigation into Buckeye, but the FERC rejected those arguments, stating that “[t]he only evidence that is considered in determining whether market-based rates are still valid is whether the pipeline no longer lacks market power in the relevant market and not whether the market-based rates exceed cost-based rates.”¹¹⁹

9. Magellan Pipeline Co., L.P.

On December 12, 2014, the FERC accepted Magellan Pipeline Company, L.P.’s (Magellan) proposed amendment to its Rocky Mountain System tariff that, among other things, included new provisions for shippers to test and certify that petroleum products offered for transportation on the pipeline meet product grade specifications outlined on Magellan’s website.¹²⁰

A shipper protested the revisions to Magellan’s product specifications.¹²¹ The shipper argued that the product specifications go beyond the standards set by the American Society for Testing and Materials (ASTM) and other industry standards.¹²² The shipper also asserted that its costs to comply with the new requirements would require one-time investments totaling \$35,000 and ongoing expenses and economic penalties of approximately \$14 million annually.¹²³ The shipper suggested that Magellan’s process for granting waivers of these requirements could be implemented in an arbitrary or capricious manner and concluded that Magellan offered no operational or pipeline safety standards to justify the revisions to the proposed product standards.¹²⁴

Magellan argued that its product specifications reflected product standards common throughout the refined petroleum products industry, including in other parts of the Magellan pipeline system and that the ASTM standards the shipper cited are minimum standards for when refined products are delivered into trucks after being transported in pipelines.¹²⁵ However, due to unavoidable degradation of the products during transportation pipeline, transporters such as Magellan must establish standards that allow for product degradation but still ensure that the product meets federal and state standards when it reaches its destination.¹²⁶ Magellan also stated that its specification waiver provisions are implemented in a

119. *Id.* at P 14.

120. Order on Tariff, *Magellan Pipeline Co.*, 149 F.E.R.C. ¶ 61,222 at P 3 (2014).

121. *Id.* at PP 10-14. The shipper also protested proposed language regarding setoff rights and choice of law provisions, but the FERC rejected the protest and accepted the language. *Id.* at PP 15-16, 28-29.

122. *Id.* at PP 12-13. Specifically, the shipper protested the haze rating test for gasoline and No. 2 ultra-low sulfur diesel, stating that shipper would need to install new laboratory equipment to meet the testing requirements Magellan proposed. *Id.* at P 12. The shipper also argued the new product specifications would require the company to operate its refinery process units at higher severity and to make operational changes that limit commercial flexibility, each costing millions of dollars annually. *Id.*

123. *Id.* at P 11.

124. *Id.* at PP 13, 14.

125. 149 F.E.R.C. ¶ 61,222 at P 17. Magellan noted further that twenty refineries and other shippers have complied with the product specification provisions in the revised tariff language for many years. *Id.* at PP 18, 19.

126. *Id.* at P 27.

non-discriminatory manner, and that the protest raised no specific instances of discrimination in its application of the waiver provisions in the past.¹²⁷

Noting that Magellan's proposed product specifications complied with ASTM standards and conform to similar provisions on other refined products pipelines and would bring the Rocky Mountain System into conformity with other parts of Magellan's pipeline system, the FERC accepted the proposed tariff changes effective December 1, 2014.¹²⁸ The FERC noted that Magellan adequately explained that the heightened product specification standards are needed to account for degradation that occurs during pipeline transportation prior to delivery at a truck loading facility.¹²⁹ The FERC also concluded that Magellan's explanation of the production specification waiver provision, and its use to benefit all shippers on a non-discriminatory basis, adequately justified the provision.¹³⁰

10. American Airlines, Inc. v. Buckeye Pipe Line Co.

On December 18, 2014, the FERC issued an Order on Complaint and Establishing Hearing in Docket No. OR14-41-000, a complaint by American Airlines, Inc. (American) against Buckeye Pipe Line Company, L.P. (Buckeye).¹³¹ American alleged that Buckeye's rates for transportation in and around the New York City airports were not just and reasonable, arguing that Buckeye was over-recovering its cost of service by as much as 22.9%.¹³² American also alleged that Buckeye incorrectly excluded revenue from its Page 700, that Buckeye had not been able to keep up with deliveries into the New York City airports, had not called for prorationing, and had not used another of its lines to keep up with demand.¹³³ Buckeye argued its rates were grandfathered, and thus American had the burden of proving "a substantial change in economic circumstances" to justify a rate change.¹³⁴ Further, Buckeye said American's arguments regarding Buckeye's rates were "speculative, conclusory or made without justification or any analysis of the facts."¹³⁵ Buckeye also defended its decision not to declare prorationing formally at the New York City airports, saying that to do so would have "led to one or more airlines being without supply . . . while other airlines had more supply than they needed."¹³⁶

127. *Id.* at P 24.

128. *Id.* at P 27.

129. *Id.* The FERC also stated that its rules and regulations require an oil pipeline's transmittal letter accompanying a change in the carrier's rates, rules, or terms of service must explain those changes. *Id.* at n.6 (citing 18 C.F.R. § 341.2(c)(1)) (noting that Magellan's transmittal letter did not contain the same level of detail as its protest answer). "In the future, the Commission expects Magellan and other oil pipelines to fully comply with section 341.2(c)(1) by providing an adequate explanation in their transmittal letters as opposed to waiting to justify a filing in an answer." *Id.* at n.6.

130. 149 F.E.R.C. ¶ 61,222 at P 29.

131. Order on Complaint and Establishing Hearing, *American Airlines, Inc. v. Buckeye Pipe Line Company, L.P.*, 149 F.E.R.C. ¶ 61,241 (2014).

132. *Id.* at PP 2-3.

133. *Id.* at PP 4, 6-7.

134. *Id.* at P 13.

135. *Id.* at P 15.

136. 149 F.E.R.C. ¶ 61,241 at P 17.

The FERC held that there were “disputed issues of material fact concerning Buckeye’s practices relating to nominations, scheduling, and deliveries of jet or aviation turbine fuel to the New York City area airports that also need to be determined at an evidentiary hearing.”¹³⁷ Thus, the complaint was set for hearing and for settlement judge procedures.¹³⁸

11. SFPP, L.P.

On February 19, 2015, the FERC issued orders on rehearing in Docket Nos. IS08-390-002 and IS09-437-000 involving SFPP, L.P. (SFPP).¹³⁹ These dockets addressed the waterfront of cost-of-service ratemaking, with Opinion Nos. 511-B and 522-A (Opinions) addressing narrow matters raised on rehearing and in SFPP’s compliance filings. Collectively, the Opinions addressed, among other things, accumulated deferred income taxes (ADIT) and the role of indexing in calculating refunds and forward-looking rates. This report only addresses major issues for which the Commission granted rehearing.

With respect to ADIT, SFPP sought rehearing of Opinion Nos. 511-A and 522 to the extent the FERC intended to require use in the ADIT calculation of the weighted average marginal income tax rate for a single year (1996) for the deferred taxes for each year from 1997 forward. In the Opinions, the FERC held that, for the relevant periods in each docket, each year’s deferred taxes should be calculated based on the pipeline’s weighted average marginal income tax rate for the applicable year.¹⁴⁰

In Opinion No. 522-A, the FERC ruled that it would permit a pipeline to use the index to set refund and forward-looking rates—irrespective of the index increase actually taken by the pipeline during the relevant period—but only to the extent that the pipeline could justify the index amount under the FERC’s percentage comparison test.¹⁴¹ The FERC established the percentage comparison test in the context of its review of protests against index-based rate increases.¹⁴² Under the percentage comparison test, the pipeline is permitted to apply the index so long as the percentage change in the pipeline’s cost-of-service does not diverge from the percentage change in the index for the years at issue by more than ten percent.¹⁴³ In their comments on SFPP’s Opinion No. 522-A compliance filing, the shipper parties challenged the FERC’s ruling on the use of the index to set refund and forward-looking rates, and this issue remains pending before the FERC.

137. *Id.* at P 22.

138. *Id.* at P 24.

139. Order on Rehearing and Compliance Filing, *SFPP, L.P.*, 150 F.E.R.C. ¶ 61,096 (2015) (Opinion No. 511-B); *SFPP, L.P.*, 150 F.E.R.C. ¶ 61,097 (2015) (Opinion No. 522-A).

140. 150 F.E.R.C. ¶ 61,096 at P 21; 150 F.E.R.C. ¶ 61,097 at P 27.

141. 150 F.E.R.C. ¶ 61,097 at PP 69-70.

142. *Id.* at P 71.

143. *Id.*

12. Mars Oil Pipeline Co., Colonial Pipeline Co., Plains Pipeline, L.P.,
Enterprise TE Products Pipeline Co.

On February 27, 2015, the FERC issued an order rejecting the tariff filing of Mars Oil Pipeline Company (Mars) for an increase in its inventory management fee.¹⁴⁴ On January 28, 2015, Mars filed FERC Tariff No. 27.9.0 to increase its inventory management fee to 60 cents per barrel from 45 cents per barrel, an increase of 33%. In its filing, Mars claimed the fee was “non-jurisdictional” and was needed in order to maintain safe and reliable service on its system. On February 11, 2015, Chevron Products Company (Chevron) protested the tariff filing, claiming that under the Interstate Commerce Act, pipelines are obligated to provide justification for any new inventory management policies or fee; in addition, Chevron claimed that Mars provided no evidence that it is experiencing any problems with shippers maintaining inadequate inventory levels.¹⁴⁵

In its order, the FERC rejected Mars’ contention that the inventory management fee was entirely “non-jurisdictional” since the requirement to provide a certain level of oil inventory is a pre-requisite to meet the pipeline’s linefill needs.¹⁴⁶ The FERC pointed out that in the past, Mars had said that the inventory management fee was needed to deter shippers from not meeting their minimum linefill requirements. The FERC further confirmed that the inventory management fee was “inextricably tied” to the provision of jurisdictional pipeline service and the fact that some shippers may pay the fee in certain circumstances to cover excess petroleum situations, does not sever the link between the fee and the jurisdictional service. The FERC also asserted that Mars failed to provide sufficient justification for the fee increase and how such an increase would deter shippers from failing to add sufficient petroleum to linefill.¹⁴⁷

As part of its justification for rejecting the Mars filing, the FERC referred to Section 341.2(c)(1) of its regulations stating that tariff filing transmittal letters must “explain any changes to the carrier’s rates, rule, terms of conditions or service.” The FERC indicated that Mars failed to meet this requirement since it did not explain, in its transmittal letter, the basis for its view that the fee was “non-jurisdictional.” The FERC also confirmed that any failure to provide adequate explanation in a transmittal letter may result in a finding that the filing is “patently deficient.”¹⁴⁸

In three subsequent decisions, the FERC has reiterated that pipeline companies must follow Section 341.2(c)(1). In *Colonial Pipeline Company*, certain shippers alleged that Colonial was attempting to implement tariff changes prior to the requested effective date. The FERC found that neither the shippers nor the pipeline had complied with the regulations.¹⁴⁹ Regarding the pipeline, the FERC stated that it “has alerted oil pipelines that it expects pipelines to follow the

144. Order Rejecting Tariff Filing, *Mars Oil Pipeline Co.*, 150 F.E.R.C. ¶ 61,148 (2015).

145. *Id.* at P 4 & n.1 (citing *Mid-America Pipeline Co.*, 99 F.E.R.C. ¶ 61,119, at P 24 (2002), *reh’g denied*, 103 F.E.R.C. ¶ 61,233 (2003); *Kinder Morgan Operating L.P. “A”*, 99 F.E.R.C. ¶ 61,133, at 61,150 (sic) (2002), *order on reh’g*, 101 F.E.R.C. ¶ 61,017 (2002)).

146. 150 F.E.R.C. ¶ 61,148 at P 7.

147. *Id.* at P 8.

148. *Id.* at P 7 & n.7.

149. Order Suspending Tariff, *Colonial Pipeline Co.*, 150 F.E.R.C. ¶ 61,187 (2015).

regulation requiring the explanation of changes contained in section 341.2(c)(1).¹⁵⁰ The protesting shippers also did not comply with the regulations by filing their protest late. In order to address the substance of the issues rather than dispose of the case on procedural grounds, the FERC suspended Colonial's filing for a month and provided Colonial seven days to answer the protest.¹⁵¹ Colonial subsequently withdrew its tariff filing.

In *Plains Pipeline, L.P.*, the Commission rejected Plains Pipeline, L.P.'s revised tariff that included an exception to its gravity table because the transmittal letter failed to adequately support the proposed change.¹⁵² Likewise, in *Enterprise TE Products Pipeline Company*, the FERC rejected tariffs filed by Enterprise TE Products Pipeline Company, Dixie Pipeline Company, LLC, and Mid-American Pipeline Company, LLC, which sought to increase their off-spec penalties.¹⁵³ The FERC found the transmittal letters inadequate and therefore rejected the filings as inconsistent with section 341.2(c)(1).¹⁵⁴

D. Petitions for Declaratory Order

In addition to the declaratory orders discussed below, the FERC also issued several declaratory orders for liquids pipelines during the current reporting period.¹⁵⁵ However, those declaratory orders mostly reiterated regulatory assurances provided by the FERC in orders issued during prior reporting periods. Accordingly, this report does not summarize those orders, but rather summarizes the regulatory assurances that the FERC provided during the current reporting period and that address unique facts or that had not been granted by the FERC prior to the commencement of the current reporting period.

1. White Cliffs Pipeline, L.L.C

On July 15, 2014, the FERC issued a Declaratory Order (Order) in response to White Cliffs Pipeline, L.L.C.'s (White Cliffs) protested Petition for Declaratory Order (Petition).¹⁵⁶ White Cliffs sought approval from the FERC regarding its priority service, rate, and tariff structure for a proposed crude oil pipeline expansion project (Expansion), which were arrived at through an open season and the execution of throughput and deficiency agreements (T&Ds).

In the Petition, White Cliffs stated that it held a widely-publicized open season for the Expansion, which would double its capacity and run parallel to its existing pipeline.¹⁵⁷ White Cliffs requested the FERC find that: (1) the T&Ds would be upheld; (2) the T&D rates would be treated as settlement rates; and (3)

150. *Id.* at P 3.

151. *Id.*

152. Letter Order, *Plains Pipeline, L.P.*, FERC Order No. IS15-214-000 (2015).

153. Order Accepting Tariffs, Denying Special Permission and Directing Refunds, *Enterprise TE Products Pipeline Co.*, 152 F.E.R.C. ¶ 61,068 (2015).

154. *Id.* at P 8.

155. See generally *Enable Bakken Crude Services, LLC*, 148 F.E.R.C. ¶ 61,048 (2014); *Hiland Crude, LLC*, 148 F.E.R.C. ¶ 61,228 (2014); *Dakota Access, LLC*, 149 F.E.R.C. ¶ 61,275 (2014); *JBBR Pipeline LLC*, 150 F.E.R.C. ¶ 61,012 (2015); *Medallion Pipeline Company, LLC*, 150 F.E.R.C. ¶ 61,156 (2015).

156. Declaratory Order, *White Cliffs Pipeline, L.L.C.*, 148 F.E.R.C. ¶ 61,037 (2014).

157. *Id.* at P 10.

up to 90% of the Expansion capacity may be deemed priority committed capacity and made available at a premium rate for committed shippers.¹⁵⁸

Noble Energy, Inc. (Noble) and Kerr McGee Oil & Gas Onshore, LP (Kerr McGee) filed limited protests challenging the Petition. While both supported the Expansion and T&D, they argued that White Cliffs entered into a T&D with at least one shipper that did not participate in the open season and therefore requested that the FERC prevent capacity allocations to those shippers and require White Cliffs to hold a new open season for the Expansion. The shippers argued that offering priority service to some customers but not others was discriminatory, particularly since the newly-accepted shippers did not have to show adequate financial support.¹⁵⁹ White Cliffs opposed the protests and argued that they did not show proof of undue discrimination or undue preference and the T&Ds had the same terms.¹⁶⁰

The FERC found that White Cliffs conducted the open season in a manner consistent with FERC precedent because it was widely-publicized and provided all interested shippers a fair opportunity to become committed shippers. The FERC also found that the priority service, rate, and tariff provisions in the T&D Agreements were consistent with FERC precedent, and that the 10% reservation of Expansion capacity for uncommitted shippers was appropriate.¹⁶¹ However, the FERC found that the T&D Agreements that White Cliffs had entered into after the close of the open season went against ICA and FERC policies because all shippers were not afforded a fair and equal opportunity to obtain the remaining Expansion capacity. Therefore, the T&D Agreements entered into after the close of the open season were invalidated, and White Cliffs was required to hold another open season. The FERC further noted that White Cliffs violated its own amended notice extending the open season by two days because, although the notice stated that all T&D Agreements must be submitted by October 24, 2012, White Cliffs continued to enter into T&D Agreements after that date.¹⁶² The FERC opined that all arguments made by White Cliffs justifying the post-open season T&D Agreements were unpersuasive because White Cliffs failed to meet its basic obligations under the ICA.¹⁶³ Accordingly, the FERC conditionally granted the rulings requested in the Petition with respect to the Expansion capacity subscribed during the open season but ordered White Cliffs to conduct a new widely-publicized open season if it wished to obtain commitments for the surplus Expansion capacity on the same terms.¹⁶⁴

2. Tesoro High Plains Pipeline Company LLC, et al.

On August 18, 2014, the FERC issued a Declaratory Order granting the assurances sought by Tesoro High Plains Pipeline Company LLC (Tesoro Pipeline) in connection with a project to expand the capacity of an existing

158. *Id.* at P 13.

159. *Id.* at P 22.

160. *Id.* at PP 27, 31.

161. 148 F.E.R.C. ¶ 61,037 at P 46.

162. *Id.* at P 48.

163. *Id.* at P 47.

164. *Id.* at P 52.

segment of its crude oil pipeline system.¹⁶⁵ Among various typical regulatory assurances, Tesoro Pipeline's petition sought two notable rulings related to uncommitted shippers.

The open season held by Tesoro Pipeline offered all potential shippers the ability to bid on expansion capacity from Johnson's Corner to Ramberg Station in North Dakota.¹⁶⁶ In the petition, Tesoro Pipeline asked the FERC to confirm that at least 30% of the pipeline's capacity from the Johnson's Corner origin points designated in the open season notice may be reserved for uncommitted shippers.¹⁶⁷ The petition also contained what the FERC characterized as "a somewhat unusual request" for "confirmation that it is appropriate for Tesoro Pipeline to continue to charge the individual rates in effect from the Johnson's Corner origin points to Ramberg Station."¹⁶⁸

In its order, the FERC noted that it "previously found a reservation of at least 10 percent of the pipeline's capacity for uncommitted shippers is sufficient to provide reasonable access to the pipeline."¹⁶⁹ Accordingly, FERC found "the 30 percent capacity allocation proposed here for uncommitted shippers conforms to its policy."¹⁷⁰ With regard to Tesoro Pipeline's request for confirmation that it was appropriate to continue to charge the individual rates in effect from the Johnson's Corner origin points to Ramberg Station, the FERC found that, "to the extent already existing, previously approved, tariff rates are used after the commencement of the project in question, there is no reason why those rates should not continue."¹⁷¹ However, "to the extent Tesoro Pipeline requests approval for uncommitted rates for future use," the Commission reminded Tesoro Pipeline that "it must file such uncommitted rates with the Commission for approval prior to the pipeline going into service, and such rates must be approved by the date service under the committed rates commences."¹⁷²

3. Enbridge Energy, Limited Partnership

On August 29, 2014, the FERC issued a Declaratory Order confirming that Enbridge Energy, Limited Partnership (Enbridge) may establish a new receipt point on its Lakehead System at Flanagan, Illinois, which would be available for shipper nominations only in months when the Lakehead System is in apportionment upstream of Flanagan such that not all of the volumes nominated to or through Flanagan can be accepted.¹⁷³ The FERC found that the supplemental nomination process Enbridge proposed to use in case any barrels destined for Flanagan or beyond are apportioned upstream of Flanagan in a given month is

165. 148 F.E.R.C. ¶ 61,129 (2014); Although the petition referenced both Tesoro Pipeline and its parent, Tesoro Logistics Operations LLC, the FERC said, "for ease of understanding, Tesoro Pipeline refers to either entity." *Id.* at P 1 & n.1.

166. *Id.* at PP 6-7.

167. *Id.* at P 14.

168. *Id.* at PP 14, 20.

169. *Id.* at P 19.

170. 148 F.E.R.C. ¶ 61,129 at P 19.

171. *Id.* at P 21.

172. *Id.*

173. *Enbridge Energy, Ltd. P'ship*, 148 F.E.R.C. ¶ 61,157 at P 1 (2014).

consistent with FERC policy and Enbridge's common carrier obligations under the ICA.¹⁷⁴

As background, Enbridge simultaneously planned downstream expansion and extensions and upstream expansions and replacements on its Lakehead System, but the timeline for the upstream components had not aligned with the in-service schedule for the downstream components.¹⁷⁵ Enbridge's proposal addressed the possibility of a temporary period during which the downstream pipelines would have a larger take-away capacity at Flanagan than the capacity of the upstream pipelines serving that point.¹⁷⁶ Enbridge's temporary receipt proposal at Flanagan, in connection with a new rail terminal at Flanagan to be constructed by Enbridge's affiliate, were designed to help bridge that gap by providing shippers with the opportunity to move barrels by a combination of rail and pipeline in periods when upstream apportionment prevents those barrels from moving via an all-pipeline route.¹⁷⁷

While no protests were filed, Suncor Energy (Suncor) filed comments that generally supported Enbridge's proposal but raised certain concerns and suggestions.¹⁷⁸ The FERC found Suncor's claim that Enbridge's proposed supplemental nomination process would contravene its common carrier obligations to be unsupported.¹⁷⁹ Suncor's assertion that the proposed supplemental nomination process would not be open to anyone that requests transportation service was found to be misplaced.¹⁸⁰ FERC also held that Suncor's concerns about Enbridge's ability to terminate or suspend existing receipt or delivery points to be misplaced because pipelines do not need abandonment authority under the ICA.¹⁸¹

In granting the petition, the FERC found that Enbridge's proposed supplemental nomination process "balances between the pipeline's interest in efficiently utilizing the pipeline and its obligation to provide service upon reasonable request."¹⁸² It reminded Enbridge that the supplemental nomination procedures should be fully and completely described in its rules and regulations tariff.¹⁸³ The FERC also stated that, "to comply with ICA section 1(4), Enbridge Energy must hold this option out to all shippers in a fair and non-discriminatory manner."¹⁸⁴

4. Tesoro High Plains Pipeline Company LLC

On September 2, 2014, the FERC issued a Declaratory Order in response to a petition for declaratory order filed by Tesoro High Plains Pipeline Company

174. *Id.*

175. *Id.* at P 4.

176. *Id.*

177. *Id.* at P 5.

178. 148 F.E.R.C. ¶ 61,157 at PP 10-13.

179. *Id.* at P 19.

180. *Id.*

181. *Id.* at P 20.

182. *Id.* at P 21.

183. 148 F.E.R.C. ¶ 61,157 at P 22.

184. *Id.* at P 23.

LLC (Tesoro).¹⁸⁵ Tesoro requested FERC's approval of tariff rates and terms proposed for its Dunn Center Gathering System, including rates and terms set forth in the transportation service agreements (TSA) signed by committed shippers that had participated in the open season. Tesoro also requested that the FERC approve the proposed rate design and initial rate for uncommitted shippers. The FERC granted the petition in part and denied the petition in part. Among other things, Tesoro requested that the FERC approve (1) the \$2.25 uncommitted rate; (2) the right of committed shippers to assign their contractual rights to affiliates without Tesoro's consent and to non-affiliates with Tesoro's consent; and (3) its ability to negotiate a quality bank.¹⁸⁶

The FERC denied approval of Tesoro's proposed initial rate of \$2.25/barrel for uncommitted shippers, holding that the declaratory order process was not the proper venue to set such rates.¹⁸⁷ The FERC also opined on the TSA's contractual assignment provision, permitting Tesoro to differentiate between assignment to affiliates and non-affiliates on grounds that it operates in a non-discriminatory manner. The FERC stated in reference to the assignment provision that it was "imperative that parties provide a clear understanding of proposals to the Commission."¹⁸⁸ The FERC also explained that the parties were free to discuss the quality bank issue at any time and that it would only rule on the actual provisions agreed to if and when Tesoro publishes them in its tariff.¹⁸⁹

5. Alpha Crude Connector, LLC

On October 1, 2014, the FERC issued its Declaratory Order in *Alpha Crude Connector, LLC*.¹⁹⁰ Alpha Crude Connector, LLC (Alpha) requested that the FERC issue a declaratory order approving the overall tariff and rate structure and proposed apportionment policy for a new crude oil gathering project to be located in New Mexico and Texas.¹⁹¹ Alpha stated in its petition for a declaratory order that it had received sufficient commitments during the widely publicized open season for the project, but that it had announced a second open season to afford interested parties an additional opportunity to become committed shippers.¹⁹² Alpha also stated that it would offer the same committed shipper options in the second open season as were offered during the first open season.¹⁹³

Alpha's petition for a declaratory order was unique in certain respects. Alpha asked the FERC to approve a rate structure with "four proposed classes of committed service (Levels A-D, which are based on the level of volumes committed or the size of the acreage dedication)" plus one class of uncommitted service.¹⁹⁴ The initial rate to be paid by committed shippers "will vary, depending

185. *Tesoro High Plains Pipeline Co.*, 148 F.E.R.C. ¶ 61,160 (2014).

186. *Id.* at PP 6-7.

187. *Id.* at P 23.

188. *Id.* at P 24.

189. *Id.* at P 31.

190. 149 F.E.R.C. ¶ 61,001 (2014).

191. *Id.* at P 1.

192. *Id.* at P 7.

193. *Id.*

194. *Id.* at P 5.

on the size of the acreage dedication or volume commitment, as well as on the length of the contract term.”¹⁹⁵ Alpha requested an assurance that it could “provide most favored nation treatment for Level A Committed Shippers” because such shippers made the greatest acreage or volume and contract term commitments.¹⁹⁶ Alpha also sought assurance that it could assess a lower product loss allowance (PLA) on Level A and Level B committed shippers than the PLA assessed on Level C and Level D committed shippers and uncommitted shippers, in recognition of the fact that Level A and Level B committed shippers made the greatest volume or acreage dedications.¹⁹⁷ Alpha stated that it would bear the cost of the PLA discount afforded to Level A and Level B committed shippers.¹⁹⁸ In addition, Alpha noted that Level A and Level B committed shippers would not be required to provide electricity to power gathering pumps because they made the greatest commitments for the longest terms.¹⁹⁹

The FERC granted the rulings requested by Alpha, subject to conditions.²⁰⁰ Acknowledging Alpha’s plans to hold a second open season, the FERC stated that, “during the Second Open Season, should Alpha wish to offer interested shippers any terms that differ from the terms applicable to shippers participating in the Open Season, Alpha must seek specific prior Commission approval of any such terms.”²⁰¹ Although the FERC granted all of the assurances requested by Alpha, the FERC found that it was not clear who would bear the electricity costs from which the Level A and Level B committed shippers would be relieved.²⁰² The FERC therefore directed Alpha to include in its tariff a provision applying electricity charges to all classes of shippers in proportion to the volumes of crude oil they ship.²⁰³

On November 7, 2015, the FERC issued an Order Granting Clarification, which granted a motion filed by Alpha on October 16, 2014, asking the FERC to clarify the two conditions imposed in the Declaratory Order.²⁰⁴ Alpha argued that a second petition for a declaratory order was unnecessary because it would offer the same committed shipper options in the second open season as it offered in the first.²⁰⁵ Alpha also said that if it were to agree in the second open season to alter any terms of service agreed to by Alpha and a committed shipper in the initial open season, any such changes would be offered to, and voluntarily accepted by, any entity that executed a transportation services agreement in the initial open season.²⁰⁶ Alpha maintained that “it will not require the protections afforded by a second declaratory order to justify pursuing the investment and other

195. 149 F.E.R.C. ¶ 61,001 at P 8.

196. *Id.* at PP 9, 19.

197. *Id.* at P 12.

198. *Id.*

199. *Id.*

200. 149 F.E.R.C. ¶ 61,001 at P 25.

201. *Id.* at P 26.

202. *Id.* at P 28.

203. *Id.*

204. *Alpha Crude Connector, LLC*, 149 F.E.R.C. ¶ 61,111 at P 2 (2014).

205. *Id.* at P 4.

206. *Id.*

commitments necessary for the Project.”²⁰⁷ The FERC accepted these assurances in the Order Granting Clarifications.²⁰⁸

Alpha also argued that no tariff adjustment should be required with respect to electric cost recovery.²⁰⁹ The FERC agreed, clarifying that “A-Level and B-Level acreage—dedication Committed Shippers will not be required to pay the costs of electricity to power their gathering pumps.”²¹⁰ Rather, Alpha will bear their costs of electricity in recognition that they made the greatest commitments.²¹¹ The FERC explained, “[t]he C-Level and D-Level Committed shippers will be required to provide electricity to power their own gathering pumps, but this requirement will not apply to any shipper making volumetric commitments because they do not have gathering pumps that will require power.”²¹² The FERC also stated that Alpha “did not propose in its *pro forma* tariffs or elsewhere to impose electricity on any other shippers, so there will be no costs that could possibly be shifted to Uncommitted Shippers.”²¹³

6. Sunoco Pipeline L.P.

On December 1, 2014, the FERC issued a Declaratory Order approving Sunoco Pipeline L.P.’s (Sunoco) Petition for Declaratory Order regarding an expansion of its proposed pipeline system that would create additional pipeline capacity to transport ethane, propane, and butane from the Marcellus Shale and Utica Shale to Claymont, Delaware (Pipeline).²¹⁴

Among other things, Sunoco requested approval of its proposal to allow a committed shipper that executed a transportation services agreement (TSA) the option to amend or trade the origin points it selected under its TSA and to reallocate selected natural gas liquids (NGLs) under limited circumstances.²¹⁵ Under the TSA, a committed shipper was required to select in its TSA the specific volumes of propane and/or butane that it would ship from a specified origin point or points (Selected Origin Points).²¹⁶ However, the TSA gave a committed shipper a one-time option to amend its Selected Origin Points and to reallocate some or all of its selected NGLs among the amended Selected Origin Points within six months from the effective date of the TSA.²¹⁷ The TSA also gave a committed shipper a one-time option to trade, with another committed shipper, one or more of its Selected Origin Points with respect to the same volume of selected NGLs at least three months prior to the date the Pipeline commences operations.²¹⁸ The FERC approved Sunoco’s proposal to give committed shippers the option to

207. *Id.*

208. *Id.* at P 7.

209. 149 F.E.R.C. ¶ 61,111 at P 5.

210. *Id.* at P 8.

211. *Id.* at P 5.

212. *Id.* at P 8.

213. *Id.*

214. *Sunoco Pipeline L.P.*, 149 F.E.R.C. ¶ 61,191 at P 1 (2014).

215. *Id.* at P 21.

216. *Id.*

217. *Id.*

218. *Id.*

amend or trade their Selected Origin Points and to reallocate their selected NGLs as just and reasonable and consistent with Commission precedent.²¹⁹

Sunoco also sought approval that, in the event it decides to further expand the Pipeline's propane/butane capacity and elects to accept long-term volume commitments for such expansion capacity, it be permitted to give committed shippers the right of first offer (ROFO) to submit volume commitments on up to 75% of the expansion capacity that is being made available for long-term volume commitments until the tenth anniversary of the Pipeline's in-service date.²²⁰ Provided, however, that the volume commitment allowed to be submitted by a committed shipper pursuant to this ROFO would be capped at 50% of its volume commitment as of the date the Pipeline becomes operational.²²¹ The FERC also approved this, holding that it was not unduly discriminatory or preferential and was appropriate because of the committed shippers' financial support of the project.²²²

7. Palmetto Products Pipe Line LLC

On May 1, 2015, the FERC issued an order approving the Petition for Declaratory Order (Petition) that Palmetto Products Pipe Line LLC (Palmetto) filed for a new pipeline system to transport refined petroleum products and denatured fuel ethanol from origin points in Louisiana, Mississippi, and South Carolina to destination points in South Carolina, Georgia, and Florida (Pipeline). In its Petition, Palmetto requested that the FERC approve multiple aspects of its open season process and the terms of service set forth in the transportation services agreements that it entered into with shippers who were interested in obtaining firm capacity rights on the Pipeline. Many of the requests for which Palmetto sought approval had previously been approved by the FERC. However, three of the requests for which Palmetto sought approval were issues of first impression before the FERC.

First, Palmetto requested that the FERC find it has jurisdiction over the interstate transportation of denatured fuel ethanol by pipeline and therefore has authority to approve the proposed terms and conditions of service related to the Pipeline's transportation of ethanol. As described in section I(B)(1) of this report, the FERC found that it had such jurisdiction.²²³

Second, Palmetto requested that it be permitted to combine certain existing but underutilized capacity to provide firm transportation service on the Pipeline. As Palmetto explained in its Petition, a portion of the Pipeline's capacity was to be acquired by Palmetto via a long-term lease with Plantation Pipe Line Company (Plantation), which was comprised of "(1) capacity that had been historically and consistently underutilized on Plantation's system (Underutilized Capacity), and (2) capacity that Plantation would create on its system through expansion and construction efforts (Expanded Capacity)" (collectively, the Leased Capacity).²²⁴

219. 149 F.E.R.C. ¶ 61,191 at PP 31, 33.

220. *Id.* at P 17.

221. *Id.*

222. *Id.* at PP 31, 33.

223. 151 F.E.R.C. ¶ 61,090 at PP 30-31 (2015).

224. *Id.* at P 4.

The other portion of the Pipeline's capacity would be provided by greenfield facilities that Palmetto constructed. Palmetto established that the Underutilized Capacity had not been used by any shipper on Plantation's system for at least ten years.²²⁵ In addition, the Underutilized Capacity would be used to provide transportation services that were not currently offered by any other pipeline, including Plantation's pipeline.²²⁶ Palmetto also submitted that it was a more economic and efficient approach to lease the Underutilized Capacity from Plantation, thereby allowing Palmetto to offer services on the Pipeline at a lower cost and in a more timely manner than had it constructed such capacity itself.²²⁷ The FERC granted Palmetto's request that it be allowed to provide firm transportation service on the Underutilized Capacity.²²⁸ The FERC distinguished its ruling from its prior holding in *Colonial Pipeline Co.*, 146 FERC ¶ 61,206 (2014), noting that, unlike in *Colonial* where the pipeline was simply trying to convert existing capacity into contract capacity without any changes to the system, Palmetto was creating a new pipeline project, part of which enabled the use of underutilized existing capacity on an affiliated pipeline.²²⁹

Third, Palmetto requested approval of its proposal to release any unused Leased Capacity back to Plantation each month for Plantation's use. To maximize the efficient use of the Leased Capacity each month, Palmetto and Plantation developed a mechanism that would release any portion of the Leased Capacity that is not used by Palmetto shippers in a month back to Plantation for the potential use by Plantation's shippers. The release of the Leased Capacity would occur automatically each month prior to the in-service date of the Pipeline since Palmetto would not be able to provide transportation service on the Leased Capacity.²³⁰ Once the Pipeline is operational, the release would only occur each month if, following Palmetto's fulfillment of all requested nominations for service on the Pipeline, a portion of the Leased Capacity was still available for use.²³¹ The entirety of the Leased Capacity would then revert back to Palmetto at the end of each month.²³² The FERC found that Palmetto's proposed capacity release process was an efficient use of the Leased Capacity "because it would allow potential shippers on Plantation to use the Leased Capacity rather than have it sit idle."²³³ Further, all potential shippers were aware of how the capacity lease arrangement would work during the open season that Palmetto held. Finally, the capacity release arrangement would not undermine any of the rights that Palmetto had promised to its committed shippers because (1) the Leased Capacity would only be released to Plantation in the event that no shipper on the Pipeline wished to use such capacity, and (2) the Leased Capacity would automatically become available for Palmetto's use the following month.²³⁴

225. *Id.*

226. *Id.* at P 33.

227. *Id.*

228. 151 F.E.R.C. ¶ 61,090 at P 33.

229. *Id.*

230. *Id.* at P 34.

231. *Id.*

232. *Id.*

233. 151 F.E.R.C. ¶ 61,090 at P 34.

234. *Id.*

8. Express Pipeline LLC

On May 1, 2015, the FERC issued a Declaratory Order on a petition for declaratory order from Express Pipeline LLC (Express), proposing to construct new facilities and expand its existing pipeline system to transport crude petroleum from Western Canada to points in Montana and Wyoming.²³⁵

Among other things, Express requested that the Commission grant Express a waiver under section 4 of the ICA to permit it to charge committed shippers a higher rate for a shorter haul movement than that charged to uncommitted shippers for a longer haul movement.²³⁶ The Commission granted this waiver on the basis that (1) the committed shippers agreed to the committed shipper rates in an open season; (2) committed shipper and uncommitted shippers are not similarly situated; (3) the waiver would have no impact on uncommitted shippers; and (4) the FERC found no issue of abuse or discrimination.²³⁷

9. Belle Fourche Pipeline Company, et al.

On May 15, 2015, the FERC issued a Declaratory Order approving the overall rate and tariff structure for a new expansion pipeline that involved the expansion of Belle Fourche Pipeline Company's and Bridger Pipeline LLC's (collectively, the Carriers) pipeline systems and would provide crude oil transportation service from the Powder River Basin (PRB) to Guernsey, Wyoming (Pipeline).²³⁸ Among the proposed terms and conditions of service that the FERC approved in its Declaratory Order, there were three provisions that were unique to the Project, which are further described below.

First, shippers that executed a transportation services agreement (TSA) for transportation service on the Pipeline, pursuant to which such shippers agreed to ship, or otherwise pay for, a minimum volume of crude oil over a specified period of time (Committed Shippers), were given the flexibility to split their shipments between the various origin points on the Pipeline, and to have those shipments count toward fulfillment of their volume commitment obligations.²³⁹ The Carriers asserted this structure was appropriate because it was anticipated that most of the Committed Shippers would be marketers, not producers, of crude oil. Because marketers need to have transportation flexibility on a month-to-month basis in order to effectively respond to changing market conditions in the PRB, the Pipeline was designed to give marketers the required flexibility.²⁴⁰ The FERC approved this structure, recognizing that "[s]uch provisions provide flexibility to Committed Shippers to respond to market demands and commercial needs while offering pipelines sufficient investment to finance expansions."²⁴¹

235. Order on Petition for Declaratory Order, *Express Pipeline LLC*, 151 F.E.R.C. ¶ 61,093 (2015); *Id.* at P 2.

236. *Id.* at PP 9, 12.

237. *Id.* at P 12.

238. Order on Petition for Declaratory Order, *Belle Fourche Pipeline Co. and Bridger Pipeline LLC*, 151 F.E.R.C. ¶ 61,139 (2015).

239. *Id.* at P 6.

240. *Id.*

241. *Id.* at P 22.

Second, the TSA included a provision that if a Committed Shipper failed to ship its required committed volume in any given month, the Committed Shipper was required to make a deficiency payment to Carriers to account for such deficiency. Because each Committed Shipper had the flexibility each month to split its committed volumes among the various origin points on the Pipeline, as discussed above, and because there were different rates for the different origin points, the Carriers established a single rate (Deficiency Payment Rate) that would be multiplied by the Committed Shipper's deficient volumes to determine its deficiency payment.²⁴² The Deficiency Payment Rate was calculated to be near the median of the rates from all of the available origin points, which provided a reasonable approximation of the rate that a Committed Shipper would otherwise have paid for the portion of its committed volume that it failed to ship.²⁴³ The FERC approved the Deficiency Payment Rate, noting that it had previously approved other deficiency rate provisions and that such provisions ensure that a pipeline receives the finances to which its Committed Shippers agreed, "which encourages future investment."²⁴⁴

Third, the TSA gave Committed Shippers the ability to receive firm service (*i.e.*, service not subject to prorating during normal operating conditions) for the transportation of their committed volumes from the gathering system origin points located on the Pipeline.²⁴⁵ Any portion of a Committed Shipper's committed volume that originated from a truck station origin point on the Pipeline, however, would not receive firm service and would be subject to prorating.²⁴⁶ Accordingly, the capacity allocated to Committed Shippers that received firm service effectively reduced the amount of capacity available to other shippers, including Committed Shippers, not receiving firm service. The Carriers made clear, however, that at least 10% of the Pipeline's total available capacity would be available to fulfill the nominations of uncommitted shippers (*i.e.*, shippers that did not execute a TSA) during periods of prorating.²⁴⁷ This allocation approach was developed in recognition of the market dynamics surrounding the PRB and the resulting shipper needs. A shipper's production that is tied to gathering systems origin points on the Pipeline is subject to being shut-in if that shipper is unable to ship its crude oil on the Project, because the shipper lacks the flexibility to transport its production by truck or other pipelines—a flexibility that is enjoyed by those shippers that are not tied to gathering system origin points.²⁴⁸ Therefore, it was important to give those shippers that are tied to gathering system origin points the ability to secure firm capacity rights to prevent shut-ins or disruptions that would be a significant financial hardship for the shipper, as well as consumers of the crude oil.²⁴⁹ Recognizing these shipper needs, the FERC approved the

242. *Id.* at P 8.

243. 151 F.E.R.C. ¶ 61,139 at P 8.

244. *Id.* at P 24.

245. *Id.* at P 12.

246. *Id.*

247. *Id.* at P 23.

248. 151 F.E.R.C. ¶ 61,139 at P 13.

249. *Id.*

Carriers' approach, finding that the provision was "non-discriminatory, as it was provided to all potential shippers during a widely publicized open season."²⁵⁰

10. Panola Pipeline Company, LLC

On May 15, 2015, the FERC issued a Declaratory Order on a Petition for Declaratory Order initiated by Panola Pipeline Company, LLC (Panola).²⁵¹ Panola proposed to expand an existing natural gas liquids pipeline to facilitate the transportation of natural gas liquids to Mont Belvieu, Texas.²⁵²

All of the regulatory assurances sought by Panola were consistent with regulatory assurances provided to other pipelines in prior FERC orders.²⁵³ However, the FERC noted in this decision that the pipeline had presented a unique fact that the FERC had not previously addressed—*i.e.*, that the pipeline would provide both interstate and intrastate service.²⁵⁴ In recognizing this fact, the FERC ruled that, when a pipeline is providing both interstate and intrastate service, uncommitted shippers making interstate movements must have a first right to at least 10% of project capacity.²⁵⁵

11. Monarch Oil Pipeline, LLC

On May 18, 2015, FERC issued a Declaratory Order on a petition for declaratory order (Petition) initiated by Monarch Oil Pipeline LLC (Monarch).²⁵⁶ Monarch had requested that the FERC approve its proposed shipper rates as well as the rate structures and terms and conditions regarding its proposed pipeline project (Project) located in the northeast region of the Texas Panhandle. Once constructed, the Project would interconnect with Plains Pipeline, LP at Plains' Reydon Station in Oklahoma.²⁵⁷ The Commission explained that the Project consists of four parts: (1) a dual-jurisdictional crude oil pipeline gathering system; (2) a central tankage, truck unloading, and blending and batching station at the terminus of the gathering system (Casey Station); (3) an interstate transmission system pipeline with 30,000 barrels per day (bpd) of capacity; and (4) an intrastate downstream crude oil transmission system, originating at the Casey Station and terminating at a refinery in Texas. The Petition had stated that the gathering system, when used to transport crude oil in intrastate commerce, the Casey Station, and the intrastate transmission system were not under the FERC's authority.²⁵⁸

Monarch's Petition requested that the FERC confirm that: (1) the Project's widely-publicized open season, which commenced on December 1, 2014 and ended February 20, 2015, aligned with FERC guidelines;²⁵⁹ (2) Monarch appropriately committed Project capacity by reserving 10% of project capacity for

250. *Id.* at P 23.

251. Order on Petition for Declaratory Order, *Panola Pipeline Co.*, 151 F.E.R.C. ¶ 61,140 (2015).

252. *Id.* at PP 3-4.

253. *Id.* at PP 19-24.

254. *Id.* at P 23, n.16.

255. *Id.*

256. Order on Petition for Declaratory Order, *Monarch Oil Pipeline, LLC*, 151 F.E.R.C. ¶ 61,150 (2015).

257. *Id.* at PP 3, 5.

258. *Id.* at P 7.

259. *Id.* at PP 4, 13-14.

uncommitted shippers and 90% for committed shippers, and, given that the Project was undersubscribed, it could continue to commit capacity; (3) a committed rate variable rate structure that was based on volumes transported; and (4) that several contractual terms for committed shippers were consistent with FERC precedent and reasonable under the ICA.²⁶⁰ These committed shipper contractual provisions included: (1) committed shipper status based upon either an acreage dedication with no minimum volume commitment or a minimum volume commitment with no acreage dedication; (2) the right to upwardly and downwardly adjust committed volumes, provided that 10% of capacity remained reserved for uncommitted shippers; (3) the right to avoid proration through the payment of a one cent premium; (4) the use of the FERC's Oil Pipeline Index annual adjustments, capped at a 3% increase or decrease; and (5) the right to a contract extension.²⁶¹

The FERC found that Monarch's open season was widely-publicized and afforded every shipper with the same opportunities. The FERC also found that Monarch appropriately committed Project capacity. The FERC approved the committed shipper variable rate structure based on the average of transported volumes. It found that the rates and rate structures in the committed shipper transportation and gathering services agreement (acreage dedication committed shipper agreement) and transportation services agreement (volume committed shipper agreement), as described, and *pro forma* tariff provisions were consistent with FERC precedent and appeared to be reasonable under the ICA, and therefore would not be subject to revision.²⁶²

12. Sunoco Pipeline, L.P.

On June 1, 2015, the FERC issued a Declaratory Order on a Petition for Declaratory Order (Petition) initiated by Sunoco Pipeline, L.P. (Sunoco).²⁶³ Sunoco proposed to construct an approximately 130-mile crude petroleum pipeline, with an initial capacity of approximately 100,000 barrels per day, from origin points in the Delaware Basin in New Mexico and Texas to destination points in Midland, Texas.

Among other things, Sunoco requested that a committed shipper be permitted to have a one-time right to increase its volume commitment, if sufficient capacity was available.²⁶⁴ Based on Sunoco's representation that at least 10% of project capacity would remain available for uncommitted shippers, the FERC approved this requested regulatory assurance.²⁶⁵

E. Temporary Waiver Orders

During the period July 1, 2014 to June 30, 2015, the Commission issued eight orders concerning requests for temporary waiver of the tariff filing and reporting requirements of sections 6 and 20 of the ICA and parts 341 and 357 of the

260. *Id.* at P 8.

261. 151 F.E.R.C. ¶ 61,150 at P 8.

262. *Id.* at P 33.

263. *Sunoco Pipeline, L.P.*, 151 F.E.R.C. ¶ 61,192 (2015).

264. *Id.* at P 5.

265. *Id.* at P 14.

Commission's regulations.²⁶⁶ In four cases, the Commission granted the request for waiver.²⁶⁷ The other three orders rejected the request.²⁶⁸

In each case, the FERC applied its four well-established criteria: (1) the pipeline applicant requesting the temporary waiver (or its affiliates) owns 100% of the throughput on the line; (2) there is no demonstrated third-party interest in gaining access to or shipping on the line; (3) there is no likelihood that such third-party interest will materialize; and (4) there is no opposition to granting the waiver. Any waiver the FERC grants is subject to revocation should circumstances change. Each successful applicant must immediately report to the FERC any changes, including, but not limited to, increased accessibility of other pipelines or refiners to the subject pipeline, changes in the ownership of the pipeline or throughput shipped on the pipeline, and shipment tenders or requests for service by any third person. Pipelines granted a waiver must keep their books and records consistent with the FERC's Uniform System of Accounts, and such books and records must be made available to the FERC or its agents upon request.²⁶⁹

The FERC granted waivers to pipelines shipping NGLs²⁷⁰ and crude oil.²⁷¹ Neither the location nor the size of the pipeline is dispositive for purposes of a temporary waiver. The successful applicants' lines were located in Colorado, Texas, and New Mexico. The pipelines ranged in size from six²⁷² to twelve inches,²⁷³ and extended from six miles²⁷⁴ to thirty-four miles.²⁷⁵ Waivers were granted for pipelines that crossed state lines²⁷⁶ and those located within a single state.²⁷⁷ The FERC accepted waiver requests for a proposed NGL pipeline,²⁷⁸ a pipeline being brought back into crude oil service after five years of no use,²⁷⁹ and NGL pipelines that the owners recently realized could be operating in interstate commerce.²⁸⁰ Successful applicants were owners of the subject lines,²⁸¹ as well as the lessee of the subject line.²⁸²

Of the three requests for temporary waiver rejected by the FERC, two of them were rejected because the pipeline applicant failed to satisfy the requirement that

266. 49 U.S.C. app. §§ 6, 20 (1988); 18 C.F.R. §§ 341, 357 (2015).

267. *Whiting Oil and Gas Corp.*, 149 F.E.R.C. ¶ 61,080 (2014); *Holly Energy Partners, L.P.*, 149 F.E.R.C. ¶ 61,192 (2014); *RGP Marketing LLC*, 150 F.E.R.C. ¶ 61,174 (2015); *Targa NGL Pipeline Co.*, 151 F.E.R.C. ¶ 61,060 (2015).

268. *Tapstone Midstream, LLC*, 150 F.E.R.C. ¶ 61,016 (2015), *order accepting compliance filing and denying req. for waiver*, 151 F.E.R.C. ¶ 61,080 (2015); *Noble Energy, Inc.*, 150 F.E.R.C. ¶ 61,073 (2015); *Jayhawk Pipeline, L.L.C.*, 151 F.E.R.C. ¶ 61,020 (2015).

269. 18 C.F.R. pt. 352 (2015).

270. 149 F.E.R.C. ¶ 61,080 at P 2; 150 F.E.R.C. ¶ 61,174 at P 2; 151 F.E.R.C. ¶ 61,060 at P 2.

271. 149 F.E.R.C. ¶ 61,192 at PP 6, 9.272.150 F.E.R.C. ¶ 61,174 at P 2.

272. 150 F.E.R.C. ¶ 61,174 at P 2.

273. 151 F.E.R.C. ¶ 61,060 at P 2.

274. 149 F.E.R.C. ¶ 61,192 at P 2.

275. 150 F.E.R.C. ¶ 61,174 at P 2.

276. 149 F.E.R.C. ¶ 61,192 at P 2; 150 F.E.R.C. ¶ 61,174 at P 2.

277. 149 F.E.R.C. ¶ 61,080 at P 2 & n.2; 151 F.E.R.C. ¶ 61,060 at P 2.

278. 149 F.E.R.C. ¶ 61,080 at P 1.

279. 149 F.E.R.C. ¶ 61,192 at P 2.

280. 150 F.E.R.C. ¶ 61,174 at P 6; 151 F.E.R.C. ¶ 61,060 at P 3.

281. 149 F.E.R.C. ¶ 61,192 at P 2; 150 F.E.R.C. ¶ 61,174 at P 2; 151 F.E.R.C. ¶ 61,060 at P 2.

282. 149 F.E.R.C. ¶ 61,080 at P 2.

the pipeline (or its affiliates) owns 100% of the throughput on the line.²⁸³ Tapstone Midstream LLC (Tapstone) argued that, while it would not hold title to all throughput on the facilities at issue, its request for waiver was warranted because an affiliate would serve as operator under various joint operating agreements (JOAs) and would either own or have control of all of the crude oil to be transported on the facilities.²⁸⁴ The FERC disagreed, stating as follows:

The Commission has heretofore never equated substantial control of, or dominion over, the crude oil to be transported with the 100-percent ownership requirement to warrant temporary waiver of the ICA and oil pipeline regulation. Tapstone's assertion that other indicia of ownership, 'such as custody, control, and good right to sell' should equate to ownership for purposes of waiver of the regulations is not sufficient to warrant acceptance of its tariff filing.²⁸⁵

The FERC applied the "same rationale" when it denied the request for temporary waiver filed by Noble Energy, Inc. (Noble).²⁸⁶ The FERC found that Noble had failed to "demonstrate unambiguously that it will own 100 percent of the production to be transported." Noble did not meet the FERC's ownership requirement because, although Noble would produce and own every barrel of crude oil to be transported on the facilities, within each barrel, it might only have an undivided interest in 80% of the crude oil.²⁸⁷

The FERC also rejected a request for temporary waiver filed by Jayhawk Pipeline, L.L.C. (Jayhawk) and National Cooperative Refinery Association (NCRA) which failed to satisfy the requirements that: (1) there is no likelihood that such third-party interest will materialize, and (2) there is no opposition to granting the waiver.²⁸⁸ Jayhawk had entered into a lease with Osage Pipe Line Co. (Osage) for capacity, which it would in turn sublease to NCRA who would use it to transport its crude oil from Cushing, Oklahoma, to a refinery.²⁸⁹ The request for temporary waiver was denied because it was opposed by a shipper on Osage, which demonstrated a third-party interest in shipping on the leased capacity.²⁹⁰

II. PRESIDENTIAL PERMITS AND PIPELINE SAFETY

A. *Thompson v. Heineman*

In January 2015, the Nebraska Supreme Court issued its decision in *Thompson v. Heineman* and vacated the Nebraska District Court decision that struck down a 2012 Nebraska oil pipeline siting law.²⁹¹ The most publicized outcome of the Supreme Court decision was that it effectively left intact the approved route of the Keystone XL Pipeline through Nebraska. The case itself, however, was not about approving the Keystone XL Pipeline in Nebraska. At

283. 150 F.E.R.C. ¶ 61,016; 150 F.E.R.C. ¶ 61,073.

284. 150 F.E.R.C. ¶ 61,016 at PP 7-8.

285. *Id.* at P 16.

286. 150 F.E.R.C. ¶ 61,073 at P 13.

287. *Id.*

288. 151 F.E.R.C. ¶ 61,020 at P 15.

289. *Id.* at P 3.

290. *Id.* at P 15.

291. 289 Neb. 798, 857 N.W.2d 731 (2015).

issue in *Thompson v. Heineman* was the constitutionality of LB 1161, a law that allows “major oil pipeline” carriers to elect to obtain pipeline siting approval from the Nebraska Governor rather than going through the Nebraska Public Service Commission (PSC) pipeline approval process. Under LB 1161, the Governor’s approval also has the effect of bestowing eminent domain powers on the pipeline carrier without requiring the carrier to go to the PSC to obtain eminent domain authority.

In February 2014, Nebraska District Court Judge Stephanie Stacy ruled in favor of the landowner plaintiffs and held that LB 1161 violated Article IV, section 20 of the Nebraska Constitution because it divested the PSC of its constitutionally-protected powers over rates, services, and general operations of common carriers. Judge Stacy found that LB 1161 effected an unconstitutional divestment of powers from the PSC because the law permits the Governor to approve major oil pipeline routes through the state, completely bypassing the PSC. The Nebraska Attorney General appealed the District Court’s ruling to the Nebraska Supreme Court, which issued a divided decision on January 9, 2015. In that decision, four of the seven justices of the Nebraska Supreme Court found that the landowners who challenged LB 1161 had standing to challenge the law and voted to uphold the district court’s decision. The other three justices found that the landowners lacked standing to challenge the law; therefore, they did not reach the merits of the case. In Nebraska, according to the “supermajority clause” of the Nebraska Constitution, Const. Art. V, sec. 2, “no legislative act shall be held unconstitutional except by the concurrence of five judges.”²⁹² Because only four justices reached the merits of the case and have held LB 1161 unconstitutional, it stands as good law. Practically speaking, the Supreme Court’s decision means that the current Keystone XL pipeline route, as approved by Governor Heineman in January 2013, stands as a valid route through the State of Nebraska.

B. Criminal Charges Under the Pipeline Safety Act

1. United States v. Pacific Gas & Electric Company

In the wake of the September 2010 rupture and explosion of a natural gas pipeline in San Bruno, California, which resulted in eight fatalities and property damage, the United States Attorney for the Northern District of California, in July 2014, filed a superseding criminal indictment against Pacific Gas & Electric Company (PG&E), the pipeline operator.²⁹³ The indictment alleges obstruction of the National Transportation Safety Board’s (NTSB) investigation of the incident and twenty seven knowing and willful violations of the Pipeline Safety Act and pipeline safety regulations of the Pipeline and Hazardous Materials Safety Administration (PHMSA).²⁹⁴ The maximum penalty for each count alleged in the

292. NEB. CONST. art. V, § 2.

293. *United States v. Pacific Gas & Electric Co.*, No. CR14-175, (N.D. Cal. July 30, 2014) (superseding indictment), <http://www.justice.gov/sites/default/files/usao-ndca/legacy/2014/07/30/PG%26E%20-%20Superseding%20Indictment.pdf>.

294. Natural Gas Pipeline Safety Act of 1968, 49 U.S.C. §§ 60,101-60,140; Press Release: *PG&E Charged With Obstruction Of The Investigation Of The National Transportation Safety Board And Additional Violations Of The Natural Gas Pipeline Safety Act*, DEP’T OF JUSTICE (July 29, 2014), <http://www.justice.gov/usao-ndca/pr/pge-charged-obstruction-investigation-national-transportation-safety-board-and>.

indictment is a \$500,000 fine, or a fine based on twice the gross gain PG&E made as a result of the violations (\$281 million), or twice the losses suffered by the victims (\$565 million). No individuals have been charged; PG&E has pled not guilty.

2. United States v. Randy Jones

In April 2015, a former corrosion coordinator for Shell Pipeline Co. pled guilty to knowingly failing to conduct required pipeline corrosion inspections and submitting false data to PHMSA regarding those inspections.²⁹⁵ The violations involved a pipeline that delivered commercial aviation jet fuel to General Mitchell International Airport in Milwaukee, Wisconsin. In January 2012, a hole was discovered in the pipeline at Mitchell Airport after jet fuel began showing up in the soil surrounding the airport and Wilson Creek. Approximately 9,000 gallons of jet fuel were released from the pipeline. The former employee was sentenced to five years' probation and ordered to pay over \$19 million in restitution.²⁹⁶

C. Regulatory Initiatives

1. Hazardous Liquid Integrity Verification Process

PHMSA has established a new proceeding to consider an Integrity Verification Process (IVP) for hazardous liquid pipelines.²⁹⁷ According to a PHMSA industry briefing and chart, the hazardous liquid IVP would apply to hazardous liquid pipelines that could affect high consequence areas (HCA) or a right-of-way of a principal roadway, rural gathering lines that could affect HCAs, pipelines carrying highly volatile liquids, and non-HCA pipelines with maximum operating pressures (MOP) greater than 20% of specified minimum yield strength.²⁹⁸ Operators of such lines may be required to, among other things: (1) verify that records validate MOP and pipe materials; (2) perform pressure tests and verify pipe materials for lines lacking records; (3) re-evaluate pipe where MOP is established based on the risk-based alternative to pressure testing; and (4) perform fatigue analysis to determine reassessment intervals cracking issues.²⁹⁹

PHMSA has stated that Hazardous Liquid IVP is intended to respond to section 23 of the Pipeline Safety, Regulatory Certainty and Job Creation Act of 2011 (2011 Act).³⁰⁰ The 2011 Act required that operators of certain gas

295. *United States v. Randy Jones*, Case No. 14-CR-220, (E.D. Wis. Nov. 14, 2014) (plea agreement), <http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/01/07/information.pdf>. See also Press Release: *Former Shell Pipeline Company Corrosion Control Coordinator Sentenced*, DEP'T OF TRANSP., <https://www.oig.dot.gov/library-item/32470>.

296. *Id.*

297. Notice of Public Meeting, Pipeline Safety: Public Workshop on Hazardous Liquid Integrity Verification Process, 80 Fed. Reg. 48,955 (Aug. 14, 2015).

298. *Hazardous Liquid Pipeline Integrity Verification Process (HL IVP), Overview Industry (API/AOPL) Briefing*, PHMSA (Nov. 18, 2014), <http://www.regulations.gov/#!documentDetail;D=PHMSA-2014-0150-0003> [hereinafter HL IVP]; *Draft HL IVP Chart*, PHMSA (9/17/2014), <http://www.regulations.gov/#!documentDetail;D=PHMSA-2014-0150-0001>; HL IVP at 4, 6.

299. HL IVP, *supra* note 298, at 9-32.

300. Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011, Pub. L. No. 112-90, § 23, 125 Stat. 1904.

transmission lines confirm maximum allowable operating pressure (MAOP), ensure that records accurately reflect physical and operational pipe characteristics, and test the material strength of previously untested lines.³⁰¹ These provisions do not apply to hazardous liquids pipelines. Hazardous Liquid IVP also responds to National Transportation Safety Board (NTSB) recommendations addressing pressure testing of certain gas transmission pipelines.³⁰² Next steps for Hazardous Liquid IVP is unclear.

2. Miscellaneous Changes to Pipeline Safety Regulations

On March 11, 2015, PHMSA issued a final rule updating and clarifying a number of pipeline safety regulations affecting gas and liquid pipelines.³⁰³ The regulations are effective October 1, 2015. PHMSA has authorized immediate compliance with the amended rules. Issues affecting hazardous liquid pipelines include:

- *Post-Construction Inspections.* Individuals involved in the construction of a hazardous liquid pipeline are prohibited from inspecting their own work.³⁰⁴ In response to comments, PHMSA clarified that it did not intend to require third-party inspections or prohibit all company personnel from inspecting the work of another company employee. Rather, PHMSA clarified that only the person performing the construction task is excluded from conducting the subsequent inspection.³⁰⁵
- *Alternative Methods for Calculating Pressure Reductions for Hazardous Liquid Pipeline Anomalies.* PHMSA provided alternative methods for calculating a pressure reduction for immediate repair conditions caused by threats other than corrosion.³⁰⁶ The final rule establishes that acceptable methods now include, but are not limited to, ASME/ANSI B31G and PRCI PR-3-805 (R-STRENG). These standards already apply to determine whether an anomaly is an “immediate repair condition,” and PHMSA has broadened their application to include calculating a temporary operating pressure reduction. In addition, if no suitable calculation method can be identified for any given anomaly, the operator must reduce operating pressure by 20% or more until the pipeline anomaly is repaired.³⁰⁷
- *Ethanol is a Hazardous Liquid.* PHMSA adopted a provision adding ethanol to the definition of a “hazardous liquid.”³⁰⁸ PHMSA declined a request to also add “bio-diesel petroleum” to the definition of hazardous liquid, noting this issue may be addressed in a future rulemaking.³⁰⁹

301. 49 U.S.C. § 60,139 (2012).

302. HL IVP, *supra* note 298, at 5.

303. Pipeline Safety: Miscellaneous Changes to Pipeline Safety Regulations, 80 Fed. Reg. 12,762 (Mar. 11, 2015) (to be codified at 49 C.F.R. pts. 191, 192, and 195).

304. *Id.* at 12,779.

305. *Id.* at 12,763-65.

306. *Id.* at 12,769.

307. *Id.*

308. Pipeline Safety: Miscellaneous Changes to Pipeline Safety Regulations, 80 Fed. Reg. at 12,768, 12,780.

309. *Id.* at 12,767-68.

3. Advisory Bulletin and Guidance for Flow Reversals, Conversions of Service, and Product Changes

On September 18, 2014, PHMSA issued an advisory bulletin addressing flow reversals, product changes, and conversions of service for gas and hazardous liquid pipelines.³¹⁰ In conjunction with the advisory bulletin, PHMSA issued a new guidance document that provides additional information and recommendations for operators to consider before undertaking these activities. Together, the advisory bulletin and guidance document address the notification, operation and maintenance, and integrity management implications of flow reversals, product changes, and conversions of service.³¹¹ Notably, the guidance suggests that pipelines with certain design and operational characteristics should not be considered for these changes.³¹² While not directly enforceable, these documents reflect current PHMSA policy on the regulatory requirements implicated by these events and warrant careful consideration.

4. PHMSA Issues Advisory Bulletin for Construction Notification

On September 12, 2014, PHMSA issued an advisory bulletin to clarify the application of its pre-construction notification requirements for gas and hazardous liquid pipelines.³¹³ Currently, operators of such facilities are required to notify PHMSA through the National Registry of Pipeline at least sixty days prior to construction of: (1) a facility, other than a section of line pipe, that costs \$10 million or more; (2) ten or more miles of new pipeline; and (3) a new LNG plant or facility, or a new pipeline facility.³¹⁴ The advisory bulletin seeks to clarify what qualifies as “construction” for purposes of the notification provision and states that operators are “strongly encouraged” to contact PHMSA no later than sixty days prior to engaging in any of the following construction-related activities (whichever occurs first): material purchasing and manufacturing; right-of-way acquisition; construction equipment move-in activities; onsite or offsite fabrications; or right-of-way clearing, grading, and ditching.³¹⁵ The guidance indicates that PHMSA now seeks notification of project activities far earlier than previously indicated. PHMSA also states that the notification requirements for “ten or more miles of new pipeline” apply to both new construction and replacement of ten or more miles of existing pipe.³¹⁶

310. Pipeline Safety: Guidance for Pipeline Flow Reversals, Product Changes and Conversion to Service, 79 Fed. Reg. 56,121 (Sept. 18, 2014).

311. *Id.* at 56,121-22.

312. *Id.* at 56,122.

313. Pipeline Safety: Construction Notification, 79 Fed. Reg. 54,777 (Sept. 12, 2014).

314. 49 C.F.R. § 191.22(c) (2011) (gas pipelines); 49 C.F.R. § 195.64(c) (2011) (hazardous liquid pipelines).

315. Pipeline Safety: Construction Notification, 79 Fed. Reg. at 54,777.

316. *Id.*

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