REPORT OF THE OIL & LIQUIDS PIPELINE REGULATION COMMITTEE

This report summarizes policy developments and legal developments that have occurred at the Federal Energy Regulatory Commission (FERC or Commission) and the U.S. Courts of Appeals in the area of oil and liquids pipeline regulation. The time frame covered by this report is the period between July 1, 2012, and June 30, 2013.*

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I. SIGNIFICANT FERC ADMINISTRATIVE ORDERS

A. Rulemaking

1. Order No. 780, *Filing, Indexing and Service Requirements*, 143 F.E.R.C. ¶ 61,137 (2013).

On May 16, 2013, the Federal Energy Regulatory Commission (FERC) issued a final rule to revise its regulations that govern the form, composition, and filing of rates and charges by interstate oil pipelines.[1] The final rule made several changes to 18 C.F.R. part 341. First, the FERC updated section 341.0(a)(7) to require oil pipelines to electronically post their "currently effective, pending and suspended tariffs on their public web sites."[2] The FERC also eliminated the requirement that oil pipelines make their tariffs available at the carrier's place of business.[3] Second, the FERC amended section 341.2(a) "by eliminating an oil pipeline's option to serve tariff" filings by paper.[4] Oil pipelines are now required to serve tariff filings to each shipper and subscriber electronically.[5] Third, the FERC eliminated the requirement in section 341.9 that oil pipelines file an index of tariffs.[6] Instead, oil pipelines will be required to maintain an index of all effective tariffs on their public web sites only if the oil pipeline has more than two tariffs.[7] Fourth, the FERC amended section 341.9(a)(5) to require identification of "the specific origins and destination for each product or products covered by the tariff."[8] Fifth, the FERC deleted sections 341.4(a)(1)-(2) and 341.4(f) after finding the filing requirements for amendments, supplements, corrections, cancellations, and suspensions to tariffs obsolete because tariff filings had shifted from paper to electronic.[9] The FERC also consolidated the instructions for cancellation of tariffs into section 341.5 of the Commission's regulations.[10] Sixth, the FERC revised section 341.4 to treat all amendments to pending tariffs, whether ministerial or substantive, the same.[11] This allows "an oil pipeline to file to amend or to modify a tariff record at any time" while the tariff record is pending before the FERC.[12] Lastly, the FERC consolidated the adoption notice filing and the filing to integrate the tariff records of the adopting carrier by removing sections 341.6(b) through (d), which were duplicative.[13] The FERC also consolidated the requirements for oil

1. Order No. 780, *Filing, Indexing and Service Requirements*, 143 F.E.R.C. ¶ 61,137 at P 1 (2013).
2. *Id.* at P 14.
3. *Id.*
4. *Id.* at P 20.
5. *Id.* at P 23.
6. *Id.* at P 30.
7. *Id.*
8. *Id.* at P 31.
9. *Id.* at PP 33-42.
10. *Id.* at P 55.
11. *Id.* at P 48.
12. *Id.*
13. *Id.* at PP 55-57.

pipelines to update tariffs to reflect adoptions and/or cancellations in new sections 341.5 and 341.6.[14]

B. Jurisdictional Standing Issues

1. *Thrifty Propane, Inc. v. Enterprise TE Products Pipeline LLC*, 140 F.E.R.C. ¶ 61,017 (2012).

On July 11, 2012, the Commission issued its "Order on Complaint" in *Thrifty Propane, Inc. v. Enterprise TE Products Pipeline, LLC,*[15] where it denied a complaint brought by a propane shipper against a propane pipeline's proposed closure of a terminal. The pipeline transported propane from origins in several states, commencing in Louisiana, and made deliveries via one segment of its system to a terminal located in Chester County of eastern Pennsylvania.[16] In May 2012, the pipeline announced that it was closing the Chester terminal due to commercial considerations.[17] Although the line serving the terminal would remain in service, the facilities would be removed at the site for future use.[18] The propane shipper argued that the closure was an unauthorized and material change to the tariff and that the closure would have serious economic impacts on the customer because the nearest terminal on the pipeline was a 500 mile round trip away, the loss of supply would be damaging given that it had facilities, business obligations and contracts in reliance on the terminal, and alternatives were not feasible.[19] In its response, the pipeline asserted that the terminal was owned by a non-pipeline affiliate, that the Commission had previously found that terminals connected to its system were not subject to Commission regulation, and thus the closure was beyond the Commission's jurisdiction.[20] The pipeline also asserted that the shipper relied on contract and other claims that did not provide a basis for Commission jurisdiction.[21] Further, the pipeline contended that the (future) filing of a tariff change to reflect the closure did not confer jurisdiction and that the announcement that shippers would retain their volume histories in the event of prorationing similarly granted the Commission no jurisdiction over the closure.[22]

The Commission found that it had previously determined in a 2010 order[23] that the same pipeline could remove all terminalling services from its tariff because it did not exercise jurisdiction over such services, regardless of the fact that the terminal services were owned and operated by a pipeline affiliate.[24] The Commission found the tariff and prorationing arguments to be without merit

14. *Id.* at P 55.
15. *Thrifty Propane, Inc., v. Enterprise TE Products Pipeline, LLC*, 140 F.E.R.C. ¶ 61,017 (2012) .
16. *Id.* at P 2.
17. *Id.* at P 3.
18. *Id.*
19. *Id.* at PP 4-8.
20. *Id.* at PP 10-11.
21. *Id.* at PP 14-15.
22. *Id.* at PP 11-12.
23. *TE Products Pipeline Co.*, 130 F.E.R.C. ¶ 61,257 (2010), *order on reh'g*, 131 F.E.R.C. ¶ 61,277 (2010).
24. 140 F.E.R.C. ¶ 61,017 at P 17.

and stated that any contractual claims against the pipeline should be pursued in state court.[25] The Commission noted that regardless of the hardships claimed by the shipper, the complaint must be denied for lack of jurisdiction.[26]

2. *High Prairie Pipeline, LLC v. Enbridge Energy, LP*, 142 F.E.R.C. ¶ 61,199 (2013).

On March 22, 2013, the Commission issued its "Order Dismissing Complaint" in *High Prairie Pipeline, LLC v. Enbridge Energy, LP*.[27] In its complaint, High Prairie Pipeline, LLC (High Prairie) alleged that Enbridge Energy, LP (Enbridge) discriminated against it by refusing to grant it an interconnection at Enbridge's Clearbrook, Minnesota origin.[28] The Commission dismissed the complaint as premature on the procedural ground that interconnection negotiations between High Prairie and Enbridge remained ongoing, and thus, a denial of interconnection service had not yet occurred.[29]

In its complaint, High Prairie alleged that it intends to construct a 450-mile pipeline "capable of transporting 150,000 barrels of crude oil per day from the Baaken" region to Clearbrook.[30] High Prairie claimed that Enbridge had denied it an interconnection at Clearbrook despite Enbridge's agreement to interconnections at Clearbrook with other similarly situated entities, including an affiliate, in violation of sections 1(4), 1(6), 3(1), 6(1), and 6(7) of the Interstate Commerce Act (ICA).[31] In its answer, Enbridge responded that interconnection negotiations remained "in a preliminary stage due to changes made by High Prairie in its interconnection request."[32] Enbridge also disputed the contention that it had granted interconnections to any similarly situated affiliate.[33] Enbridge argued that the Commission lacked jurisdiction under the Interstate Commerce Act (ICA) to order one pipeline to interconnect with another, citing *Plantation Pipe Line Co. v. Colonial Pipeline Co.*,[34] in which the Commission dismissed Plantation Pipe Line Company's complaint.[35] That complaint asked that Colonial Pipeline Company be required to establish an interconnection. In addition, Enbridge contended that High Prairie, as a potential competing pipeline and not a current or prospective shipper, is not protected by the anti-discrimination provisions of the ICA.[36]

In its order, the Commission did not decide the parties' respective claims regarding the ICA.[37] The Commission found that High Prairie "identifies several

25. *Id.* at P 18.
26. *Id.* at P 19.
27. *High Prairie Pipeline, LLC v. Enbridge Energy, LP*, 142 F.E.R.C. ¶ 61,199 (2013).
28. *Id.* at P 1.
29. *Id.* at P 27.
30. *Id.* at P 2.
31. *Id.* at PP 6-9 (citing 49 U.S.C. §§ 1337-1338, 1390-1391, 1395 (2012)).
32. *Id.* at P 12.
33. *Id.* at P 13.
34. *Id.* (citing *Plantation Pipe Line Co. v. Colonial Pipeline Co.*, 104 F.E.R.C. ¶ 61,271 (2003)).
35. *Plantation Pipe Line Co.*, 104 F.E.R.C. ¶ 61,271 at P 1.
36. 142 F.E.R.C. ¶ 61,199 at P 12.
37. *Id.* at PP 24-25, 27.

potential violations of the ICA," but found the complaint to be premature.[38] It held that a carrier that offers interconnection service must publish that service in its tariff and "provide the service upon reasonable request and in a non-discriminatory manner" under the ICA.[39] However, the Commission held, "neither the requisite offering of interconnection service nor a denial of such service" had been shown.[40] With respect to the discrimination claim, the Commission concluded that it could not determine whether High Prairie had been improperly denied service or whether the terms offered were not just and reasonable.[41] The Commission rejected High Prairie's claim that Enbridge had discriminated against it by establishing an interconnection with an affiliate on the ground that the interconnection was established decades ago under very different circumstances, and, thus, it was not similarly situated to High Prairie.[42] The Commission did not address Enbridge's arguments that it lacks jurisdiction under the ICA to order a pipeline to interconnect with another pipeline or that a competing pipeline is not protected by the anti-discrimination provisions of the ICA.[43] However, Commissioner Tony Clark, in a concurring opinion, concluded that the Commission "does not have the statutory tools" to order the interconnection requested in High Prairie's complaint because it lacks jurisdiction "over the abandonment and interconnection of oil pipeline facilities."[44]

3. *Gooch v. Colonial Pipeline Co.*, 142 F.E.R.C. ¶ 61,220 (2013).

On March 25, 2013, the Commission dismissed a complaint filed by a private citizen, R. Gordon Gooch, challenging several Colonial Pipeline Company tariffs on the basis that they are unjust and unreasonable.[45] In his complaint, Mr. Gooch argued that he had standing to file a complaint both as a person under section 13(1) of the ICA and as a resident of the Commonwealth of Virginia.[46] He also argued that he was affected by the rates charged by Colonial and that as an end-user of petroleum products in the markets served by Colonial, he had "suffered damages of $5.02 in 2011, which he calculate[d] by dividing [a purported excess profit of] $251,200,399 by the 50,000,000 residents served by Colonial."[47]

Colonial explained in its answer that the complaint against its rates should be dismissed because Colonial's rates have not adversely affected Mr. Gooch.[48] Colonial argued that generally a complainant is required to establish that it has been charged a rate, that Mr. Gooch has not directly paid any rates for Colonial's

38. *Id.* at P 23.
39. *Id.* at P 24.
40. *Id.*
41. *Id.* at P 25.
42. *Id.* at P 26.
43. *Id.* at PP 13-14.
44. *Id.* (Clark, Comm'r, concurring).
45. *Gooch v. Colonial Pipeline Co.*, 142 F.E.R.C. ¶ 61,220 at PP 1, 4 (2013).
46. *Id.* at P 5.
47. *Id.*
48. *Id.* at P 8.

service, and that Mr. Gooch is not a shipper.[49] Further, Colonial contends that Mr. Gooch's complaint focuses on Colonial's rates and not on the rules and regulations in Colonial's tariff.[50]

The Commission found that Mr. Gooch failed to demonstrate that he was adversely affected by Colonial's alleged over-earnings.[51] The Commission also found that although "a complainant need not be a shipper, [that person] must show . . . [they are somehow] 'adversely affected' by the challenged rate or practice."[52] Further, the Commission found that Mr. Gooch's calculation was based upon a rough calculation and was too speculative that the pipeline transportation costs resulted in the price of retail motor gasoline paid.[53] Specifically, the Commission found that:

> The market price for petroleum products, such as motor gasoline, is influenced by a variety of factors, and the relatively insignificant influence of marginal changes in pipeline rates can be subsumed by other market forces. Mr. Gooch has not demonstrated that the pipeline's transportation costs are not wholly or in part absorbed by the pipeline's shippers or other intermediaries before Mr. Gooch pays for motor gasoline. Thus, Mr. Gooch has not demonstrated that transportation costs associated with any alleged over-recoveries by Colonial are passed onto him via the price for retail motor gasoline.[54]

The Commission further found that Mr. Gooch had not demonstrated that he was adversely affected by Colonial's rules and regulations tariff, so the complaint was also dismissed.[55]

C. Temporary Waiver Orders

During the period July 1, 2012, to June 30, 2013, the Commission issued six orders concerning requests for temporary waiver of the tariff filing and reporting requirements of sections 6 and 20 of the ICA[56] and parts 341 and 357 of the Commission's regulations.[57] The waivers were requested for pipelines owned and operated by the applicants.[58] The Commission grants such waivers when "(1) the pipelines (or their affiliates) own 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) no such interest is likely to materialize; and (4) there is

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

50. *Id.* at P 11.

51. *Id.* at P 13.

52. *Id.* at 14 (quoting *Continental Res., Inc., v. Bridger Pipeline, LLC*, 113 F.E.R.C. ¶ 61,178 at P 8 (2005)).

53. *Id.* at P 15.

54. *Id.*

55. *Id.* at P 11.

56. 49 U.S.C. app. §§ 6, 20 (2012).

57. 18 C.F.R. §§ 341, 357 (2013); *Western Refining Pipeline Co.*, 142 F.E.R.C. ¶ 61,152 (2013); *Pelican Gathering Sys., LLC*, 141 F.E.R.C. ¶ 61,245 (2012); *Tesoro High Plains Pipeline Co.*, 141 F.E.R.C. ¶ 61,143 (2012); *Brigham Oil & Gas, L.P.*, 141 F.E.R.C. ¶ 61,142 (2012); *Delek Crude Logistics, LLC*, 141 F.E.R.C. ¶ 61,058 (2012); *Lion Oil Trading & Transp., Inc.*, 140 F.E.R.C. ¶ 61,118 (2012).

58. *Western Refining*, 142 F.E.R.C. ¶ 61,152 at P 1; *Pelican Gathering*, 141 F.E.R.C. ¶ 61,245 at P 1; *Tesoro High Plains*, 141 F.E.R.C. ¶ 61,143 at P 1; *Brigham Oil & Gas*, 141 F.E.R.C. ¶ 61,142 at P 1; *Delek Crude*, 141 F.E.R.C. ¶ 61,058 at P 1; *Lion Oil*, 140 F.E.R.C. ¶ 61,118 at P 1.

no opposition to granting the waivers."[59] In each case except for *Lion Oil*, the applicant alleged that either it or its affiliates owned all of the throughput to be transported on the relevant facilities, and no third party had requested or was likely to request service on the subject facilities.[60]

The Commission granted the requested temporary waivers in all cases except *Lion Oil*, subject to the conditions the Commission generally applies to such requests.[61] Each applicant was required to immediately report any change in circumstances upon which the temporary waivers were based,[62] including, but not limited to, "increased accessibility of other pipelines or refiners to . . . [the] facilities; changes in the ownership of the facilities; changes in the ownership of the crude being shipped; and shipment tenders or requests for service by any person."[63] In addition, the Commission required the applicants to "maintain all books and records . . . consistent with the Uniform System of Accounts for Oil Pipelines . . . and make such books and records available to the Commission or its . . . agents upon request."[64]

In *Lion Oil*, the Commission rejected the request for a temporary waiver.[65] The Commission found that the applicants did not meet the first criteria, i.e., that the pipeline or its affiliates own 100% of the throughput on the line at issue.[66] The applicants alleged that historically, all of the crude and refined products shipped on the system were owned by applicants or their affiliates.[67] However, to reduce financing costs, the applicants had entered into a master supply and offtake agreement with J. Aron & Company, under which J. Aron acquired title to the crude and refined products and agreed to resell them to the applicants under certain conditions.[68] The Commission found that J. Aron was not an affiliate of the applicants so the criteria for temporary waiver were not satisfied.[69]

59. *Western Refining*, 142 F.E.R.C. ¶ 61,152 at P 4; *Pelican Gathering*, 141 F.E.R.C. ¶ 61,245 at P 6; *Tesoro High Plains*, 141 F.E.R.C. ¶ 61,143 at P 4; *Brigham Oil & Gas*, 141 F.E.R.C. ¶ 61,142 at P 6; *Delek Crude*, 141 F.E.R.C. ¶ 61,058 at P 3; *Lion Oil*, 140 F.E.R.C. ¶ 61,118 at P 9.

60. *Western Refining*, 142 F.E.R.C. ¶ 61,152 at PP 2-3; *Pelican Gathering*, 141 F.E.R.C. ¶ 61,245 at P 2; *Tesoro High Plains*, 141 F.E.R.C. ¶ 61,143 at PP 2-3; *Brigham Oil & Gas*, 141 F.E.R.C. ¶ 61,142 at PP 2-5; *Delek Crude*, 141 F.E.R.C. ¶ 61,058 at P 2.

61. *Western Refining*, 142 F.E.R.C. ¶ 61,152 at PP 7-8; *Pelican Gathering*, 141 F.E.R.C. ¶ 61,245 at PP 5-6; *Tesoro High Plains*, 141 F.E.R.C. ¶ 61,143 at PP 7-8; *Brigham Oil & Gas*, 141 F.E.R.C. ¶ 61,142 at PP 9-10; *Delek Crude*, 141 F.E.R.C. ¶ 61,058 at PP 6-7.

62. *Western Refining*, 142 F.E.R.C. ¶ 61,152 at P 8; *Pelican Gathering*, 141 F.E.R.C. ¶ 61,245 at P 6; *Tesoro High Plains*, 141 F.E.R.C. ¶ 61,143 at P 8; *Brigham Oil & Gas*, 141 F.E.R.C. ¶ 61,142 at P 10; *Delek Crude*, 141 F.E.R.C. ¶ 61,058 at P 7 .

63. *Western Refining*, 142 F.E.R.C. ¶ 61,152 at P 8; *Pelican Gathering*, 141 F.E.R.C. ¶ 61,245 at P 6; *Tesoro High Plains*, 141 F.E.R.C. ¶ 61,143 at P 8; *Brigham Oil & Gas*, 141 F.E.R.C. ¶ 61,142 at P 10; *Delek Crude*, 141 F.E.R.C. ¶ 61,058 at P 7.

64. *Western Refining*, 142 F.E.R.C. ¶ 61,152 at P 8; *Pelican Gathering*, 141 F.E.R.C. ¶ 61,245 at P 6; *Tesoro High Plains*, 141 F.E.R.C. ¶ 61,143 at P 8; *Brigham Oil & Gas*, 141 F.E.R.C. ¶ 61,142 at P 10; *Delek Crude*, 141 F.E.R.C. ¶ 61,058 at P 7.

65. *Lion Oil Trading & Transp., Inc.*, 140 F.E.R.C. ¶ 61,118 at P 17 (2012).

66. *Id.* at P 16.

67. *Id.* at P 4.

68. *Id.*

69. *Id.* at P 16.

D. Ratemaking

In June and August 2012, the Commission issued several orders clarifying its standards for suspending and investigating index filings by oil pipelines on the grounds that they are so substantially in excess of the actual cost increases that the proposed rates are unjust and unreasonable.

1. *SFPP, L.P.*, 140 F.E.R.C. ¶ 61,106 (2012), *order on reh'g*, 143 F.E.R.C. ¶ 61,141 (2013); *NuStar Logistics, L.P.*, 140 F.E.R.C. ¶ 61,107 (2012), *order on reh'g*, 143 F.E.R.C. ¶ 61,142 (2013).

In *SFPP I*,[70] protesting shippers argued that the pipeline's costs as reported in its Form 6 had declined 4.48% during the most recent year-to-year period (2010-2011), which would result in a revenue increase of 9.88% when combined with the pipeline's 5.4% proposed index increase.[71] The protesting shippers argued that this conjunction of declining costs and increased revenues demonstrates SFPP's index-based rate increase "substantially exceeds its costs" and is thus unjust and unreasonable in light of earlier orders.[72] In *SFPP I,* the Commission explained that it uses the "percentage comparison test" to evaluate protests to index-based rate increases by comparing Form 6 cost changes with the index filing.[73]

The Commission found that when the 4.48% decrease in the pipeline's costs during the prior year (2010-2011) was added to the proposed index-based increase of 5.4%, this would result in "an approximately 9.88[%] revenue increase under its transportation rates," and that it had never found an index increase to be substantially in excess of a pipeline's costs "when the difference between the proposed index rate increase and the pipeline's actual change in cost is less than 10[%]."[74] The Commission concluded that because the pipeline's "rate increase" was 9.88%, it "is not so substantially in excess of the actual cost increases incurred by the carrier that the rate adjustment should be disallowed."[75]

Also on June 29, 2012, the Commission issued two orders that suspended and investigated index filings, under the "10%" test.[76] With respect to a separate index filing relating to SFPP's West Line rates (*SFPP I* addressed the index filing for the pipeline's East Line rates), the Commission issued an order[77] in which it concluded that the pipelines' prior year cost decrease (4.48%) combined with the proposed index increase (8.6%) yielded "an approximately 13.1[%] revenue increase under its transportation rates,"[78] which met the standard of being potentially "so substantially in excess of its change in actual costs that the

70. *SFPP, L.P. (SFPP I)*, 139 F.E.R.C. ¶ 61,267 (2012).

71. *Id.* at P 4.

72. *Id.*

73. *Id.* at P 9.

74. *Id.* at P 10.

75. *Id.* The Commission did accept the increase subject to refund and review due to pending proceedings as to the pipeline's base rates. *Id.* at P 11.

76. *SFPP, L.P. (SFPP II)*, 139 F.E.R.C. ¶ 61,266 (2012); *NuStar Logistics, L.P. (NuStar I)*, 139 F.E.R.C. ¶ 61,278 (2012).

77. *SFPP II*, 139 F.E.R.C. ¶ 61,266.

78. *Id.* at P 7.

proposed rates may be unjust and unreasonable."[79] In a concurrently issued order in response to another protested index filing,[80] the Commission found that the indexed rate increase filed by another carrier, NuStar Logistics, L.P. (Nustar), might also be unjust and unreasonable, because the pipeline's prior year cost decrease had been 1.56%; when combined with the 8.6% index increase, this resulted in a 10.16% revenue increase.[81] In addition to suspending both SFPP's and Nustar's index filings, the Commission set them for hearing, subject to initial settlement procedures.[82]

On July 5, 2012, SFPP and Nustar, respectively, filed withdrawals of the tariffs that were the subject of the suspension orders in *SFPP II* and *NuStar I*.[83] On the same date, both carriers filed new index tariff increases; in each filing, the carrier increased the rates at a level below the 8.6% permitted by the index for July 1, 2012, but at a level reduced so that the sum of the index increase with the prior year's cost decrease was slightly below 10%.[84] Shippers protested both filings, and on August 3, 2012, the Commission issued two orders addressing the filings.[85] In *SFPP III*,[86] the Commission found that the proposed index increase of 5.4%, when combined with the prior year cost decrease of 4.48%, resulted in a revenue increase of 9.88%, which was "not sufficient for the protesters to satisfy the requirements of section 343.2(c)(1)" because the Commission had never found a proposed increase to be substantially in excess of the actual cost changes when the difference was less than 10%.[87] On the same day, the Commission issued an order regarding NuStar's second index filing.[88] In *NuStar II*, the Commission found that the pipeline's proposed increase under the 2012 index of 8.29%, when combined with the prior year cost decrease of 1.56%, resulted in a divergence under its percentage comparison test of 9.85%, which was "not sufficient for the protest to satisfy the requirements of section 343.2(c)(1)."[89]

In response to *SFPP III* and *NuStar II*, shippers filed requests for rehearing regarding the Commission's decision to accept the index filings, on grounds that the two orders departed from earlier precedent in permitting index increases where the divergence was less than ten percent, that the rulings were not based on reasoned decision-making, and were unlawful on other grounds.[90] On May

79. *Id.* at P 8.

80. *NuStar I*, 139 F.E.R.C. ¶ 61,278.

81. *Id.* at PP 12-13.

82. *SFPP II*, 139 F.E.R.C. ¶ 61,266 at P 9; 139 F.E.R.C. ¶ 61,278 at P 13.

83. Withdrawal Letter, *SFPP, L.P.*, FERC Docket No. IS12-388-000 (July 5, 2012); Withdrawal Letter, *NuStar Logistics, L.P.*, FERC Docket No. IS12-314-000 (July 5, 2012).

84.

85. *SFPP, L.P. (SFPP III)*, 140 F.E.R.C. ¶ 61,106 (2012); *NuStar Logistics, L.P. (NuStar II)*, 140 F.E.R.C. ¶ 61,107 (2012).

86. *SFPP III*, 140 F.E.R.C. ¶ 61,106 (2012).

87. *Id.* at P 8. The Commission did make the rate increase subject to ongoing investigations of SFPP's base rates. *Id.* at P 9.

88. *NuStar III*, 140 F.E.R.C. ¶ 61,107.

89. *Id.* at P 8.

90. *SFPP, L.P.*, 143 F.E.R.C. ¶ 61,141 at P 3 (2013); *NuStar Logistics, L.P.*, 143 F.E.R.C. ¶ 61,142 at P 3 (2013).

16, 2013, the Commission issued orders denying rehearing.[91] In both orders, the Commission reaffirmed its 10% standard as being consistent with its regulations, and further noted that a pipeline is not prevented from filing an index increase solely because its costs had declined.[92] In each proceeding, the Commission specifically noted that it was exercising its discretion in declining to investigate the increases.[93]

2. Opinion No. 522, *SFPP, L.P.*, 140 F.E.R.C. ¶ 61,220 (2012).

On September 20, 2012, the Commission issued Opinion No. 522,[94] affirming in part and modifying in part the initial decision (*I.D.*)[95] issued on February 10, 2011, regarding a rate increase filed by the pipeline in 2009 and interim rates filed in 2010.[96] The Commission noted that the *I.D.* was issued prior to the Commission's issuance of Opinion Nos. 511 and 511-A,[97] which would govern many of the conclusions in this proceeding.

Regarding the appropriate base and test periods to be applied, the Commission modified the result required by the *I.D.*, which had determined that the pipeline's cost of service should be set using data from the twelve-month period between April 1, 2009, and March 31, 2010, including the last three months of the base period and the nine-month adjustment period—in effect, the last twelve months of the combined twenty-one-month base and adjustment period, without modification for known and measurable changes.[98] In Opinion No. 522, the Commission modified the *I.D.* on this issue by requiring the use of the costs as filed in the pipeline's proposed cost of service, as modified in this case,[99] finding the data incomplete for the period chosen in the *I.D.* and finding that this approach would result in a more efficient compliance rate process.[100]

The Commission affirmed the *I.D.*'s determination to use actual throughput transported in the final twelve months of the twenty-one-month combined base and adjustment period because it was the method most consistent with its regulations and it accounted for volume trends.[101] The Commission rejected the alternative approaches sought by certain shipper interests as inconsistent with its regulations and not reflecting actual throughput during the relevant period. The Commission noted that as found in Opinion No. 511, projections of future volumes were speculative.[102] Similarly, the Commission similarly rejected

91. 143 F.E.R.C. ¶ 61,141; 143 F.E.R.C. ¶ 61,142.

92. 143 F.E.R.C. ¶ 61,141 at P 6; 143 F.E.R.C. ¶ 61,142 at P 7.

93. 143 F.E.R.C. ¶ 61,141 at P 6; 143 F.E.R.C. ¶ 61,142 at P 7.

94. Opinion No. 522, *SFPP, L.P.*, 140 F.E.R.C. ¶ 61,220 at P 1 (2012) [hereinafter Opinion No. 522, *SFPP*].

95. *SFPP, L.P.*, 134 F.E.R.C. ¶ 63,013 (2011).

96. Opinion No. 522, *SFPP*, *supra* note 94, at PP 3-4.

97. Opinion No. 511, *SFPP, L.P.*, 134 F.E.R.C. ¶ 61,121 (2011), *order on reh'g*, Opinion No. 511-A, 137 F.E.R.C. ¶ 61,220 (2012).

98. Opinion No. 522, *SFPP*, *supra* note 94, at PP 9-10.

99. *Id.* at P 19.

100. *Id.*

101. *Id.* at P 41.

102. *Id.* at PP 42-44.

several other alternative approaches to volume determination proposed by intervenors as flawed.[103]

The Commission affirmed in part and reversed in part the *I.D.* regarding disputed operating costs.[104] Concerning the allocation of certain litigation costs relating to railroad right-of-way, the Commission affirmed the *I.D*. to exclude certain litigation costs and to allocate other litigation costs in proportion to rental fees.[105] Regarding FERC-related litigation costs, the Commission reversed the determination of the *I.D*. to permit recovery of actual costs from 2009 and instead found that the appropriate approach would be the use of surcharges to recover actual litigation costs over three years, as was required in Opinion Nos. 511 and 511-A, to ensure that the pipeline can recover its "prudently incurred litigation costs."[106] As to whether common carrier costs and revenues should be separated out from non-jurisdictional costs and revenues, the Commission reversed the *I.D*. and found that, consistent with Opinion No. 511, jurisdictional and non-jurisdictional costs would not be separated.[107]

Regarding the allocation of general and administrative (G&A) costs among the pipeline's affiliated business family of enterprises, the Commission reversed the *I.D*.'s determination to use a different allocation method than that proposed by the pipeline—the "all-in" Massachusetts formula allocation method—and instead adopted the nearly "multi-tiered" approach largely proposed by the pipeline that was virtually the same as the method approved in Opinion Nos. 511 and 511-A.[108] The Commission noted that the proposal by the pipeline, using systematic direct assignment and a supervised allocation of overhead, better aligned cost responsibility with cost causation than the approach urged by the intervenors.[109] The Commission rejected criticisms of the accuracy of the pipeline's methodology;[110] found the existence of differences in allocations of G&A costs by other affiliates unpersuasive;[111] and rejected the *I.D*.'s conclusions regarding the role of joint ventures,[112] the KMI-Operated Entities,[113] certain parent entities,[114] and Kinder Morgan Canada.[115] The Commission addressed several additional allocation disputes as to particular types of expenses.[116] With regard to indirect G&A costs related to construction projects, the Commission affirmed the *I.D*.'s finding that the pipeline should directly assign such costs consistent with its ruling in Opinion No. 511-A, rather than

103. *Id.* at PP 45-51.
104. *Id.* at P 59.
105. *Id.* at PP 68-69.
106. *Id.* at PP 80-82.
107. *Id.* at P 88.
108. *Id.* at P 99.
109. *Id.* at PP 100-02.
110. *Id.* at PP 133-34.
111. *Id.* at P 138.
112. *Id.* at PP 143-44.
113. *Id.* at PP 151-53.
114. *Id.* at P 158.
115. *Id.* at PP 165-67.
116. *Id.* at PP 170-87.

treat them as "residual costs" to be allocated via the Massachusetts Formula.[117] Regarding the allocation of legal costs, the Commission found that the pipeline was entitled to directly assign certain legal costs arising from litigation with the Union Pacific Railroad on the basis of land value but that the allocation of other legal costs to SFPP had not been justified, as found by the *I.D.*[118] The Commission also affirmed the *I.D.* as to its disallowance of allocated insurance costs on the ground that the allocation had not been adequately supported, requiring instead allocation of insurance costs via the Massachusetts Formula.[119] The *I.D.* also held that in calculating allocations under the Massachusetts Formula, the pipeline should not remove purchase account adjustments (PAAs) from the gross property values of affiliates, but consistent with Opinion Nos. 511 and 511-A, the Commission found that the pipeline may remove PAAs when calculating gross plant allocations among unregulated entities for Massachusetts Formula purposes.[120]

Regarding the allocation of G&A costs among the pipeline's own divisions or functions, the Commission affirmed the *I.D.*'s decision to reject the pipeline's modified "KN method."[121] Instead, G&A costs were allocated based on the ratio of direct labor and capital investment among the company's functions and services at issue to the total direct labor and capital investment of all divisions involved, as required by Opinion No. 731,[122] for the reasons that the Commission had rejected the same methodology proposed by the pipeline in Opinion Nos. 511 and 511-A.[123]

Regarding capital structure, although there was no dispute as to the use of the parent company's capital structure or the appropriate date for selecting the capital structure, the pipeline had challenged several points regarding capital structure that were decided by the *I.D.* Regarding the PAA, the Commission decided that consistent with Opinion Nos. 511 and 511-A, it would reverse the *I.D.* that the pipeline remove PAAs from the parent company capital structure due to the difficulty in accurately removing the effects of PAAs and because it should not distort the relative percentage of debt and equity for return purposes.[124] The Commission noted that the pipeline's equity structure was actually slightly more favorable to shippers than the industry average and faulted the *I.D.*'s decision on this point.[125]

The Commission affirmed the *I.D.*'s requirement that the pipeline include in its debt component three items that were challenged by the pipeline on exceptions: senior notes due to expire within one year, borrowings under the

117. *Id.* at PP 167, 169.

118. *Id.* at PP 173, 175-76.

119. *Id.* at P 181.

120. *Id.* at P 184.

121. *Id.* at PP 189, 192.

122. Opinion No. 731, *Kansas-Nebraska Natural Gas Co.*, 53 F.P.C. 1691 (1975), *order on reh'g*, 54 F.P.C. 923, *aff'd*, *Kansas-Nebraska Natural Gas Co. v. Federal Power Comm'n*, 534 F.2d 227 (10th Cir. 1976).

123. Opinion No. 522, *SFPP*, *supra* note 94, at P 192.

124. *Id.* at PP 201-02.

125. *Id.* at PP 203-04.

revolving credit facility, and certain commercial paper.[126] The Commission found that these issues had been resolved in Opinion No. 511 and found the reasoning applicable in this proceeding as well.[127] With respect to the cost of debt, the pipeline and Commission Trial Staff filed exceptions to the *I.D.*'s determination that the pipeline must incorporate its parent's interest rate swaps into the debt cost for ratemaking, and the Commission reversed the *I.D.* on this point.[128] The Commission found that the swaps were related to the financing of the parent, not the operations of the pipeline; furthermore, despite suggestions in some SEC filings under different accounting rules than those used at the Commission, the swaps affect the interests of the parent and not the pipeline, so the parent should take the risks and enjoy the benefits of the swaps.[129] The Commission distinguished a natural gas case relied upon by intervenors and concluded that the cost of debt issuances by the parent, which did not appear imprudent, should be the cost of debt for ratemaking purposes.[130]

On the issue of the proper calculation of the starting rate base (SRB), consistent with Opinion No. 511-A, the Commission affirmed the *I.D.*'s conclusion that the pipeline had incorrectly calculated the SRB by failing to multiply the depreciated cost rate base by the debt ratio and the Interstate Commerce Commission (ICC) valuation rate base by the equity ratio and then to add the two figures together.[131] The Commission found that the pipeline should recalculate the SRB as instructed in their order.[132]

The Commission addressed a number of disputed findings in the *I.D.* relating to income tax allowance and noted that all of the issues had already been addressed substantively in Opinion Nos. 511 and 511-A.[133] The Commission affirmed the holding of the *I.D.* that the pipeline was entitled to have an income tax allowance in its cost of service despite being a flow-through entity.[134] However, the *I.D.* also made factual findings based on hypotheticals, suggesting that the tax allowance would permit over-recovery of costs and double-recovery of costs; the Commission explained at length why these concerns must be rejected as incorrect and already addressed in other orders, including Opinion Nos. 511 and 511-A.[135] The Commission also affirmed the finding of the *I.D.* that the pipeline had met its burden to show an actual or potential tax liability.[136]

The Commission reversed the *I.D.* regarding its finding that the pipeline should not have calculated its weighted average tax using incentive distribution provisions in its agreement with a parent, noting that it reached the same conclusions in Opinion Nos. 511 and 511-A.[137] However, the Commission

126. *Id.* at P 220.
127. *Id.* at PP 221-23.
128. *Id.* at PP 225, 244.
129. *Id.* at PP 245-48.
130. *Id.* at PP 249-50.
131. *Id.* at PP 265-66.
132. *Id.* at P 266.
133. *Id.* at P 267.
134. *Id.* at P 283.
135. *Id.* at PP 285-89.
136. *Id.* at P 291.
137. *Id.* at PP 305-07.

affirmed the *I.D.* regarding the point that the weighted tax calculation is based on the income distributed to the partnership categories, not on the taxable income of a partner used by that partner for its tax returns; the Commission also required the pipeline to use the proposed methodology of one of the shipper groups using distributed income rather than actual cash distributions in determining the weighted average tax rate.[138] The Commission reversed the *I.D.*'s decision to adjust the tax rate for unrelated business taxable income (UBIT) and mutual funds to 0%, and briefly summarized the grounds upon which the same decision had been reached in Opinion No. 511.[139] The Commission also affirmed the *I.D.*'s conclusion that accumulated deferred income tax (ADIT) calculations should reflect relevant state income taxes, consistent with Opinion No. 511, and the marginal tax rate should be adjusted in accordance with the *I.D.*'s findings, though only to the extent that those findings have not been changed by the Commission.[140]

3. *Enbridge Energy, LP*, 139 F.E.R.C. ¶ 61,269 (2012).

On June 29, 2012, the FERC issued an order which accepted Enbridge Energy, Limited Partnership's (Enbridge) proposed tariff.[141] In the tariff filing, Enbridge proposed to increase its rates consistent with a multiplier issued by the Commission on May 15, 2012.[142] PBF Holding Company LLC and Toledo Refining Company LLC (PBF) protested the filing, claiming that Enbridge's proposed index rate increase was substantially in excess of Enbridge's actual cost increases and therefore unreasonable.[143] PBF asserted that Enbridge's Form No. 6 showed that the cost of service decreased from 2010 to 2011 and when combined with Enbridge's proposed tariff increase and then applying the Commission's percentage comparison test, resulted in an approximately 56% revenue increase.[144] PBF relied on the Commission's 2011 decision in *SFPP, L.P.* to support its claim, asserting that the Commission had found a total revenue increase of 10.9% was sufficient to warrant investigation.[145] Enbridge responded that oil spills in 2010 and settlements in 2011 resulted in one-time costs and recoveries that artificially made its cost of service rise sharply in 2010 and then decrease in 2011.[146] Excluding these one-time costs, Enbridge maintained that it passed the Commission's screen for receiving the index increase.[147]

The Commission applied the percentage comparison test to evaluate PBF's protest to the index-based tariff filing.[148] However, the Commission noted that under the test, "the Commission can take cognizance of explanatory information

138. *Id.* at P 308.
139. *Id.* at PP 314-16.
140. *Id.* at P 349.
141. *Enbridge Energy, LP*, 139 F.E.R.C. ¶ 61,269 at P 1 (2012).
142. *Id.* at P 2 (referencing Docket No. RM93-11-000).
143. *Id.* at PP 3-4.
144. *Id.* at P 4.
145. *Id.* (citing *SFPP, L.P.*, 135 F.E.R.C. ¶ 61,274 (2011)).
146. *Id.* at P 7.
147. *Id.*
148. *Id.* at P 11.

that the pipeline reported on Page 700 of in [sic] its FERC Form No. 6."[149] Taking into account such information, the Commission found that "Enbridge's 2010 and 2011 costs were skewed by extraordinary events"—namely the oil spills and settlement recoveries.[150] The Commission asserted that "[t]he index serves as a mechanism for recovering a pipeline's normal business costs, not costs associated with extraordinary one-time events that cause an extreme and temporary change in the pipeline's cost of service."[151] The Commission found that Enbridge demonstrated in its Form No. 6 that, excluding the extraordinary events, its adjusted cost of service increased by 5.2%.[152] Thus, the Commission accepted the tariff filing, concluding that the proposed increase was "not so substantially in excess of the actual cost increases incurred by the carrier that the rate adjustment should be disallowed."[153]

4. *Buckeye Pipe Line Co.*, 142 F.E.R.C. ¶ 61,140 (2013).

On February 22, 2013, the Commission issued its "Order Terminating Experimental Program and Denying Rehearing" in *Buckeye Pipe Line Co.*,[154] in which the Commission terminated Buckeye Pipe Line Company, L.P.'s (Buckeye) experimental rate program that had been in effect since 1991 and also denied rehearing as to the Commission's initial order rejecting tariff increases.[155] That proceeding originated in a tariff filing by Buckeye under its experimental program in March 2012.[156] A jet fuel shipper protested the filing as to certain destinations, challenging both the program and its continued operation, and arguing, inter alia, that its rates had increased more than would have occurred under the Commission's indexing methodology.[157] In its Show Cause Order, the Commission rejected all of the pipeline's rate increases and required the pipeline to show cause why its experimental program—approved in 1991 and extended when indexing was implemented—should not be terminated and replaced with the generally-applicable methodologies under the oil pipeline regulations, in light of questions raised by the protest, the lack of previous review, and the availability of generic rate alternatives.[158] In response to the show cause order, Buckeye filed a response supporting the appropriateness of continuing the program, but in the alternative, seeking that if the program were to be ended, the competitive markets would be subject to general market-based ratemaking authority, the other markets would be subject to indexation, and the changes

149. *Id.* at P 12.

150. *Id.*

151. *Id.* at P 13.

152. *Id.*

153. *Id.*

154. *Buckeye Pipe Line Co.*,142 F.E.R.C. ¶ 61,140 (2013).

155. *Id.* at PP 6, 8, 13. The initial order in the proceeding was *Buckeye Pipe Line Co.*, 138 F.E.R.C. ¶ 61,239 (2012).

156. 138 F.E.R.C. ¶ 61,239 at P 1.

157. 142 F.E.R.C. ¶ 61,140 at P 4.

158. *Id.* at P 5. Buckeye's experimental program was approved at the same time that most of its markets were found to be subject to sufficient competition to permit market-based rates. *Id.* at P 2. Under the program, Buckeye's rates in competitive markets were subject to some restrictions, and rates changes in other markets were tied to the weighted average change of rates in the competitive markets. *Id.*

would be prospective.[159] Shippers, including the original protester, opposed continuation of the program.[160]

In the *Termination Order*, the Commission noted the background and history of Buckeye's experimental program, which was not protested but also not subject to review.[161] The Commission noted, however, that the decision to authorize the pipeline's program as an experimental program differed from the current issue, which was in effect whether to make the program permanent—a step requiring greater support. The Commission concluded instead that given the various ratemaking alternatives available to shippers under its oil pipeline regulations, which have been successful, it would decline to make any "permanent changes" to those regulations by permanently adopting the program and thus determined that the program should be discontinued.[162] Consequently, the Commission held that future changes to the pipeline's rates would need to be undertaken under the methodologies in its part 342 regulations and that the pipeline must amend its tariff to remove the experimental program procedures.

The Commission noted that certain rates in the New York City market were subject to pending complaints.[163] The Commission also denied the pipeline's rehearing request as to the rates rejected in the Show Cause Order, as being moot because the program is being terminated, with future rate changes made prospectively subject to the generic ratemaking procedures.[164]

E. Rules Tariff Decisions

1. *Seaway Crude Pipeline Co.*, 143 F.E.R.C. ¶ 61,036 (2013).

On April 12, 2013, the Commission issued its "Order Accepting Tariff" in *Seaway Crude Pipeline Company LLC*.[165] Seaway Crude Pipeline Company LLC (Seaway) filed a tariff to revise its prorationing policy and implement a lottery system for allocating uncommitted capacity.[166] Under Seaway's existing prorationing policy, Seaway allocated 90% of available capacity to regular shippers, who had moved barrels during the base period, and 10% to new shippers.[167] However, Seaway experienced continued problems of "proliferation of [n]ew [s]hippers and over-nominations on its pipeline."[168] Seaway claimed the proliferation of new shippers "(1) resulted in substantial speculation and market uncertainty in the nomination process; (2) made it impossible for [n]ew [s]hippers to satisfy the minimum monthly tender requirement . . . ; and (3) created substantial and time-consuming administrative burdens and pipeline inefficiencies."[169] To address these issues, Seaway proposed "to implement a

159. *Id.* at P 9.
160. *Id.* at P 10.
161. *Id.* at PP 11-12.
162. *Id.* at P 13.
163. *Id.*
164. *Id.* at P 15.
165. *Seaway Crude Pipeline Co.*, 143 F.E.R.C. ¶ 61,036 (2013).
166. *Id.* at P 1.
167. *Id.* at P 3.
168. *Id.*
169. *Id.* at P 4.

lottery mechanism using a software-generated random process to establish a fair and non-discriminatory method of allocating the number of minimum volume tenders . . . available to [n]ew [s]hippers."[170] In addition, Seaway proposed to change the definition of "affiliate" in order "to ensure there are no affiliated winners obtaining capacity in the same lottery."[171] Seaway also proposed to prohibit shippers from submitting nominations for more than the total amount of capacity reserved for new shippers.[172]

Protestants claimed that the proposal should be rejected or suspended subject to a technical conference because Seaway had failed to convene a shipper meeting prior to filing the tariff.[173] They further alleged that the proposal "makes it very difficult for a New Shipper to transition to Regular Shipper status" because a new shipper would have to win the lottery in twelve consecutive months.[174] Thus, "the proposed tariff [would] effectively ensure capacity and space for existing [c]ommitted [s]hippers" and lock out new shippers.[175]

The Commission accepted the tariff, finding that "the lottery will likely reduce the number of speculators because if such an entity wins the lottery it will need to deliver volumes equal to the minimum tender or pay the tariff charge related to the amount of its allocation."[176] The Commission also rejected the protestants' argument that Seaway was required to call a shipper meeting before filing the tariff, noting that "[w]hile consultation with a pipeline's shippers to discuss proposed tariff revisions can be beneficial[,] it is not required."[177] The Commission stated that "crafting an allocation procedure is specific to the circumstances of each pipeline" and because "all [n]ew [s]hippers will be subject to the same lottery system . . . there is no issue of undue discrimination."[178] The Commission concluded that the tariff represented "a good faith attempt to alleviate the apportionment problems with uncommitted capacity on [Seaway's] system in order to protect bona fide shippers who intend to be long term customers of Seaway,"[179] which was reinforced by Seaways commitment "to monitor its experience under this system and consider further tariff amendments if needed."[180]

2. *Enbridge Pipeline (North Dakota) LLC*, 140 F.E.R.C. ¶ 61,193 (2012).

On September 14, 2012, the Commission issued its "Order Accepting Tariff" in *Enbridge Pipelines (North Dakota) LLC*.[181] In the tariff filing, Enbridge (North Dakota) LLC (Enbridge North Dakota) sought to modify its

170. *Id.* at P 5.
171. *Id.*
172. *Id.* at P 19.
173. *Id.* at P 7.
174. *Id.* at P 8.
175. *Id.* at P 15.
176. *Id.* at P 19.
177. *Id.* at P 21.
178. *Id.*
179. *Id.* at P 23.
180. *Id.* at P 22.
181. *Enbridge Pipeline (North Dakota) LLC*, 140 F.E.R.C. ¶ 61,193 (2012).

prorationing policy in response to "significant and prolonged apportionment on the system and subsequent shipper proliferation."[182] In October of 2010, the Commission had approved a tariff implementing a twenty-four month freeze on the ability of new shippers to become regulation shippers on Enbridge North Dakota's system as an emergency measure.[183] During that period, new shippers were limited to 10% of the pipeline's capacity.[184] However, the problem of new shipper proliferation continued. Overall, 246 new shippers became registered on the system between 2006 and 2012.[185]

With the temporary freeze set to expire, Enbridge North Dakota sought the following changes to its prorationing policy: (1) shippers who shipped in nine out of the past twelve months would be considered historical shippers and would receive capacity equal to their histories during prorationing; (2) all other shippers would be considered new shippers and their allocations would be capped at a minimum batch size; (3) historical shippers would be allocated up to 95% of total capacity with 5% reserved for new shippers, but any additional capacity from future expansions would be used to guarantee new shippers at least 10% of total capacity; (4) a new shipper would not be permitted to become a historical shipper if this would result in a historical shipper's allocation falling below a minimum batch; (5) affiliates of historical shippers could not become new shippers; and (6) a historical shipper could not increase its historical percentage through an acquisition or merger with a new shipper.[186]

A protestant argued that the temporary freeze should be extended and that the proposal would encourage further proliferation of small volume shippers who could not provide long-term support of the pipeline.[187] Nonetheless, the Commission found the proposed tariff just and reasonable.[188] The Commission noted that the proposal was based on "broad shipper input" and was only opposed by one party.[189] The Commission determined that "[t]he proposal appropriately balances the interests of [h]istorical and [n]ew [s]hippers and eliminates incentives of shippers to create new affiliated shippers as a means of increasing their allocations of capacity."[190] The Commission also found that the 5% reservation of capacity for new shippers instead of the more common 10% reservation was "reasonable given the unique circumstances on Enbridge North Dakota's system," particularly its commitment to allocate future expansion capacity to new shippers first.[191]

182. *Id.* at P 3.
183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.* at PP 5-9.
187. *Id.* at PP 13-14.
188. *Id.* at P 21.
189. *Id.*
190. *Id.*
191. *Id.* at P 22.

3. *Dixie Pipeline Co.*, 140 F.E.R.C. ¶ 61,127 (2012).

On August 15, 2012, the Commission issued its "Order Following Technical Conference" in *Dixie Pipeline Co.*[192] Dixie Pipeline Company (Dixie) filed a tariff to modify its prorationing policy.[193] The prior policy allocated capacity based on shippers' historical volumes at origin points only.[194] The proposed modification added a destination component that would prevent shippers from using their historical volume to certain destination points for movements to downstream destinations.[195]

A shipper, Dow Hydrocarbons and Resources LLC (DHR), protested, claiming that the proposed tariff discriminated against it in violation of section 3(1) of the ICA.[196] DHR had built up a history as a short-haul shipper delivering to a certain destination but occasionally used its allocation to transport volumes to another long-haul destination further downstream during peak periods of demand.[197] The new policy would prevent DHR from using its historical allocation to ship to long-haul destinations.[198] DHR claimed that the new policy would deprive it alone of the ability to ship to the downstream markets.[199] DHR further alleged that Dixie had designed the policy to protect its owner and operator—a long-haul shipper on Dixie's system.[200]

Dixie replied that its current prorationing policy based on injection allocations provided DHR an unfair preference in capacity over traditional long-haul shippers.[201] Dixie claimed the policy provided DHR with "the ability to use its control over injection capacity to restrict the ability of the traditional long-haul shippers to move their product to [downstream destinations]."[202] Dixie further argued that this would discourage long-haul shippers from using Dixie's system to the detriment of the pipeline and all shippers.[203] DHR countered that Dixie's current policy was fair because "any other long-haul shipper on the Dixie system has the same opportunity as DHR to build up its historical volumes to take advantage of the current injection capacity allocation policy."[204]

The Commission denied the proposed tariff as violating section 3(1) of the ICA.[205] The Commission found that "Dixie's proposal to revise its current prorationing methodology retroactively undermines the prior allocation history of a particular shipper, and DHR is the primary, if not the only, shipper that would be impacted adversely by the application of the proposed revision to

192. *Dixie Pipeline Co.*, 140 F.E.R.C. ¶ 61,127 (2012).
193. *Id.* at P 1.
194. *Id.* at P 9.
195. *Id.*
196. *Id.* at P 41.
197. *Id.* at P 6.
198. *Id.* at P 7.
199. *Id.*
200. *Id.* at P 23.
201. *Id.* at P 9.
202. *Id.* at P 32.
203. *Id.* at P 11.
204. *Id.* at P 27.
205. *Id.* at P 53.

Dixie's tariff."[206] The Commission held the proposed policy was an impermissible attempt to favor certain shippers.[207] The Commission explained:

> The Commission acknowledges that it affords pipelines considerable latitude in developing methods for allocating pipeline capacity in periods of excess demand for the capacity. However, Dixie's proposal attempts to expand that latitude beyond the limitations established in the ICA by unjustly subjecting DHR to "undue or unreasonable prejudice or disadvantage."[208]

The Commission further noted that Dixie's existing prorationing method was reasonable and neutral because it permitted "any long-haul shipper . . . to make the decision to build up a shipping history that would permit it to obtain a greater share of allocated injection capacity during periods of prorationing."[209] The Commission also dismissed Dixie's claim that long-haul shippers would leave the system as "speculative."[210]

F. Petitions for Declaratory Order

1. *Seaway Crude Pipeline Co.*, 142 F.E.R.C. ¶ 61,201 (2013).

On March 22, 2013, the Commission issued its "Order on Petition for Declaratory Order," in *Seaway Crude Pipeline Co.*[211] Seaway Crude Pipeline Company LLC (Seaway) had filed a petition for declaratory order requesting that the Commission "affirm its policy of honoring the tariff rates agreed to by shippers who sign contracts in a valid open season."[212] The Commission denied Seaway's request on procedural grounds but nonetheless affirmed its policy regarding committed rates.[213] Seaway had filed a prior petition for declaratory order to establish initial rates for a reversed pipeline project, which was set for hearing.[214] In that proceeding, the Commission Trial Staff claimed Seaway's proposed committed and uncommitted rates should be cost-based.[215] In response, Seaway filed the petition requesting that the Commission "promptly affirm that its established policy of honoring the tariff rates agreed to by shippers who sign contracts in a valid open season applies equally to Seaway's [c]ommitted [s]hippers" and to "reassure the oil pipeline industry as a whole that the Commission supports contracts fairly offered to all potential shippers to finance and construct new and expanded oil pipelines."[216] Several parties opposed the petition.[217]

206. *Id.* at P 47.
207. *Id.* at P 52.
208. *Id.* at P 49.
209. *Id.* at P 51.
210. *Id.* at P 52.
211. *Seaway Crude Pipeline Co.*, 142 F.E.R.C. ¶ 61,201 (2013).
212. *Id.* at P 1.
213. *Id.*
214. *Id.* at P 2.
215. *Id.* at P 3.
216. *Id.* at P 4.
217. *Id.* at P 5.

The Commission technically denied the petition, finding that "Seaway failed to follow the Commission's administrative process."[218] Nevertheless, the Commission asserted its policy regarding committed rates and stated that it "hereby affirms that its regulations allow an oil pipeline to charge a negotiated rate if it is agreed to by at least one unaffiliated shipper."[219] The Commission acknowledged that its regulations did not explicitly provide for "negotiated initial rates with agreed-to future rate changes."[220] However, the Commission noted it had previously ruled that committed rate contracts "are consistent with the spirit of section 342.4" of its regulations.[221] The Commission also explained:

> The Commission has also clarified that "the agreed-upon terms of a [transportation service agreement (TSA)] will govern the determination of the committed shippers rates over the term of the TSA, and that the rate design embodied in the TSA used to determine both the committed and uncommitted rates will be upheld and applied during the term of the TSA," with one condition. If an uncommitted rate is protested, the pipeline must comply with section 342.2(b) of the Commission's regulations to support its uncommitted rate by filing cost, revenue, and throughput data supporting such rate as required by [p]art 346 of the Commission's regulations.[222]

The Commission affirmed its "policy of honoring contracts signed by committed shippers" including "the commitment to pay for contract volumes and other agreed-to charges for the terms of the contracts."[223] Finally, the Commission reasserted that "agreements executed by . . . committed shippers (including the agreed-to-tariff, rate, and priority service structure) would be upheld and applied during the established terms of the agreements between the pipeline and the shippers that made volume commitments during the open season."[224]

2. *Enbridge Pipelines (North Dakota) LLC*, 142 F.E.R.C. ¶ 61,212 (2013).

On March 22, 2013, the Commission issued its "Order on Petition for Declaratory Order," in *Enbridge Pipelines (North Dakota) LLC*.[225] Enbridge Pipelines (North Dakota) LLC (Enbridge North Dakota) had requested a combined declaratory order and approval of an offer of settlement regarding the rate structure of a proposed expansion and extension of its Sandpiper Project pipeline system.[226] The Sandpiper Project involved construction of two pipeline segments—(1) from Beaver Lodge, North Dakota to Clearbrook, Minnesota as a twin to an existing line, and (2) from Clearbrook to Superior, Wisconsin—as well as additional pump stations and expansions within Enbridge North Dakota's existing terminaling facilities.[227]

218. *Id.* at P 11.
219. *Id.* at P 12.
220. *Id.*
221. *Id.* (quoting *Express Pipeline P'ship*, 76 F.E.R.C. ¶ 61,245, at p. 62,258-59 (1996)).
222. *Id.* at P 13 (citations omitted) (internal quotation marks omitted).
223. *Id.* (quoting *Kinder Morgan Pony Express Pipeline LLC*, 141 F.E.R.C. ¶ 61,180 at P 21 (2012)).
224. *Id.* (quoting *Kinder Morgan*, 141 F.E.R.C. ¶ 61,180 at P 21).
225. *Enbridge Pipelines (North Dakota) LLC*, 142 F.E.R.C. ¶ 61,212 (2013).
226. *Id.* at P 1.
227. *Id.* at P 2.

Enbridge North Dakota requested Commission approval of three points: (1) recovery of the costs of the expanded pipeline between Beaver Lodge and Clearbrook "through a cost-of-service surcharge to be added to the existing rates for all barrels moving to Clearbrook, Minnesota and beyond;" (2) confirmation that Enbridge North Dakota could recover the costs of the extension from Clearbrook to Superior "through a cost-based rate for movements over that segment;" and (3) approval of certain "cost parameters to be used in setting the surcharge and the cost-based extension rate" as contained in shipper support letters characterized as an offer of settlement.[228] The cost methodology included use of the Commission's Opinion No. 154-B methodology, a tax allowance component, and a fifteen year term, as well as a stipulated capital structure, cost of debt, real cost of equity, and annual depreciation rate.[229] In addition, the expansion surcharge and extension rate tariff would be trued-up annually to actual costs and volumes.[230] Several shippers protested the petition on the grounds that "the additional capacity provided by the Sandpiper Project is not necessary given the currently available, and soon to be available, pipeline and rail alternatives," and "the risk of underutilization . . . will fall solely on Enbridge North Dakota's shippers by the terms of the proposal."[231]

The Commission denied the petition, finding that "the proposed rates would not qualify for acceptance under the Commission's regulations for establishing initial rates."[232] Enbridge North Dakota had not provided data to support the rates on cost-of-service grounds.[233] The Commission noted that "even if the letters of support can be construed as agreements of a non-affiliated person pursuant to section 342.2(b) of the Commission's regulations, the proposed rates are protested and thus require Enbridge North Dakota to support the proposed rates on a cost-of-service basis, which Enbridge North Dakota has not done."[234] The Commission further found that the rates were also not justified under the regulatory methods for changing rates.[235] Although Enbridge North Dakota submitted letters of shipper support, the rates could not be considered settlement rates because they were not "agreed to in writing by each person who is using the service on the day of the filing" as demonstrated by the protesting shippers.[236]

3. *Kinder Morgan Pony Express Pipeline LLC*, 141 F.E.R.C. ¶ 61,249 (2012).

On December 21, 2012, the Commission issued its "Order on Petition for Declaratory Order" in *Kinder Morgan Pony Express Pipelines LLC*.[237] Kinder Morgan Pony Express Pipeline LLC and Hiland Crude, LLC (jointly Petitioners)

228. *Id.* at P 5.
229. *Id.* at P 6.
230. *Id.*
231. *Id.* at 22.
232. *Id.* at 26.
233. *Id.*
234. *Id.*
235. *Id.*
236. *Id.* at 27.
237. *Kinder Morgan Pony Express Pipeline LLC*, 141 F.E.R.C. ¶ 61,249 (2012).

sought the Commission's approval of its "proposed rate structures, services, and prorationing terms" for joint and local transportation on a new crude oil pipeline from the Bakken formation to the Phillips 66 Ponca City, Oklahoma refinery and other destinations in Cushing, Oklahoma.[238] The proposed project involved construction of new pipeline infrastructure as well as the acquisition and conversion of an existing natural gas pipeline to crude oil service.[239] The Petitioners requested approval of their proposal to charge the committed shippers discounted rates that varied with the size of their volume commitments compared to the uncommitted shippers.[240] The Petitioners represented that the proposed "joint rates . . . should be no more than the sum of the underlying local rates," even though the local rates were not yet on file.[241] The joint committed rates would be adjusted annually following the Commission's indexing regulations.[242] The Petitioners specifically reserved "the right to pass through or otherwise be compensated for any regulatory-imposed costs and to account for pipeline handling shrinkage."[243] The Petitioners also sought approval of certain terms provided to the committed shippers in the throughput and deficiency agreements (T&DAs), including mechanisms for deficiency payment crediting and incremental barrels crediting that would allow committed shippers "the ability to offset both deficiencies and incremental barrels under specified circumstances," and a five year initial contract term with an extension right.[244] The Petitioners further proposed a historical prorationing methodology with a base period of twelve months and a 10% set-aside of capacity for new shippers.[245] The committed shippers would be deemed regular shippers for the first thirteen months the project was in service.[246] The committed shippers could avoid prorationing by paying a premium rate of $0.01 per barrel over the uncommitted rate to obtain priority service in any month.[247]

The Commission accepted the Petitioners' proposal regarding the committed rates and noted that "the Commission will continue to apply its policy of honoring contracts signed by committed shippers, such as the T&DAs here, which include the commitment to pay for contract volumes and other agreed-to charges during the terms of the contracts."[248] The Commission also approved the discounted rate structure and volume tiers for committed shippers, stating:

> [I]t is appropriate for shippers committing to larger volumes to pay discounted rates, versus shippers that do not commit to transport larger volumes. Since its decision in *Express*, the Commission has recognized that uncommitted shippers are

238. *Id.* at PP 1-2.
239. *Id.* at P 8.
240. *Id.* at P 21.
241. *Id.* at P 16.
242. *Id.* at P 11.
243. *Id.* at P 19.
244. *Id.* at PP 32, 37-38.
245. *Id.* at P 23.
246. *Id.* at P 27.
247. *Id.* at P 25.
248. *Id.* at P 18.

> not similarly situated with respect to shippers making longer term commitments, incurring greater costs and liabilities, and undertaking greater risks.[249]

The Commission also approved the proposed deficiency payment crediting and incremental barrels crediting mechanisms, as well as the term extension rights.[250] Finally, the Commission accepted the historical prorationing methodology with the ability for committed shippers to avoid prorationing by paying a premium rate.[251]

4. *Enbridge Pipelines (Southern Lights) LLC*, 141 F.E.R.C. ¶ 61,244 (2012).

On December 20, 2012, the Commission issued its "Order on Petition for Declaratory Order" in *Enbridge Pipelines (Southern Lights) LLC*.[252] Enbridge Pipelines (Southern Lights) LLC (Enbridge Southern Lights) had requested that the Commission "issue a declaratory order confirming the validity of a contractual right of first offer" (ROFO) included in the transportation service agreement (TSA) offered to committed shippers on Enbridge's Southern Lights Pipeline.[253] The Commission had previously issued an order approving the rate structure in the TSA in 2007.[254] The TSA provided the project's committed shippers with an ROFO.[255] In the event Enbridge Southern Lights decided to hold another open season, the ROFO permitted the committed shippers to agree to ship or pay for any remaining initial capacity at the committed rate before Enbridge would offer the capacity through a new open season to all prospective shippers.[256] The Southern Lights pipeline began service transporting diluent from Chicago, Illinois, to Edmonton, Alberta, in July of 2010.[257] In May of 2012, Enbridge Southern Lights notified the committed shippers that they could exercise their ROFO for up to 85,000 barrels per day (bpd) of capacity before it offered the capacity to other interested parties through an upcoming open season.[258] Enbridge Southern Lights also filed the petition requesting the Commission's assurance that the ROFO provision was valid.[259] Enbridge Southern Lights represented that a minimum of 10% of the pipeline's capacity would be reserved for uncommitted shippers as consistent with Commission precedent.[260] Shippers protested the petition, claiming that the ROFO was unlawful and discriminatory under the ICA.[261]

249. *Id.* at P 22 (citing *Express Pipeline P'ship*, 76 F.E.R.C. ¶ 61,245, at p. 62,254 (1996)).

250. *Id.* at PP 36-37, 39.

251. *Id.* at P 30.

252. *Enbridge Pipelines (Southern Lights) LLC*, 141 F.E.R.C. ¶ 61,244 (2012).

253. *Id.* at P 1.

254. *Id.* at P 4 (citing *Enbridge Pipelines (Southern Lights) LLC*, 121 F.E.R.C. ¶ 61,310 (2007), *order granting clarification and denying reh'g*, 122 F.E.R.C. ¶ 61,170 (2008)).

255. *Id.* at P 5.

256. *Id.*

257. *Id.* at P 2.

258. *Id.* at P 9.

259. *Id.* at P 10.

260. *Id.* at P 13.

261. *Id.* at P 14.

The Commission held the ROFO provision was valid and found that "the fact that it will not be offered to new [c]ommitted [s]hippers is not discriminatory under the ICA."[262] The Commission noted that Enbridge had offered the ROFO as part of its TSA to all interested shippers in an open season.[263] The Commission explained:

> Because all shippers had the opportunity to take advantage of the terms and conditions of the original TSA, there is no issue of undue discrimination or undue preference among the resulting class of shippers. Those shippers who elected not to make an anchor commitment are, by their own choices, not similarly situated to the original [c]ommitted [s]hippers.[264]

The Commission also observed that the protesting shippers could obtain committed capacity in the upcoming open season.[265] However, the Commission noted that "even if all of the committed capacity was subscribed, [the protesting shippers] always have the opportunity to ship on a month-to-month basis using the 10[%] uncommitted capacity with no ongoing financial commitment to the pipeline."[266] Therefore, the Commission held the ROFO provision was valid and did not violate the ICA.[267]

5. *Kinder Morgan Pony Express Pipeline LLC*, 141 F.E.R.C. ¶ 61,180 (2012).

On November 30, 2012, the Commission issued its "Order on Petition for Declaratory Order" in *Kinder Morgan Pony Express Pipeline LLC*.[268] Kinder Morgan Pony Express Pipeline LLC and Belle Fourche Pipeline Company (jointly Petitioners) had requested the Commission approve its "proposed rate structures, services, and prorationing terms applicable to joint and local transportation services to be offered via new crude oil pipeline capacity."[269] The project was designed to provide transportation from the Bakken region to Ponca City and Cushing, Oklahoma.[270] The Petitioners planned to expand an existing pipeline, acquire and convert a gas pipeline to crude oil service, and construct new pipeline in order to bring the project in to service.[271] The Petitioners conducted open seasons in which they offered joint and local T&DAs.[272] The Petitioners sought Commission approval of the initial joint committed rates and local committed rates subject to annual adjustment following the Commission's indexing regulations as well as the overall rate structure.[273] The Petitioners asserted "that the [j]oint [c]ommitted [r]ates [would] be no more than the sum of

262. *Id.* at P 26.
263. *Id.*
264. *Id.*
265. *Id.* at P 28.
266. *Id.*
267. *Id.* at P 26.
268. *Kinder Morgan Pony Express Pipeline LLC*, 141 F.E.R.C. ¶ 61,180 (2012).
269. *Id.* at P 1.
270. *Id.* at P 3.
271. *Id.* at PP 5, 8.
272. *Id.* at PP 11, 14.
273. *Id.* at PP 15-16.

the local uncommitted rates."[274] The committed shippers would be subject to deficiency payments but would also have limited make-up rights designed to "provide the flexibility to allow [c]ommitted [s]hippers to ship more or less than their contracted amount in any month" through a deficiency payment and barrels crediting mechanism.[275] The Petitioners stated that the initial terms for committed shippers under the T&DAs were five years, but committed shippers possessed a one-time right to extend the term for an additional five years and, if desired, to reduce their committed volumes by 20% in the second term.[276] The Petitioners requested the Commission find "that the key provisions of the T&DAs will govern the Petitioners' transportation services to their Committed Shippers during the term of the T&DAs."[277] Further, the Petitioners sought approval of a historical prorationing policy with a base period of twelve months and a 10% capacity set aside for new shippers.[278] The committed shippers would be deemed the regular shippers for the thirteen month period following the project's in-service date.[279] The committed shippers could maintain their regular shipper status by shipping or paying for contracted capacity that they did not utilize.[280] The Petitioners also sought permission to recover certain costs regarding conversion of the natural gas pipeline to crude oil service through its rates and to offer early service before the project's in-service date under an interim prorationing policy, where any history accumulated would be erased when the project began service.[281]

The Commission granted the requested declaratory relief and noted that "[a]lthough the local rates are unknown at this time because the Project has not been completed, Petitioners agree that the [c]ommitted [r]ates will be no greater than the uncommitted rate or any other committed rates for equivalent service."[282] The Commission also determined that, while its regulations did not explicitly allow for negotiated rates with agreed-to future rate changes, it would "continue to apply its policy of honoring contracts signed by committed shippers, such as the T&DAs here, which include the commitment to pay for contract volumes and other agreed-to charges for the terms of the contracts."[283] The Commission further approved the proposed rate structure, noting that "it is appropriate for shippers committing to larger volumes to pay discounted rates, versus shippers that do not commit to transport larger volumes."[284] The Commission accepted the proposed prorationing terms as justified by necessity and "the unique nature of the [p]roject."[285] The Commission accepted the deficiency payment and barrel crediting methodology as "affording the

274. *Id.* at P 19.
275. *Id.* at P 42.
276. *Id.* at P 15.
277. *Id.* at P 22.
278. *Id.* at P 30.
279. *Id.* at P 33.
280. *Id.* at P 28.
281. *Id.* at P 52.
282. *Id.* at P 20.
283. *Id.* at P 21.
284. *Id.* at P 25.
285. *Id.* at P 40.

flexibility in payment for [committed] shipments" while "preventing them from obtaining an unfair advantage over uncommitted shippers."[286] The Commission also approved the cost recovery plans and interim prorationing policy.[287]

6. *Shell Pipeline Co.*, 141 F.E.R.C. ¶ 61,017 (2012).

On October 5, 2012, the Commission issued its "Order on Petition for Declaratory Order" in *Shell Pipeline Co.*[288] Shell Pipeline Company, LP (Shell) requested approval of its proposed rate and service structure for transporting crude between St. James, Louisiana, and Houston, Texas, on its new Westward Ho Project.[289] Specifically, Shell sought approval of the committed rates established in its pro forma TSA.[290] The committed rates would be discounted based on volume, length, and term.[291] The rates would be subject to indexing and a viscosity surcharge.[292] In addition, the committed shippers would have their initial volume history set by the contractual volume commitment for purposes of prorationing, and their subsequent history would be based on the higher of their shipped or contract volumes.[293] In addition, the committed shippers would be permitted to assign their contracts and corresponding shipping history.[294] Shell maintained that "up to 10[%] of [the] pipeline capacity would be reserved for non-contract volumes."[295]

The Commission approved the committed rate structure and prorationing methodology.[296] The Commission found that the prorationing method "protects [c]ommitted [s]hippers, who are financially supporting the construction of the pipeline, by allowing them to commit to an expected amount of volumes without diminishing their shipping rights due to the uncertainties regarding when their production will be available."[297] The Commission also approved the committed shippers' contract assignment rights, noting that the proposal to allow committed shippers to assign their contracts and shipping history "has not been previously addressed by the Commission."[298] The Commission found that this feature "will permit the shipper being assigned the contract to step into the shoes of the original shipper, and it will be responsible for providing the continued long term financial support of the pipeline."[299]

286. *Id.* at P 45.
287. *Id.* at P 62.
288. *Shell Pipeline Co.*, 141 F.E.R.C. ¶ 61,017 (2012).
289. *Id.* at P 1.
290. *Id.* at P 7.
291. *Id.*
292. *Id.*
293. *Id.* at P 8.
294. *Id.*
295. *Id.* at P 5.
296. *Id.* at P 18.
297. *Id.* at P 14.
298. *Id.* at P 16.
299. *Id.*

7. *Explorer Pipeline Co.*, 140 F.E.R.C. ¶ 61,098 (2012).

On August 1, 2012, the Commission issued its "Order on Petition for Declaratory Order" in *Explorer Pipeline Co.*[300] Explorer Pipeline Company (Petitioner) requested the Commission issue a declaratory order approving its proposed rate and prorationing structure for transportation on its Diluent Extension Project (Project).[301] The Project was designed to provide additional diluent transportation from Peotone, Illinois, to Manhattan, Illinois.[302] Petitioners planned to build a new eighteen-mile, twenty-four-inch pipeline to provide this service.[303] Petitioner conducted open seasons during which they offered throughput agreements (TAs) to interested shippers.[304] Petitioners sought Commission approval to offer rate discounts relative to the uncommitted rate during periods the pipeline was not in prorationing to shippers who made a term and volume commitment.[305] Further, Petitioner sought approval to allow shippers signing commitments to obtain priority firm capacity by paying a premium rate of $0.01 over the prevailing committed rate during periods of prorationing.[306] Petitioner's rate structure made 71% of volumes available to committed shippers while preserving 29% of volumes for uncommitted shippers.[307] Petitioner amended its petition seeking to apply the same rate and prorationing structure to volumes bound for Kinder Morgan's Cochin pipeline following a widely-publicized open season.[308]

The Commission approved the Petitioner's proposal to allow committed shippers to pay discounted rates during periods without prorationing while giving these shippers the option to pay a premium rate during periods of prorationing for priority service.[309] The Commission stated that "[w]hile such a blended proposal is novel," the proposal "represents a blending of two separate proposals that, individually have been accepted by the Commission in prior declaratory orders."[310] The Commission examined each aspect of the rate and prorationing structure individually, finding that the Petitioner adhered to relevant precedent,[311] but expressed some confusion over the conditions which would trigger a state of prorationing and therefore the availability of priority service.[312] As the Commission recognized, the Petitioner requested that priority service at premium rates be available "any time Explorer's pipeline system as a whole is in prorationing, not merely the proposed extension between Peotone and Manhattan."[313] "[H]owever, the Notice of Binding Open Season merely states

300. *Explorer Pipeline Co.*, 140 F.E.R.C. ¶ 61,098 (2012).
301. *Id.* at P 1.
302. *Id.* at P 3.
303. *Id.*
304. *Id.* at P 6.
305. *Id.*
306. *Id.* at P 7.
307. *Id.* at PP 8, 18.
308. *Id.* at P 11.
309. *Id.* at P 17.
310. *Id.* at P 16.
311. *Id.* at PP 17-19.
312. *Id.* at P 20.
313. *Id.*

that premium service would be triggered if the open season is oversubscribed."[314] Despite this confusion, the Commission found that the "proposed combination of discount rates and premium rates into one open season is reasonable" and approved it subject to the condition that the Petitioner "set forth in its tariff the specific conditions that will place the pipeline into a condition of prorationing."[315] Finally, the Commission approved the Petitioner's request to apply the proposed rate and prorationing structure to committed volumes traveling to Kinder Morgan's Cochin pipeline.[316]

II. SIGNIFICANT LITIGATION WITH THE FERC

A. *Mobil Pipe Line Co. v. FERC*

On April 17, 2012, the U.S. Court of Appeals for the District of Columbia Circuit issued a decision on a Petition for Review of an Order of the Federal Energy Regulatory Commission granting Mobil Pipe Line Company's (Mobil) petition for review, vacating the FERC's order, and remanding for further proceedings regarding a market-based rate application by the Commission.[317] As explained by the court, Mobil filed an application with FERC to charge market-based rates on its Pegasus pipeline.[318] "The Commission scheduled an initial hearing before an administrative law judge to determine whether Pegasus possessed market power," during which the "FERC's expert staff strongly supported Mobil's application for market-based rate authority, concluding that Pegasus's origin and destination markets were plainly competitive."[319] However, the Commission ultimately denied Mobil's application on the ground that Pegasus possessed market power.[320]

The court reviewed the FERC's decision under the arbitrary and capricious standard and evaluated "whether producers and shippers of Western Canadian crude oil must rely so heavily on Pegasus for transportation of their crude oil that Pegasus can be said to possess market power."[321] Upon review, the court stated that it "fail[ed] to understand how the entry of Pegasus, which transports only about 66,000 barrels per day, into a previously competitive 2.2 million barrel per day market makes that market suddenly uncompetitive."[322] Consequently, the court concluded that the FERC's decision was unreasonable in light of the record evidence.[323]

The Canadian Association of Petroleum Producers, Canadian Natural Resources Limited, and Suncor Energy Marketing Inc., parties to the Commission proceeding and intervenors in the appeal, filed petitions on June 1,

314. *Id.*
315. *Id.* at P 21.
316. *Id.* at P 22.
317. *Mobil Pipe Line Co. v. FERC*, 676 F.3d 1098 (D.C. Cir. 2012).
318. *Id.* at 1099.
319. *Id.* at 1101.
320. *Id.* at 1099.
321. *Id.* at 1102.
322. *Id.* at 1103.
323. *Id.* at 1105.

2012, for rehearing en banc of the court's opinion.[324] The court denied the petitions in a per curiam decision issued June 11, 2012.[325] On August 28, 2012, Mobil filed a FERC tariff to implement market-based rates for transportation on its Pegasus pipeline, which was accepted by the Commission on September 27, 2012.[326] On March 5, 2013, the Commission denied requests for rehearing and to reopen the record with respect to the grant of market-based rate authority to Mobil's Pegasus pipeline.[327] The Commission explained that the shipper arguments "appear to be a collateral attack on the court's opinion as reflected in the Commission's order on remand and order accepting market-based tariff, and an attempt to re-litigate issues that have been settled by the court."[328]

III. THE PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION

A. ONEOK Hydrocarbon L.P. v. U.S. Department of Transportation

On December 3, 2012, ONEOK Hydrocarbon, L.P. and related ONEOK entities (collectively, ONEOK) filed a complaint, motion for temporary restraining order, and a motion for preliminary injunction against the Department of Transportation and the Pipeline and Hazardous Materials Safety Administration (PHMSA) in the U.S. District Court for the Northern District of Oklahoma (District Court).[329] ONEOK filed the action in response to a series of PHMSA interpretations of the Pipeline Safety Act (PSA) and the Pipeline Safety Regulations in which the agency asserted jurisdiction over a ONEOK Natural Gas Liquids (NGL) fractionation plant in Kansas and a scheduled PHMSA inspection of the plant.[330] ONEOK asserted that PHMSA lacks jurisdiction over the fractionation plant because it is a refinery and associated in-plant piping and storage that is exempt from the definition of "transporting hazardous liquid" in the PSA.[331]

On February 25, 2013, ONEOK filed a petition for review of PHMSA's legal and regulatory jurisdictional interpretations at the U.S. Court of Appeals for the D.C. Circuit.[332] On March 4, 2013, ONEOK filed an unopposed motion to hold the proceeding in abeyance pending resolution of the related district court litigation.[333] On March 25, 2013, the D.C. Circuit issued an order granting

324. *Mobil Pipe Line Co.*, 140 F.E.R.C. ¶ 61,249 at P 3 (2012).

325. *Id.*

326. *Id.* at P 5.

327. *Mobil Pipe Line Co.*, 142 F.E.R.C. ¶ 61,175 (2013).

328. *Id.* at P 14.

329. Complaint, ONEOK Hydrocarbon, L.P. v. U.S. Dep't of Transp., No. 12-CV-660-JHP-FHM (N.D. Okla. Dec. 3, 2012); Motion for Preliminary Injunction & Brief in Support, *ONEOK*, No. 12-CV-660-JHP-FHM (N.D. Okla. Dec. 3, 2012); Plaintiff's Motion for Temporary Restraining Order, *ONEOK*, No. 12-CV-660-JHP-FHM (N.D. Okla. Dec. 3, 2012).

330. Motion for Preliminary Injunction & Brief in Support, *supra* note 329, at 2-3.

331. *Id.* at 2; 49 U.S.C. § 60101(a)(22) (2012).

332. Petition for Review, ONEOK Hydrocarbon, L.P. v. U.S. Dep't of Transp., No. 13-1040 (D.C. Cir. Feb. 25, 2013).

333. Unopposed Motion to Hold Proceeding in Abeyance, *ONEOK*, No. 13-1040 (D.C. Cir. Mar. 4, 2013).

ONEOK's motion and holding the case in abeyance.[334] On April 8, 2013, the district court dismissed ONEOK's complaint for lack of subject matter jurisdiction, finding that the PHMSA action at issue was an order subject to review in the Courts of Appeals.[335] As such, the District Court did not reach the merits of ONEOK's jurisdictional arguments. The D.C. Circuit case is still pending.

334. Order Granting Motion to Hold in Abeyance, *ONEOK*, No. 13-1040 (D.C. Cir. Mar. 25, 2013).

335. *ONEOK*, No. 12-CV-660-JHP-FHM, slip op. at 8 (N.D. Okla. Apr. 8, 2013).

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