

REPORT OF THE OIL AND LIQUIDS COMMITTEE

This report summarizes oil and liquids developments of particular interest to energy law practitioners that occurred from July 1, 2016 through June 30, 2017.*

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I. SIGNIFICANT FERC ADMINISTRATIVE ORDERS

A. Rulemaking

1. Revisions to Indexing Policies and Page 700 of FERC Form No. 6

On October 20, 2016, the Federal Energy Regulatory Commission (FERC) issued an Advance Notice of Proposed Rulemaking (ANOPR), seeking comments regarding (1) potential modifications to its policies for evaluating oil pipeline index rate changes, and (2) potential changes to FERC Form No. 6, page 700.¹

With respect to evaluating index rate changes, FERC noted that it was contemplating modifying its indexing policies for evaluating oil pipeline index filings, which would include modifications to both the existing percentage comparison test and the substantially exacerbate test.² The percentage comparison test compares the change in the pipeline's cost of service for the prior two years (as reported on the pipeline's FERC Form No. 6, page 700) to the proposed index rate change.³ If the difference is 10% or greater, the rate filing would require an investigation.⁴ The ANOPR proposes to reduce the threshold from 10% to 5%.⁵ The FERC reasoned that by reducing the gap between an annual rate increase and the pipeline's cost changes from 10% to 5%, FERC constrains the difference that can emerge in a one-year period between a pipeline's costs and its revenues.⁶ However, FERC also noted that it would permit a pipeline to take the full rate increase if the pipeline's page 700 reported costs that exceeded its revenues.⁷

With respect to the substantially exacerbate test, FERC noted that the modified test would deny any ceiling level increase or indexed rate increases for any pipeline whose page 700 revenues exceeded its page 700 total costs by 15% for both of the prior two years.⁸ In addition, the second part of the evaluation under the new exacerbate test would deny a proposed increase to a pipeline's rate or ceiling level that is greater than 5% of the barrel-mile cost changes reported on its page 700.⁹ These tests would be used by FERC in evaluating whether to accept or reject an oil pipeline indexing filing without, at least in most cases, establishing hearing procedures.¹⁰

1. *Revisions to Indexing Policies and Page 700 of FERC Form No. 6*, 157 F.E.R.C. ¶ 61,047, at P 1 (2016) [hereinafter Page 700].

2. *Id.* at P 12.

3. *Id.* at P 10.

4. *Id.*

5. Page 700, *supra* note 1, at P 16.

6. *Id.*

7. *Id.*

8. *Id.* at P 13.

9. *Id.*

10. Page 700, *supra* note 1, at P 13.

The FERC also stated that under the new exacerbate test, shippers could raise objections to proposed rate increases when pipeline revenues already appreciably exceed costs, and that the 15% threshold is intended to preserve an indexing regime based upon industry-wide costs changes, while also ensuring that the index does not cause a particular oil pipeline's rates to unreasonably depart from its costs.¹¹

Finally, FERC noted that it was also considering requiring pipelines, whether or not they modified their indexed rates, to make an annual filing showing changes in their ceiling levels.¹² Those ceiling levels would also be subject to challenge using the new exacerbate and percentage comparison tests described above.¹³

The FERC also described in the ANOPR proposed additional reporting requirements that may enhance the ability of shippers and FERC to monitor oil pipeline rates.¹⁴ In particular, FERC would require that pipelines file supplemental page 700s for (1) crude pipelines and product pipelines systems, (2) non-contiguous systems, and (3) certain major pipeline systems.¹⁵ The supplemental page 700s could then be used to evaluate index rate changes based upon costs and revenues more closely related to the proposed index rate change.¹⁶ In addition, FERC noted that it was considering requiring pipelines to report additional information regarding (1) cost allocations used on the supplemental page 700s, and (2) separate revenues for cost-based rates, non-cost-based rates, and other jurisdictional revenues.¹⁷

The rulemaking also would create additional reporting requirements for page 700.¹⁸ At present, page 700 lists the entire company's costs but does not break out costs by crude and product systems.¹⁹ Including greater detail on costs would better allow shippers and FERC to monitor that pipeline rates remain just and reasonable.

Initial comments were submitted to FERC on January 19, 2017, with reply comments provided on March 17, 2017.²⁰

B. Notice of Inquiry Regarding the Commission's Policy for Recovery of Income Tax Costs

On December 15, 2016, FERC issued a Notice of Inquiry (NOI) to solicit comments regarding how to address any amount of income tax double recovery resulting from the application of FERC's Income Tax Allowance Policy Statement

11. *Id.* at P 15.

12. *Id.* at P 17.

13. *Id.*

14. Page 700, *supra* note 1, at P 21.

15. *Id.*

16. *Id.*

17. *Id.* at P 22.

18. Page 700, *supra* note 1, at P 34.

19. *Id.* at P 23.

20. *Id.* at P 1.

and/or its Discounted Cash Flow (DCF) methodology to determine an appropriate return on equity (ROE) that may be recovered in pipeline rates.²¹

FERC issued the NOI in response to the U.S. Court of Appeals for the District of Columbia Circuit's (D.C. Circuit) July 1, 2016 decision in *United Airlines, Inc. v. FERC*.²² In *United Airlines*, the D.C. Circuit considered whether it was unjust and unreasonable to permit products pipelines organized as a master limited partnership (MLP) to collect an income tax allowance in its regulated rates.²³

United Airlines marked the third time that the D.C. Circuit has reviewed FERC's income tax allowance policy.²⁴ The first proceeding, *BP West Coast Products, L.L.C. v. FERC*, was decided in 2004.²⁵ *BP West Coast* objected to the disparate treatment of corporate and non-corporate unitholders in a pass-through entity in an earlier iteration of the Commission's tax allowance policy.²⁶ In response, FERC issued the Income Tax Allowance Policy Statement.²⁷ Various shipper parties challenged the application of that policy statement to SFPP, L.P. (SFPP), resulting in a second D.C. Circuit decision in 2007, *ExxonMobil Oil Corp. v. FERC*.²⁸ The *ExxonMobil* court upheld the Income Tax Allowance Policy Statement, finding reasonable FERC's determination that taxes could be "attributable" to [a] regulated [MLP] entity, given that partners must pay tax on their share of the partnership income regardless of whether they actually receive a cash distribution.²⁹ The D.C. Circuit also held that FERC had "reasonably relied upon evidence that a full income tax allowance [was] necessary to ensure that corporations and partnerships of like risk will earn comparable after-tax returns."³⁰ Finally, *ExxonMobil* found it was reasonable for FERC to reject alternative policy proposals.³¹ In *United Airlines*, the Court stated that in *ExxonMobil* it "reserved the issue of whether the combination of the discounted cash flow return on equity and [] tax allowance results in double recovery of taxes for partnership pipelines."³²

The NOI summarized the *United Airlines* decision's holding as "the Commission fail[ing] to demonstrate that there is no double recovery of taxes for a partnership pipeline as a result of awarding that pipeline both an income tax allowance and a pre-investor-tax ROE pursuant to the DCF methodology."³³ The

21. *Notice of Inquiry Regarding the Commission's Policy for Recovery of Income Tax Costs*, 157 F.E.R.C. ¶ 61,210 (2016) [hereinafter *NOI*]. See *Inquiry Regarding Income Tax Allowances*, 111 F.E.R.C. ¶ 61,139 (2005), *petition for review dismissed*, *Canadian Ass'n of Petroleum Producers v. FERC*, 487 F.3d 973 (D.C. Cir. 2007) [hereinafter *Income Tax Allowance Policy Statement*]; see also *Policy Statement on the Composition of Proxy Groups for Determining Gas and Oil Pipeline Return on Equity*, 123 F.E.R.C. ¶ 61,048 (2008).

22. *United Airlines, Inc. v. FERC*, 827 F.3d 122 (D.C. Cir. 2016).

23. *Id.* at 131.

24. *Id.* at 134.

25. *BP West Coast Products, L.L.C. v. FERC*, 374 F.3d 1263 (D.C. Cir. 2004).

26. *Id.* at 1287.

27. *Policy Statement on Income Tax Allowances*, 111 F.E.R.C. ¶ 61,139 (2005).

28. *ExxonMobil Oil Corp. v. FERC*, 487 F.3d 945 (D.C. Cir. 2007).

29. *Id.* at 955.

30. *Id.*

31. *Id.*

32. *United Airlines*, 827 F.3d at 134.

33. *NOI*, *supra* note 21, at P 14 (citing *United Airlines*, 827 F.3d at 134, 136).

NOI asked for comments regarding methods that would “allow regulated entities to earn an adequate return consistent with *Hope* that do not result in a double recovery of investor-level taxes for partnerships or similar pass-through entities.”³⁴ It offered several possible alternatives for consideration, inviting comments on possible changes to FERC’s ROE policies, reductions of the DCF return to remove supposed investor-level tax costs, or mechanisms of determining the level of income tax allowance for partnership entities, provided that proposals “do not result in a double recovery of investor level income tax costs for partnership entities as required by *United Airlines*.”³⁵ Initial comments were submitted to FERC on March 8, 2017 with reply comments provided on April 7, 2017.³⁶

C. Jurisdictional Issues

1. Shell Pipeline Co.

In *Shell Pipeline Co.*, FERC granted the request of Shell Pipeline Co., L.P. (Shell) to cancel its local tariff for movements on its Boxer Pipeline, finding that the pipeline was not subject to FERC’s jurisdiction under the ICA because it was engaged in the transportation of oil entirely on the Outer Continental Shelf (OCS).³⁷ In particular, the Boxer Pipeline involved movements from Block 19, Green Canyon and Ship Shoal Block 200 Injection, Offshore Louisiana to Ship Shoal Block 203, Offshore Louisiana.³⁸

One transporter of crude oil on the Boxer Pipeline (through a netback arrangement with a shipper) protested Shell’s cancellation filing, claiming that Shell (1) sought to evade jurisdiction for purposes of raising rates and (2) cited no changed circumstances that would justify the change in jurisdictional status.³⁹ The FERC rejected the protest and accepted Shell’s cancellation, noting that the ICA does not expressly cover pipelines transporting oil solely on or across the OCS.⁴⁰ The FERC also found “no evidence that Shell [was] attempting to evade federal regulation” and held that Shell was “not required to cite changed circumstances in order to cancel a tariff for movements that are not subject to [FERC’s] jurisdiction under the ICA.”⁴¹ The FERC also noted that, to the extent Shell continues to provide transportation services on the Boxer Pipeline, such services are subject to the provisions of the Outer Continental Shelf Lands Act, including the duty to provide open and non-discriminatory access.⁴²

34. *Id.* at P 17 (citing *FPC v. Hope Nat. Gas Co.*, 320 U.S. 591, 603 (1944)).

35. *Id.* at P 20.

36. *Id.* at p. 1.

37. *Order Accepting Tariff Cancellation Filing*, 157 F.E.R.C. ¶ 61,158, at PP 1, 17 (2016) [hereinafter *Tariff*].

38. *Id.* at P 3.

39. *Id.* at P 18.

40. *Id.* at P 14.

41. *Tariff*, *supra* note 37, at P 18.

42. *Id.*

D. FERC Quorum

On February 3, 2017, FERC issued an Order Delegating Further Authority to Staff in Absence of Quorum, which delegated certain authority to staff to take action during the period in which FERC lacked a quorum.⁴³ The FERC issued this order in anticipation that it would lack a quorum for an indeterminate period in the near future and that it needed to be able to carry out its regulatory obligations under the various statutes that FERC administers, including the ICA.⁴⁴

Of relevance to liquids pipelines, with respect to required actions on rate or other filings pursuant to section 6(3) of the ICA, FERC delegated to its staff the authority to (1) accept and suspend such filings and to make them effective, subject to refund and further order of FERC, or (2) accept and suspend such filings and to make them effective, subject to refund, and to set them for hearing and settlement judge procedures.⁴⁵ The FERC also noted that all pre-existing delegations of authority by FERC to its staff also continue to be effective during the period in which FERC lacks a quorum.⁴⁶

Following the issuance of the delegation order noted above and the lack of a FERC quorum, the Office of Energy Market Regulation has issued several letter orders on protested tariff filings in accordance with its delegated authorities, including: *Colonial Pipeline Co.*, 158 F.E.R.C. ¶ 62,192 (2017); *Frontier Aspen L.L.C.*, 159 F.E.R.C. ¶ 62,201 (2017); and *Leveret Pipeline Co. & Mid-America Pipeline Co.*, 160 F.E.R.C. ¶ 62,020 (2017).

E. Tariff and Ratemaking Issues

1. Enbridge Energy, L.P.

On January 31, 2017, FERC approved a supplement to Enbridge Energy, L.P.'s (Enbridge) Facilities Surcharge Settlement to allow Enbridge to recover \$30 million in early execution activities for a capital expansion project that ultimately was not completed due to a lack of shipper interest.⁴⁷ The Facilities Surcharge Settlement was first approved by FERC in 2004, and permits Enbridge to recover costs associated with particular shipper-agreed projects through an incremental surcharge layered on top of its base rates.⁴⁸ In its order, FERC noted that the Canadian Association of Petroleum Producers, the other party to the Facilities Surcharge Settlement, had agreed to inclusion of the \$30 million in the facilities surcharge, and therefore FERC approved "the supplement to the Facilities Surcharge Settlement as it appears to be fair and reasonable and in the public interest."⁴⁹

43. *Order Delegating Further Authority to Staff in Absence of Quorum*, 158 F.E.R.C. ¶ 61,135 at P 2 (2017).

44. *Id.* at P 1.

45. *Id.* at P 4.

46. *Id.* at P 2 n.5.

47. *Enbridge Energy, L.P.*, 158 F.E.R.C. ¶ 61,094 at P 6 (2017).

48. *Enbridge Energy, L.P.*, 107 F.E.R.C. ¶ 61,336 (2004).

49. 158 F.E.R.C. ¶ 61,094 at PP 3, 6.

On February 28, 2017, Enbridge filed a proposed tariff, FERC Tariff No. 43.22.0, to adjust its rates in accordance with the Facilities Surcharge Settlement.⁵⁰ Enbridge indicated that the purpose of the filing was to reflect the difference between estimates and the actual cost and throughput data in 2016 for projects previously approved and included within the facilities surcharge, as well as forecasted costs and throughput data for 2017, including the Line 61 Twin Project described above.⁵¹ Suncor Energy Marketing Inc. (Suncor) moved to intervene and protested Enbridge's tariff filing, contending that the cost of debt inputs supporting the facilities surcharge revenue requirement for certain of the included projects were inconsistent with the plain language of the Facilities Surcharge Settlement Agreements and FERC precedent.⁵²

The FERC Office of Energy Market Regulation, pursuant to delegated authority, set Enbridge's FERC Tariff No. 43.22.0 for hearing and settlement judge procedures on March 30, 2017, finding that "[t]he proposed tariff has not been shown to be just and reasonable, and may be unjust, unreasonable, unduly discriminatory, or preferential or otherwise unlawful."⁵³ The order setting Enbridge's tariff for hearing and settlement judge procedures noted that "Enbridge's entire [tariff] filing" had been set for hearing, and that any "[i]ssues to be explored at hearing are not limited to those noted" in the order.⁵⁴ On April 20, 2017, Enbridge filed a request for rehearing, which remains pending before FERC, contesting the scope of the hearing investigation on the basis that under FERC regulation, 18 C.F.R. § 343.3(c) (1994), and the Interstate Commerce Act, 49 U.S.C. § 15(7) (1988), the scope of the issues that can be set for hearing are limited to those raised in protest.⁵⁵

2. Colonial Pipeline Co.

On November 3, 2015, Colonial Pipeline Company (Colonial) filed FERC Tariff No. 98.22.0, which sought to change certain of Colonial's procedures related to its minimum tender requirements and the allocation of capacity on the pipeline.⁵⁶ Colonial explained that, since 2012, shipper demand for capacity on Colonial has exceeded the pipeline capacity, requiring it to prorate its system.⁵⁷ Colonial also contended that certain shippers have taken advantage of unintended loopholes in Colonial's rules, consequently resulting in those shippers obtaining more capacity on Colonial's system than they may otherwise be entitled during the monthly nomination process, leading to the need for the instant tariff filing.⁵⁸

On July 1, 2016, following the completion of a technical conference, FERC rejected Colonial's initial filing on the grounds that the proposed tariff revisions as a whole were inconsistent with the tenets of the Interstate Commerce Act

50. *Enbridge Energy, L.P.*, 158 F.E.R.C. ¶ 62,262 (2017).

51. *Id.*

52. *Id.* at p. 2.

53. 158 F.E.R.C. ¶ 61,135, at P 4; 158 F.E.R.C. ¶ 62,262 at p. 2.

54. *Id.* at p. 2 n.6.

55. Request for Rehearing, *Enbridge Energy, L.P.*, Docket No. IS17-170-000, at 4-6 (filed April 20, 2017).

56. *Colonial Pipeline Co.*, 158 F.E.R.C. ¶ 61,024 at P 3 (2017).

57. *Id.* at P 2.

58. *Id.* at PP 2, 3.

(ICA).⁵⁹ The FERC also indicated that Colonial's proposed tariff revisions could have the effect of protecting larger customers from having some of their monthly nominations reduced.⁶⁰

Several parties filed rehearing requests of FERC's July 2016 order, asking FERC to re-assess its decision in light of the fact that Colonial had not intended the tariff revisions to be considered as an all-or-nothing package.⁶¹ Colonial and the other parties that submitted requested requests asked for the Commission to reconsider whether certain parts of Colonial's initial tariff filing may be approved, contending that certain of the proposed changes would provide a number of benefits to shippers on the system and would result in a fair allocation of capacity to all shippers.⁶²

On rehearing, FERC found that certain of Colonial's proposed tariff revisions were adequately supported and just and reasonable and not unduly discriminatory.⁶³ In particular, FERC found that the revisions to Colonial's minimum tender requirements and the reduction of the rounding increment for proration purposes would produce similar impacts across all regular shippers of all volume classes, and would reduce the gap between ticketed shipper history and capacity allocation as well as dis-incentivizing trading history to realized greater rounding gains.⁶⁴ Therefore, FERC found that Colonial may re-file tariff provisions consistent with its order.⁶⁵ However, FERC noted that its order was being issued without prejudice to any further findings in the pending Docket No. OR16-17 proceeding, which involves an investigation of capacity allocation on Colonial's system.⁶⁶

3. HollyFrontier Refining & Marketing L.L.C. v. SFPP, L.P.

On December 8, 2016, the Commission issued an order granting the complaining shippers' rehearing requests and dismissed the complaints challenging SFPP, L.P.'s (SFPP) 2012 and 2013 indexed rate increases.⁶⁷

SFPP had previously filed to increase its rates applicable to movements on its East and West Lines by FERC's 2012 index adjustment, and to increase its rates applicable to movements on its East, West, North, Oregon and Sepulveda Lines by FERC's 2013 index adjustment.⁶⁸ Various shipper parties filed complaints against SFPP's proposed 2012 and 2013 index increases on the basis that such increases were not just and reasonable.⁶⁹ In its Order on Complaints, FERC held the complaints in abeyance pending resolution of other ongoing

59. *Id.* at P 15.

60. *Id.*

61. Colonial Pipeline, *supra* note 56, at P 7.

62. *Id.*

63. *Id.* at P 20.

64. *Id.*

65. Colonial Pipeline, *supra* note 56, at P 20.

66. *Id.* at P 20 n.50.

67. *HollyFrontier Refining & Mktg., L.L.C. v. SFPP, L.P.*, 157 F.E.R.C. ¶ 61,186 at P 1 (2016).

68. *Id.*

69. *Id.* at P 2.

proceedings involving SFPP's base rates.⁷⁰ The complaining shippers filed a request for rehearing of FERC's Order on Complaint.⁷¹

In its order dismissing the complaints, FERC noted that any complaint challenging a pipeline's index rate changes on the basis of the "substantially exacerbate" test must show reasonable grounds that the pipeline is (1) substantially over-recovering its costs, and (2) the index increase substantially increases that over-recovery.⁷² The FERC found that the complaining shippers failed to meet the second part of the "substantially exacerbate" test.⁷³ In particular, despite the challenged index rate increases, SFPP's page 700 showed that the difference between SFPP's costs and revenues declined from 13.11% in 2011 to 10.13% in 2012 and 9.22% in 2013.⁷⁴ The FERC held that if a substantial exacerbation of any over-recovery in costs would have been present, the 2013 revenues following the index rate increases would have caused the gap between revenues and costs to grow, not decline.⁷⁵ Accordingly, the complaining shippers had not met their burden of proof.⁷⁶

The FERC also rejected the complaining shippers' contention that it only evaluated the complaints based upon data for the two years prior to each index increase.⁷⁷ The FERC differentiated the instant proceeding from a protest proceeding, which involves a challenge to a pipeline's proposed index increase within 15 days of the challenged filing.⁷⁸ In the context of a complaint proceeding, FERC stated that it would not ignore evidence that was available at the time the complaining shippers filed their complaints that undermined the basis of their claim that SFPP's 2012 and 2013 index rate increases substantially increased the gap between SFPP's revenues and costs.⁷⁹

4. Colonial Pipeline Co.

On November 6, 2016, Colonial filed FERC Tariff No. 98.28.0, which proposed to remove Collins, Plantation, Mississippi (Collins-Mississippi) as a location at which segregated, fungible or joint batch shipments can be terminated.⁸⁰ Colonial explained that terminating segregated, fungible or joint batches at Collins-Mississippi would cause serious operational difficulties because it would require the pipeline to reduce the flow rate on Colonial's mainline, thereby disrupting cycle time and the number of barrels delivered per cycle.⁸¹ Colonial emphasized that it was not removing Collins-Plantation as a

70. *Id.* at P 1.

71. *Id.*

72. HollyFrontier, *supra* note 67, at P 9.

73. *Id.*

74. *Id.*

75. *Id.*

76. HollyFrontier, *supra* note 67, at P 9.

77. *Id.* at P 10.

78. *Id.*

79. *Id.*

80. Colonial Pipeline, *supra* note 56, at P 1.

81. *Id.* at P 4.

delivery point on its system, but rather removed Collins-Plantation as a point in which an entire batch may terminate.⁸²

TransMontaigne Partners L.P. (TransMontaigne) and Vitol Inc. (Vitol) both protested Colonial's proposed tariff revisions, asserting that FERC should reject Colonial's proposal because it would result in a tariff that does not provide service upon reasonable request.⁸³ The protesting parties also argued that Colonial had failed to adequately justify the need for the proposed revision.⁸⁴ In addition, Vitol noted that it had entered into a terminalling agreement with a division of TransMontaigne for construction of a tank downstream of Collins-Plantation and asserted that the commercial success of the tank relied upon Vitol's ability to deliver batched shipments to the Collins-Plantation delivery point.⁸⁵ Vitol further argued that it had notified Colonial of this agreement in October of 2016.⁸⁶

In its order, FERC found that Colonial had not shown its tariff revisions to be just and reasonable, and therefore established an evidentiary hearing to determine the lawfulness of the proposed tariff.⁸⁷ The FERC pointed out that although a pipeline can cancel service to certain delivery points, it can only do so consistent with the statutory requirements of the ICA.⁸⁸ The FERC noted that the proposed tariff raises several issues concerning Colonial's provision of service under the ICA.⁸⁹ The first issue was whether TransMontaigne or Vitol had made a reasonable request for the service that Colonial proposes to eliminate.⁹⁰ The FERC recognized that even if the protesting parties had made a request for the service that Colonial proposes to cancel, it must be a "reasonable request" in order for Colonial to be required to provide the service.⁹¹ Second, even if it is established that the protesting parties had made a reasonable request for the service that Colonial proposes to cancel, Colonial must demonstrate that cancellation of the service is not unduly discriminatory against the protesting parties.⁹² Because the record was insufficient to determine whether Colonial's proposed tariff results in undue discrimination against the protesting parties, FERC ruled that the protests of Colonial's tariff filing could not be resolved absent the development of a full record at hearing.⁹³ The FERC therefore accepted and suspended the tariff and set it for hearing and settlement procedures.⁹⁴ The FERC also determined that because any harm from Colonial's permanent termination of batch service at Collins-Plantation could cause damage that could not be remediated by refunds, it

82. *Id.* at P 6.

83. *Id.* at P 8.

84. Colonial Pipeline, *supra* note 56, at PP 8-14.

85. *Id.* at P 12.

86. *Id.*

87. *Id.* at P 25.

88. Colonial Pipeline, *supra* note 56, at P 26.

89. *Id.* at P 27.

90. *Id.*

91. *Id.* at P 28.

92. Colonial Pipeline, *supra* note 56, at P 29.

93. *Id.* at P 30.

94. *Id.*

suspended Colonial's proposed tariff for the full seven-month period as permitted by Section 15(7) of the ICA.⁹⁵

5. Tricon Energy Ltd. v. Colonial Pipeline Co.

In this order, FERC initiated an investigation into the allocation of capacity on Colonial's system.⁹⁶ Notably, the investigation's parameters were broader than the scope of the issues raised in the underlying complaint filed by Tricon Energy Ltd. (Tricon) and Rockbriar Partners Inc. (Rockbriar).⁹⁷

By way of background, Colonial's tariff classifies a shipper as either a "New Shipper" or a "Regular Shipper," based on whether the shipper accumulates a history of shipments over a twelve-month period that meets a specified threshold.⁹⁸ These categories then determine a shipper's entitlement to capacity during any proration month.⁹⁹ New Shippers obtain capacity through a lottery system, while Regular Shippers are limited by their historical allocations.¹⁰⁰ While not stated in its tariff, Colonial also allows shippers to transfer their shipper histories.¹⁰¹ However, if a New Shipper transfers its history, Colonial deems it to be a Regular Shipper and therefore ineligible for the New Shipper capacity lottery for the duration of the transfer, which takes fourteen months to complete.¹⁰² Tricon and Rockbriar filed both a protest against Colonial's attempt to include this practice in its tariff, and a complaint arguing that Colonial should not be able to continue to enforce this practice as an off-tariff policy prior to FERC review.¹⁰³ In its order on the protests, FERC rejected Colonial's attempt to memorialize this practice in its tariff but deferred ruling on the complaint in that order.¹⁰⁴

The instant order addresses Tricon's and Rockbriar's complaint.¹⁰⁵ The FERC stated that it needed further information to inform its decision "as to whether, and to what extent, Colonial's existing practices are permissible under the Commission's regulations and the ICA."¹⁰⁶ While Tricon's and Rockbriar's complaint raised issues about Colonial's history transfer practice, FERC initiated a substantially broader investigation into "the allocation of capacity on Colonial's system, including but not limited to history transfers, to determine whether that program and any related policy or program is consistent with the ICA."¹⁰⁷ In addition, FERC appended to its order data requests to Colonial, Tricon, and Rockbriar; and to Flint Hills, an intervenor.¹⁰⁸ The FERC emphasized its broad

95. *Id.*

96. *Tricon Energy Ltd. v. Colonial Pipeline Co.*, 156 F.E.R.C. ¶ 61,176 at P 26 (2016).

97. *Id.*

98. *Id.* at P 4.

99. *Id.*

100. Tricon, *supra* note 96, at P 4.

101. *Id.* at P 5.

102. *Colonial Pipeline Co.*, 155 F.E.R.C. ¶ 61,187 at P 2 (2016).

103. *Id.* at P 3.

104. *Id.* at PP 1, 11.

105. Tricon, *supra* note 96, at P 1.

106. *Id.* at P 24.

107. *Id.* at P 26.

108. *Id.* at P 27.

authority to compel information from pipeline carriers and shippers, and noted that this authority is not limited to parties to this proceeding.¹⁰⁹

FERC also granted Tricon's and Rockbriar's motion to lodge various pleadings from Docket No. IS16-295-000 (the protest proceeding) into the docket assigned to the complaint, Docket No. OR16-17-000.¹¹⁰

6. Belle Fourche Pipeline Co.

On June 22, 2016, Belle Fourche Pipeline Company (Belle Fourche) filed a proportional and joint tariff between Belle Fourche, Bridger Pipeline L.L.C., and Black Hills Trucking (collectively, the Joint Carriers).¹¹¹ The joint tariff provided for joint transportation service of crude petroleum by truck and by pipeline (Joint Tariff).¹¹² On July 7, 2016, Bridger Logistics, L.L.C. (Bridger Logistics) protested the Joint Tariff, arguing that the Joint Tariff should be rejected for many reasons, including that the Joint Tariff (1) fails to comply with FERC's regulation for establishing initial rates, (2) is unduly discriminatory and preferential, (3) is potentially unreasonable and excessive, and (4) could result in improper cross-subsidization between pipeline and truck services.¹¹³ On July 22, 2016, FERC accepted Belle Fourche's filing and rejected the protest.¹¹⁴

The FERC found that Bridger Logistics, a marketer, gatherer, and trucking transporter of crude oil, lacked standing to protest the Joint Tariff.¹¹⁵ The FERC concluded that Bridger Logistics did not have standing because it is not a shipper on the Joint Carriers' systems, has not expressed a definitive intent to ship on the Joint Carriers' systems, and has made no valid transportation request to the Joint Carriers.¹¹⁶ The FERC distinguished Bridger Logistics' situation from *Enbridge Pipelines (Southern Lights)*, as the underlying local tariffs of the Joint Tariff had been in effect for a longer period and was therefore not a new service.¹¹⁷ The FERC stated that Bridger Logistics' standing argument that its business needs might shift over time and result in Bridger Logistics potentially becoming a shipper in the future was insufficient.¹¹⁸ Therefore, FERC found that Bridger Logistics' alleged economic harm is insufficient to demonstrate a substantial interest in the Joint Tariff.¹¹⁹

The FERC also examined the substantive arguments raised in the protest and found that even if standing were granted, the arguments raised by Bridger Logistics are insufficient for FERC to reject the Joint Tariff or suspend it subject

109. *Id.*

110. *Id.* at P 23.

111. *Belle Fourche Pipeline Co.*, 156 F.E.R.C. ¶ 61,063 (2016).

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

113. *Id.*

114. *Id.* at P 1.

115. *Belle Fourche*, *supra* note 111, at P 18.

116. *Id.* at PP 18-19.

117. *Id.* at P 19 (citing *Order Accepting and Suspending Tariff, Consolidating Proceedings and Granting Rehearing*, 134 F.E.R.C. ¶ 61,067 (2011)).

118. *Belle Fourche*, *supra* note 111, at P 20.

119. *Id.* at PP 18-21.

to a full evidentiary hearing.¹²⁰ First, FERC found that the Joint Tariff does not set forth initial rates for new service.¹²¹ Rather, FERC affirmed its long-standing policy that joint rates are changes to existing rates when the underlying local rates are already on file with FERC.¹²²

Second, FERC found that the rates in the Joint Tariff satisfied FERC's policy concerning justness and reasonableness of joint rates because they are less than the sum of the underlying local rates on file with FERC.¹²³ The FERC rejected Bridger Logistics' argument that the trucking rates must be on file with FERC in order for FERC to determine that the rate is just and reasonable.¹²⁴ Furthermore, FERC found that Bridger Logistics' challenge regarding the underlying local rates must be pursued through a complaint since those rates were already on file with FERC.¹²⁵

Third, FERC found that the Joint Tariff is not unduly discriminatory or preferential as all shippers that seek use of the service are treated equally.¹²⁶ The FERC concluded that the Joint Tariff offering a discount in exchange for a volume commitment is consistent with the FERC's policy on discounted rates.¹²⁷ Finally, FERC stated that Bridger Logistics' alleged harm regarding potential anti-competitive impacts on the crude oil trucking market is outside of FERC's jurisdiction.¹²⁸ The FERC found that Bridger Logistics failed to demonstrate that the Joint Tariff raises anti-competitive concerns with respect to oil pipeline transportation, which is subject to FERC's jurisdiction.¹²⁹

F. Select Petitions for Declaratory Order

1. Rangeland RIO Pipeline, L.L.C.

On July 8, 2016, FERC issued a Declaratory Order approving Rangeland RIO Pipeline, L.L.C.'s (Rangeland) petition for a declaratory order regarding its proposed crude oil pipeline project (RIO Pipeline System).¹³⁰ Among the proposed terms and conditions of service for which Rangeland was seeking approval, Rangeland sought a waiver of the truck unloading fees for Committed Shippers (i.e., shippers that executed a transportation services agreement with Rangeland during the open season) for the first year that the RIO Pipeline System is operational.¹³¹ In other words, Rangeland would not charge Committed Shippers for the truck unloading fees during the first year of transportation

120. *Id.* at P 21.

121. *Id.* at P 24.

122. Belle Fourche, *supra* note 111, at PP 27-30 (citing *Texaco Pipeline Inc.*, 71 F.E.R.C. ¶ 61,313 (1995); *Big West Oil Co. v. Frontier*, 94 F.E.R.C. ¶ 61,339 (2001)).

123. *Id.* at P 36.

124. *Id.* at P 37.

125. *Id.* at P 39.

126. Belle Fourche, *supra* note 111, at P 39.

127. *Id.* at PP 43-44.

128. *Id.* at P 46.

129. *Id.*

130. *Rangeland RIO Pipeline, L.L.C.*, 156 F.E.R.C. ¶ 61,023 at P 1 (2016).

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

service.¹³² Rangeland asserted that consistent with FERC precedent, it would bear any associated cost with the waiver and no shipper would subsidize the waiver.¹³³

The FERC approved Rangeland's request for waiver of the truck unloading fees for Committed Shippers during the first year the RIO Pipeline System is operational, concluding that it is reasonable and does not unduly discriminate or provide undue preference.¹³⁴

G. Temporary Waiver Orders

During the period July 1, 2016 to June 30, 2017, FERC issued one order concerning a request for temporary waiver of the tariff filing and reporting requirements of Sections 6 and 20 of the ICA, and Parts 341 and 357 of FERC's regulations.¹³⁵ The request was made by Tesoro Great Plains Gathering & Marketing, L.L.C. (Tesoro Great Plains), in connection with the acquisition of the Hidden Bench Pipeline.¹³⁶ Tesoro Great Plains alleged that the Hidden Bench Pipeline is a gathering line that transports crude that it purchases from wells in McKenzie County, North Dakota, to Watford City Terminal, North Dakota.¹³⁷ The FERC granted the request.¹³⁸

In accordance with well-established precedent, FERC evaluated whether the applicant satisfied the following 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) no such third-party interest is likely to materialize; and (4) there is no opposition to granting the waiver.¹³⁹

As is FERC's practice in temporary waiver cases, Tesoro Great Plains was required to report any change in the conditions underlying the temporary waiver.¹⁴⁰ Such changes include, but are not limited to, increased accessibility of other pipelines or refiners to the Hidden Bench Pipeline, changes in the ownership of the pipeline or the crude shipped on the pipeline, and shipment tenders or requests for service by any third party.¹⁴¹ Tesoro Great Plains was required to keep its books and records consistent with FERC's Uniform System of Accounts, and such books and records must be made available to FERC or its authorized agents upon request.¹⁴²

132. *Id.* at P 21.

133. *Id.*

134. *Id.* at P 27.

135. *Tesoro Great Plains Gathering & Mktg., L.L.C.*, 157 F.E.R.C. ¶ 61,221 at P 1 (2016).

136. *Id.* at P 2.

137. *Id.* at P 3.

138. *Id.* at P 1.

139. *Tesoro*, *supra* note 135, at P 4.

140. *Id.*

141. *Id.* at P 8.

142. *Id.*; *see also* 18 C.F.R. pt. 352 (2016).

II. PRESIDENTIAL PERMITS, CRIMINAL ENFORCEMENT AND PIPELINE SAFETY

A. *Presidential Permits and New Projects*

1. TransCanada Pipeline Keystone XL Receives Presidential Permit

On March 23, 2017, the Department of State issued a presidential permit authorizing TransCanada Keystone Pipeline, L.P. (TransCanada), to construct, connect, operate and maintain the pipeline facilities at the international boundary between the United States and Canada necessary to construct the Keystone XL Pipeline, a 1204-mile, 36-inch diameter pipeline that will deliver up to 830,000 barrels per day of crude oil from Hardisty, Alberta, to Steel City, Nebraska.¹⁴³ Previously, on November 3, 2015, under authority delegated by the President of the United States, the Secretary of State had denied TransCanada's application for a presidential permit, finding that the authorization was not in the United States' national interest.¹⁴⁴

On January 24, 2017, newly-inaugurated President Donald J. Trump signed a presidential memorandum (Keystone Memorandum) inviting TransCanada to resubmit its application for a Presidential Permit to the Department of State.¹⁴⁵ The Keystone Memorandum also directed the Department of State to take actions necessary and appropriate to make a final decision on the permit within 60 days of receiving the application and required other Federal agencies responsible for reviewing the project to expedite their efforts.¹⁴⁶

2. Approval of Dakota Access Pipeline

On February 8, 2017, the United States Army Corps of Engineers (Corps) granted an easement to Dakota Access, L.L.C., allowing the company to construct a 30-inch diameter pipeline, called the Dakota Access Pipeline (DAPL), under Federal lands managed by the Corps at Oahe Reservoir and complete the construction of the pipeline.¹⁴⁷ DAPL is a 1,172 mile pipeline designed to transport up to 570,000 barrels per day of U.S. light sweet crude from the Bakken and Three Forks production region of North Dakota to Patoka, Illinois.¹⁴⁸ Issuance of the easement followed the Corps' previous July 25, 2016, determinations

143. Presidential Permit Authorizing TransCanada Keystone Pipeline, L.P. to Construct, Connect, Operate and Maintain Pipeline Facilities at the International Boundary Between the United States and Canada (Mar. 23, 2017) [hereinafter *Keystone*], <https://keystonepipeline-xl.state.gov/documents/organization/269322.pdf>; U.S. Department of State, Record of Decision & Nat'l Interest Determination, TransCanada Keystone Pipeline, L.P. Application for Presidential Permit at 2 (Nov. 3, 2015) [hereinafter *Keystone ROD*], <https://2012-keystonepipeline-xl.state.gov/documents/organization/249450.pdf>.

144. Exec. Order No. 11,423, 3 C.F.R. § 742 (1966-1970), *as amended by*, Exec. Order No. 12,847, 58 Fed. Reg. 29,511 (May 30, 1993), *as amended by*, Exec. Order No. 13,337, 69 Fed. Reg. 25,299 (May 5, 2004); *Keystone ROD*, *supra* note 143, at 2.

145. Construction of the Keystone XL Pipeline, 82 Fed. Reg. 8,663 (Jan. 24, 2017).

146. *Id.* at 8,663-64.

147. Corps grants easement to Dakota Access, LLC, US Army Corps of Engineers (Feb. 8, 2017), <http://www.nwo.usace.army.mil/Media/News-Releases/Article/1077134/corps-grants-easement-to-dakota-access-llc/>.

148. DAKOTA ACCESS: QUICK FACTS ABOUT DAKOTA ACCESS PIPELINE, <http://landowners.dapipelinefacts.com> (last visited Oct. 12, 2017).

approving the construction of DAPL under Lake Oahe in accordance with section 14 of the Rivers and Harbors Act of 1899 and section 404 of the Clean Water Act pursuant to a Nationwide Permit 12.¹⁴⁹

Following issuance of those determinations, the Standing Rock Sioux Tribe (Tribe) and Cheyenne River Sioux Tribe filed suit against the Corps arguing it had failed to appropriately consult with the Tribe pursuant to Section 106 of the National Historic Preservation Act.¹⁵⁰ The Tribe also filed a Motion for a Preliminary Injunction to prevent construction of the pipeline in the areas surrounding the Lake Oahe crossing.¹⁵¹ These motions (for declaratory and injunctive relief) were denied.¹⁵² After those denials, the Department of the Army and the Corps halted construction at the crossing and asserted that a separate easement under the Mineral Leasing Act requiring additional review was required.¹⁵³ On December 4, 2016, the Corps announced that before making a determination on the easement, the Corps required the preparation of an environmental impact statement for the proposed crossing.¹⁵⁴

On January 24, 2017, President Trump signed a presidential memorandum (DAPL Memorandum) directing the Secretary of the Army to instruct the Corps to provide in an expedited manner all federal approvals required to complete construction of DAPL.¹⁵⁵ In particular, the Corps was urged to grant Dakota Access the easement to construct under Lake Oahe.¹⁵⁶ The DAPL Memorandum set forth a five-step process for approving the easement, including directing the Corps to rescind or modify its decision requiring additional environmental reviews for the Lake Oahe crossing and determine that a previously completed environmental assessment satisfies requirements of the National Environmental Policy Act.¹⁵⁷

149. MITIGATED FINDING OF NO SIGNIFICANT IMPACT, ENVIRONMENTAL ASSESSMENT, DAKOTA ACCESS PROJECT, WILLIAMS, MORTON, AND EMMONS COUNTIES, NORTH DAKOTA (July 25, 2016), <http://cdm16021.contentdm.oclc.org/cdm/ref/collection/p16021coll7/id/2801>; 33 U.S.C. § 408 (2012) (as amended by Pub. L. No. 114-322, 130 Stat. 1628, 1664 (2016)); 33 U.S.C. § 1344 (2012).

150. Complaint, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, No. 16-CV-01534 at P 20 (July 27, 2016) (the Cheyenne River Sioux Tribe intervened on behalf of the Tribe on Aug. 10, 2016).

151. *Id.*

152. Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers, 205 F. Supp. 3d 4, 5 (D.D.C. 2016) (denying motion for preliminary injunction); Order Denying Emergency Motion for Injunction Pending Appeal, Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers, No. 16-5259 (D.C. Cir. 2016).

153. Press Release, Army Corps of Engineers, Statement Regarding the Dakota Access Pipeline (Nov. 14, 2016); Memorandum from Jo-Ellen Darcy, Assistant Secretary of the Army (Civil Works), to the Honorable Dave Archambault II, Chairman, Standing Rock Sioux Tribe (Nov. 14, 2016).

154. Memorandum from Jo-Ellen Darcy, Assistant Secretary of the Army (Civil Works), to Secretary of the Interior (Dec. 4, 2016).

155. PRESIDENTIAL MEMORANDUM REGARDING CONSTRUCTION OF THE DAKOTA ACCESS PIPELINE (Jan. 24, 2017), <https://www.whitehouse.gov/the-press-office/2017/01/24/presidential-memorandum-regarding-construction-dakota-access-pipeline>.

156. *Id.*

157. *Id.*

B. Criminal Enforcement

1. Mixed Verdict in Criminal Trial Following San Bruno Pipeline Incident

In a case relevant to all pipeline operators, on August 9, 2016, a federal jury returned a mixed verdict against Pacific Gas & Electric (PG&E) in the criminal trial involving the fatal pipeline rupture and explosion of a gas transmission pipeline in San Bruno, California, in 2010.¹⁵⁸ The company was found guilty on five counts of knowingly and willfully violating gas transmission integrity management requirements of the federal pipeline safety regulations of the Pipeline and Hazardous Materials Safety Administration (PHMSA) and one count of obstructing the National Transportation Safety Board's (NTSB) investigation of the incident in violation of section 1505 of title 18 of the United States Code.¹⁵⁹ The jury found PG&E not guilty of knowingly and willfully violating regulations requiring the maintenance of repair records and pressure test records.¹⁶⁰

With respect to the “knowingly and willful” criminal liability standard of the Pipeline Safety Act, the judge instructed the jury that the term “willful” requires only a finding that the company disregarded the statute and displayed an indifference to its requirements.¹⁶¹ The jury was not required to find specific intent to disregard or disobey the law to reach a guilty verdict.¹⁶²

At sentencing, PG&E was ordered to pay a \$3 million fine and a \$2,400,000 special assessment; perform 10,000 hours of community service — 2,000 of which must be performed by high-level personnel; and advertise on television and in the newspaper the offenses, convictions, punishment and steps taken to prevent recurrence.¹⁶³ PG&E also was sentenced to five years' probation and required to retain an independent monitor for five years to ensure the company takes reasonable and appropriate steps to maintain the safety of its pipeline system, performs appropriate assessment testing, and maintains an effective ethics and compliance program.¹⁶⁴ These penalties are in addition to the \$1.6 billion civil penalty assessed against PG&E by the California Public Utilities Commission for violations related to the San Bruno incident.¹⁶⁵

158. Criminal Minutes, *United States v. Pac. Gas & Elec. Co.*, Case No. 14-CR-00175-TEH (N.D. Cal. Aug. 9, 2016), ECF No. 883; Verdict Form, *United States v. Pac. Gas & Elec. Co.*, Case No. 14-CR-00175-TEH, 2016 WL 8793579 (N.D. Cal. Aug. 9, 2016).

159. *Id.*; see 49 C.F.R. §§ 192.901-192.951 (2016); 18 U.S.C. § 1505 (2012).

160. *Id.*; see 49 C.F.R. § 192.709(a); 49 C.F.R. § 192.517(a).

161. *Id.*; see 49 U.S.C. § 60123(a) (2002).

162. Order Regarding Jury Instructions on Intent Elements for Regulatory Counts, *United States v. Pac. Gas & Elec. Co.*, Case No. 14-CR-00175-TEH (N.D. Cal. July 26, 2016), ECF No. 826.

163. Criminal Minutes, *Pac. Gas & Elec. Co.* (N.D. Cal. Jan. 26, 2017), ECF No. 919.

164. *Id.*

165. *Order Instituting Investigation on the Commission's Own Motion into the Operations and Practices of Pacific Gas & Elec. Co. to Determine Violations of Pub. Util. Code Section 451, General Order 112, and Other Applicable Standards, Laws, Rules and Regulations in Connection with the San Bruno Explosion and Fire on Sept. 9, 2010*, Decision 15-04-024, 2015 WL 1687684 (Cal. Pub. Utils. Comm'n Apr. 9, 2015) (decision on fines and remedies), *reh'g denied*, 2015 WL 4648065 (Cal. Pub. Utils. Comm'n July 23, 2015), *clarified by*, 2016 WL 4033733 (Cal. Pub. Utils. Comm'n Jan. 28, 2016).

C. PHMSA Pipeline Safety Regulatory Initiatives

1. PHMSA Issues Interim Final Rule Implementing New Emergency Order Authority

On October 14, 2016, PHMSA issued an interim final rule establishing temporary regulations implementing the new emergency order authority conferred under the Protecting Our Infrastructure of Pipelines and Enhancing Safety Act of 2016 (PIPES Act).¹⁶⁶ The PIPES Act expanded PHMSA's enforcement authority to include written emergency orders addressing "imminent hazards" caused by unsafe conditions or practices.¹⁶⁷

Unlike PHMSA's existing authorities to issue pipeline-specific corrective action orders or safety orders, an emergency order may be issued to multiple pipeline owners or operators.¹⁶⁸ An emergency order may prohibit an unsafe condition or practice, or impose an affirmative requirement when an unsafe condition, practice, or other activity poses a threat to life or significant harm to property or the environment.¹⁶⁹ Before issuing an emergency order, PHMSA must consider the impacts on public health and safety, the economy or national security, and service reliability.¹⁷⁰ As appropriate, PHMSA must consult with federal and state agencies and entities knowledgeable in pipeline safety or operations.¹⁷¹ The interim final rule contains hearing procedures to be conducted by an Administrative Law Judge (ALJ) in the Department of Transportation's Office of Hearings who must issue a report and recommendation.¹⁷²

2. PHMSA Increases Maximum Civil Penalty Levels and Releases Policy Statement on Calculation of Civil Penalties

On April 27, 2017, PHMSA issued a final rule increasing the maximum civil penalties for violations of the federal Pipeline Safety Laws to \$209,002 per violation per day, up to a maximum of \$2,090,022 for a related series of violations.¹⁷³ The increase complies with the Federal Civil Penalties Inflation Adjustment Act Improvement Act of 2015, which requires that executive agencies annually adjust civil penalties to account for inflation.¹⁷⁴

On October 17, 2017, PHMSA released a policy statement advising pipeline owners and operators of the availability of the agency's framework for calculating

166. Pipeline Safety: Enhanced Emergency Order Procedures, 81 Fed. Reg. 70,980, 70,985 (Oct. 14, 2016) (to be codified at 49 C.F.R. §§ 190.3, 190.236 -237); Pub. L. No. 114-183, § 16, 130 Stat. 514, 525 (2016) (codified at 49 U.S.C. § 60117 (2016)) [hereinafter PIPES Act]. PHMSA issued the interim final rule without prior notice and opportunity to comment because the PIPES Act required issuance of temporary regulations within 60 days of enactment. Upon issuance of a final rule, the temporary regulations will expire.

167. PIPES Act § 16, 130 Stat. at 525.

168. 49 C.F.R. §§ 190.233, 190.239.

169. 49 C.F.R. § 190.239(a).

170. 49 C.F.R. § 190.239(b)(1).

171. 49 C.F.R. § 190.239(b)(2).

172. 49 C.F.R. § 190.239(b)(4-5).

173. Pipeline Safety: Inflation Adjustment of Maximum Civil Penalties, 82 Fed. Reg. 19,326, 19,328 (Apr. 27, 2017) (to be codified at 49 C.F.R. § 190.223).

174. Pub. L. No. 114-74, § 701, 129 Stat. 599, 599.

civil penalties in pipeline enforcement cases.¹⁷⁵ PHMSA stated that it intends to assess higher civil penalties, consistent with the authority conferred by the Pipeline Safety, Regulatory Certainty and Job Creation Act of 2011 (2011 Act) which increased maximum federal civil penalties PHMSA may assess for violations of the Pipeline Safety Act.¹⁷⁶ PHMSA stated that it intends to use increased penalty authority to deter violations and will give greater weight to the following factors when assessing civil penalties: violations that cause or “increase the severity of incidents, including those involving smaller hazardous liquid spills or resulting in methane releases;” violations that are repeat offenses within a 5 year window; and “multiple instances of the same regulatory violation.”¹⁷⁷

3. PHMSA Issues Final Rule Adopting Numerous Amendments to Pipeline Safety Regulations

On January 23, 2017, PHMSA issued a final rule adopting numerous amendments to the federal pipeline safety regulations affecting operators of hazardous liquid pipelines, gas distribution, transmission and gathering pipelines, and liquefied natural gas (LNG) facilities.¹⁷⁸

a. Modified Pipeline Integrity Assessment Methods and Welding Procedures

The final rule modified regulations addressing how the integrity of hazardous liquid pipelines is assessed.¹⁷⁹ The final rule incorporates by reference into Part 195 of PHMSA’s regulations several industry consensus standards; modifies requirements for performing direct assessments to evaluate stress corrosion cracking (SCC) and for mitigating significant SCC; and incorporates by reference new procedures for welding and qualifying welders.¹⁸⁰

b. Tightened Accident Notification Requirements

As required by the 2011 Act, the final rule requires that operators notify the National Response Center of a pipeline accident within one hour after “confirmed discovery,” defined as the time “[w]hen it can be reasonably determined, based on information available to the operator at the time a reportable event has occurred, even if only based on a preliminary evaluation.”¹⁸¹ Within 48 hours, an operator must revise or confirm the initial notification and provide information on the amount of product released, fatalities and injuries, and significant known facts relevant to the cause of the accident or extent of the damage.¹⁸²

175. *Pipeline Safety: General Policy Statement; Civil Penalties*, 81 Fed. Reg. 71,566 (Oct. 17, 2016).

176. Pub L. No. 112-90, § 2, 125 Stat. 1904, 1905 (2012).

177. 81 Fed. Reg. at 71,566.

178. Final Rule, Pipeline Safety: Operator Qualification, Cost Recovery, Accident and Incident Notification, and Other Pipeline Safety Changes, 82 Fed. Reg. 7,972 (Jan. 23, 2017) (to be codified at 49 C.F.R. pts. 190-92, 195, 199).

179. 49 C.F.R. § 195.591 (2017).

180. *Id.*; 82 Fed. Reg. at 7,999-8,001.

181. Pub L. No. 112-90, § 9(b), 125 Stat. at 1912; 82 Fed. Reg. at 7,977.

182. Pub L. No. 112-90, § 9(b)(3), 125 Stat. at 1912.

c. New Notification Requirements

The final rule requires that operators provide PHMSA with 60 days advance notice of (1) changes in product; (2) reversals of flow in a mainline pipeline, unless the system is designed for bi-directional flow or the reversal will not last for more than 30 days; and (3) conversions of a steel pipeline from unregulated to regulated service.¹⁸³ The final rule clarifies that an existing notification requirement regarding the construction of ten or more miles of new pipeline also applies to replaced pipeline.¹⁸⁴

d. Training Requirements for Control Room Personnel

The final rule strengthens existing Control Room Management regulations to better define roles and expand training.¹⁸⁵

e. New Cost Recovery Fee for Design Reviews

The final rule prescribes a fee structure and assessment methodology under which PHMSA will recover the costs it incurs conducting facility design or construction safety reviews or inspecting pipelines or LNG facilities that have design and construction costs of at least \$2.5 billion, or that employ new or novel technologies or designs.¹⁸⁶

The rule adds procedures for renewing expiring special permits, narrows exemptions from the requirement to perform drug and alcohol testing of employees after an accident, establishes procedures for requesting protection of confidential commercial information submitted to PHMSA.¹⁸⁷

183. 82 Fed. Reg. at 7,999 (to be codified at 49 C.F.R. §§ 195.5(d), 195.64(c) (1), (iv)).

184. 82 Fed. Reg. at 7,973.

185. 49 C.F.R. § 195.446; 82 Fed. Reg. at 7,999 (to be codified at 49 C.F.R. § 195.446).

186. *Id.* at 7,996 (to be codified at 49 C.F.R. Subpart E).

187. *Id.* at 7,995, 8,001 (to be codified at 49 C.F.R. pts. 190.341, 190.343, 199.105, 199.225).

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