REPORT OF THE OIL & LIQUIDS PIPELINE REGULATION COMMITTEE

Synopsis: This report summarizes policy and legal developments that have occurred at the Federal Energy Regulatory Commission (FERC), Pipeline and Hazardous Materials Safety Administration (PHMSA), and in the federal courts. This report covers the period between July 1, 2013 and June 30, 2014.*

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I. SIGNIFICANT FERC ADMINISTRATIVE ORDERS

A. Rulemaking

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

On July 18, 2013, the FERC issued a final rule modifying the information required to be presented on page 700 of FERC Form No. 6 in order to facilitate calculation of an oil pipeline's actual return on equity.[1] The modifications to Page 700 require oil pipelines to provide "additional information regarding rate base, rate of return, return rate base, and income taxes."[2]

With respect to rate base, page 700 has been revised to include the following new line items: "(1) Rate Base – Depreciated Original Cost (line 5a); (2) Rate Base – Unamortized Starting Rate Base Write-up (line 5b); and (3) Rate Base – Accumulated Net Deferred Earnings (line 5c)."[3] The sum of these new line items, 5a-5c, equals the oil pipeline's total Trended Original Cost (TOC) rate base.[4]

For rate of return, page 700 has been modified to require additional information related to debt and equity capital structures as follows: (1) Rate of Return–Adjusted Capital Structure Ratio for Long Term Debt (line 6a), (2) Rate of Return–Adjusted Capital Structure Ratio for Stockholder's Equity (line 6b), (3) Rate of Return–Cost of Long Term Debt Capital (line 6c), and (4) Rate of Return–Real Cost of Stockholder's Equity (line 6d).[5] "This additional information forms the basis for the Rate of Return – Weighted Average Cost of Capital (the sum of the product of line 6a and line 6c added to the product of line 6b and 6d)".[6]

The modifications to page 700 also require oil pipelines to report additional information related to the Return on Rate Base reflected on line 7 of page 700. In particular, oil pipelines are now required to report the following data: (1) Return on Rate Base–Debt Component (line 7a),[7] and (2) Return on Rate Base–Equity Component (line 7b).[8]

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

2. *Id*.

3. *Id*. at P 11.

4. *Id*.

5. *Id*. at P 17.

6. *Id*. In other words, the Rate of Return – Weighted Average Cost of Capital = (line 6a x line 6c) + (line 6b x line 6d). *Id*.

7. 144 F.E.R.C. ¶ 61,049 at PP 20–21. The Return on Rate Base – Debt Component equals the product of the TOC Rate Base (line 5d) and the Weighted Average Cost of Debt (line 6a x line 6c). *Id*. at P 21.

8. *Id*. at P 20. The Return on Rate Base – Equity Component equals the product of the TOC Rate Base (line 5d) and the Weighted Average Cost of Equity (line 6b x line 6d). *Id*. at PP 20-21.

page 700 has also been modified to include a new line item (line 8a) that reports the oil pipeline's "Composite Tax Rate used to determine its Income Tax Allowance."[9] The Composite Tax Rate is the combined federal and state tax rate, as adjusted consistent with FERC policy, and is the "tax rate that represents the amount of additional taxes the oil pipeline would be required to pay if it earned its exact weighted average cost of capital as reported on line 6e and it collected an additional dollar of revenue."[10]

The page 700 modifications described above are then used to calculate an actual rate of return on equity.[11] The FERC notes the calculation of an actual rate of return on equity under Order No. 783 will provide "useful information when using page 700 as a preliminary screen to evaluate whether additional proceedings may be necessary to challenge rate[s] consistent with [FERC's] mandate under the [Interstate Commerce Act]."[12] However, the FERC clarified that Order No. 783, and the calculation of the actual rate of return on equity provided therein, does not (1) have any precedential effect for ratemaking purposes, (2) demonstrate, in itself, whether an oil pipeline's rates are just and reasonable, (3) alter ratemaking policies regarding test period adjustments, net deferred earnings or the calculation of an oil pipeline's return, or (4) alter the standards and burdens of proof applied by the FERC when it rules on complaints, petitions, and other requests for relief based on a full record and substantial evidence.[13]

B. Jurisdictional Issues

1. William Olefins Feedstock Pipelines, L.L.C.

On December 31, 2013, the FERC issued a Declaratory Order in *Williams Olefins Feedstock Pipelines, L.L.C.*,[14] where it denied Williams Olefins Feedstock Pipelines, L.L.C.'s (Williams) request to find the Williams Bayou Ethane Pipeline project (Ethane Pipeline) not subject to the FERC's Interstate Commerce Act (ICA).[15] According to Williams, "the planned Ethane Pipeline [would] deliver unbatched purity liquid ethane to petrochemical plants and storage facilities along a route from Orange, Texas, to Geismar, Louisiana[,] . . . [that] will be used as a feedstock to produce ethylene, not as fuel."[16] Williams stated further that this would be a "raw mix generally consisting of ethane, propane, butane, and natural gasoline . . . delivered to large fractionation plants . . . for separation into commercially-viable petroleum derivative products."[17] Williams contended the FERC "has not addressed the jurisdictional question," whereas the FERC has previously recognized its ICA jurisdiction only applies to "hydrocarbons used for

9. *Id*. at P 22.
10. *Id*. at P 26.
11. *Id.* at P 36.
12. *Id*.
13. 144 F.E.R.C. ¶ 61,049 at PP 37 - 38.
14. *Williams Olefins Feedstock Pipelines, L.L.C.*, 145 F.E.R.C. ¶ 61,303 (2013).
15. 49 U.S.C. Appx. §§ 1-40 (1988).
16. 145 F.E.R.C. ¶ 61,303 at P 2.
17. *Id.* at P 4.

fuel or energy purposes."[18] According to Williams, the FERC has held that "ICA jurisdiction applies to energy-use products" and not to petrochemical feedstocks.[19]

The FERC found that "the level of scrutiny inherent in [its] ICA jurisdiction is irrelevant to determining whether that jurisdiction applies to the interstate movement of a particular petrochemical."[20] Since purity ethane also has current energy uses and future undeveloped uses, the "jurisdiction cannot be based on an applicant's assertion of a product's end use in the case of a product that has potential fuel and energy uses," citing the announced plans of Enterprise Products Partners L.P. to build a new liquefied petroleum gas (LPG) terminal, which will "produce an aggregate capacity of 15-16 million bbl/month of low-ethane propane."[21] "Against this background, it is evident that purity ethane has future energy uses[,] [t]hus purity ethane is a naturally-occurring hydrocarbon that is used or can be used for energy-related purposes."[22] Since "the [FERC] has exercised and maintained its ICA regulatory authority over a number of ethane transportation projects currently approved and under construction," it will continue to do so due to the thermal heat content and "current and future uses of ethane as fuel" and will not restrict "jurisdiction on purported intended uses."[23]

2. Buckeye Linden Pipe Line Co.

On June 26, 2014, the FERC issued its Order Accepting Tariff in *Buckeye Linden Pipe Line Co.*, finding that no valid protest opposing the tariff filing had been submitted.[24]

Buckeye Linden Pipe Line Co. (Buckeye Linden) filed FERC Tariff No. 4.0.0 on May 27, 2014, proposing to establish an initial rate for new jet fuel pipeline transportation services from origins at Perth Amboy, New Jersey; Port Reading, New Jersey; and Sewaren, New Jersey to Linden, New Jersey.[25] Motiva Enterprises LLC (Motiva) protested the Buckeye Linden tariff filing, claiming the proposed initial rate was substantially in excess of the rate charged by Buckeye Linden's predecessor for similar jet fuel service. Therefore, the initial rate had not been shown to be just and reasonable within the meaning of the ICA.[26] Motiva asserted it had standing to protest the tariff filing because Motiva owned and operated a storage and terminalling facility at the Sewaren, New Jersey origin point reflected in FERC Tariff No. 4.0.0 that was "captive to the Buckeye Linden pipeline [system] for the purposes of transporting jet fuel" to Linden, New Jersey, and downstream destinations.[27] Thus, the viability of the Motiva terminal was

18. *Id.* at P 7.

19. *Id.* at P 9.

20. 145 F.E.R.C. ¶ 61,303 at P 14.

21. *Id.* at PP 16, 19.

22. *Id.* at P 19.

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

24. *Buckeye Linden Pipe Line Co., LLC*, 147 F.E.R.C. ¶ 61,249 at P 11 (2014).

25. Buckeye Linden Pipe Line Co., LLC, FERC Tariff Filing No. 4.0.0, Docket No. IS14-399 (May 27, 2014). Note the tariff also established initial rates for jet fuel pipeline transportation services from Linden, New Jersey to Perth Amboy, New Jersey. *Id.*

26. Motion of Motiva Enterprises LLC for Leave to Intervene and Protest at 1, Docket No. IS14-399 (June 11, 2014).

27. *Id.* at 3.

"dependent upon continued access to transportation service on the Buckeye Linden [system] . . . at economic rates."[28] Motiva further claimed it had a "substantial economic interest" in the tariff filing as required by section 343.2 of the FERC's regulations because both Motiva and its jet fuel customers would be financially impacted by the initial rates.[29] Motiva estimated the annual financial impact of the proposed initial rates to Motiva would be from $500,000 to $4,000,000, but did not provide a basis for the estimate.[30]

Buckeye Linden filed an answer to Motiva's protest, contending that Motiva did not have a "substantial economic interest" in the tariff filing sufficient to confer standing to protest.[31] In support of its claim, Buckeye Linden pointed out that "Motiva's claim of 'substantial economic interest' [was] grounded *solely* in its ownership of the Motiva Terminal," and that Motiva was not a past, "current or future shipper of jet fuel on the Buckeye Linden Pipeline," nor was Motiva a supplier, producer, or a royalty interest owner who would ever directly or indirectly pay the tariff rates.[32] Buckeye Linden argued Motiva's connection to the tariff filing was too remote and the potential impact of the new tariff rates on the profitability of Motiva's terminal was too speculative to constitute a "substantial economic interest" within the meaning of the regulations.[33] Buckeye Linden further claimed the Motiva terminal was not captive to the Buckeye Linden pipeline for transportation to Linden, as Colonial Pipeline Company also offered jet fuel transportation services to and from the Motiva terminal, and the Motiva terminal had truck racks, marine docks, and rail facilities.[34]

Motiva subsequently filed an answer to Buckeye Linden's answer, claiming the financial impact to Motiva was not speculative because Motiva terminal's jet fuel customers had demanded Motiva hold them "harmless for Buckeye Linden's new tariff rate by commensurately reducing Motiva's terminalling and storage rates," thereby making Motiva the "effective rate payer."[35] Buckeye Linden again responded, arguing that "Motiva['s] attempt to style itself as the 'functional ratepayer'" did not change the fact the only harm to Motiva that could potentially result from the new rates was an indirect reduction in the profitability of Motiva's terminal, and that Motiva's answer "provid[ed] no new facts or details showing that [its] claim of [a substantial] economic interest in the Tariff Filing [was] anything more than speculative."[36]

The FERC accepted the Buckeye Linden Tariff No. 4.0.0 and allowed it to go into effect on short notice, finding no valid protests had been submitted

28. *Id*. at 4.

29. *Id*. at 4.

30. *Id*.

31. Answer of Buckeye Linden Pipe Line Co. to Motion to Intervene and Protest of Motiva Enterprises, LLC at 7-13, Docket No. IS14-399 (June 16, 2014).

32. *Id*. at 8-9.

33. *Id*. at 10-11.

34. *Id*. at 5-7.

35. Motion of Motiva Enterprises LLC for Leave to Answer and Answer at 2-3, Docket No. IS14-399 (June 20, 2014).

36. Motion for Leave to Answer and Answer of Buckeye Linden Pipe Line Co. in Reply to Motion of Motiva Enterprises LLC for Leave to Answer and Answer at 3-5, Docket No. IS14-399 (June 25, 2014).

opposing the tariff filing.[37] In so holding, the FERC noted Motiva was neither a current shipper nor a future shipper on Buckeye Linden's system, and that "[t]he sole economic interest claimed by Motiva [was] that its [terminal] customers [would] pay a higher rate to move aviation jet fuel from Motiva's terminal [in Sewaren, New Jersey] to the New Jersey-New York airports."[38] The FERC further noted that "[t]he effects of the proposed rates upon Motiva itself [were] speculative and unsupported," pointing out that Motiva had provided no support for the costs it estimated it would incur as a result of the new tariff rates.[39] The FERC concluded Motiva lacked standing to protest because it had not demonstrated a "substantial economic interest" in the tariff filing, as required by FERC regulations.[40]

3. CHS Inc. v. Enterprise TE Products Pipeline Co.

On October 17, 2013, the FERC issued an Order on Complaints in *CHS Inc. v. Enterprise TE Products Pipeline Co.*,[41] where it granted the complaints in part, and established a limited hearing for the purpose of determining damages.[42] The complaints at issue were filed in response to Enterprise TE Products Pipeline Company's (Enterprise) tariff filing cancelling its transportation service of jet fuel and distillates.[43] However, Enterprise had also entered into a settlement agreement with certain complainants in a separate proceeding, which set forth settlement rates for the same jet fuel and distillate service at issue in the complaints and indicated such settlement rates "shall remain in effect for the remainder of the Settlement Period."[44]

In the Order, the FERC addressed two primary issues: (1) whether the complainants, who were not parties to the settlement agreement, had standing to contest Enterprise's cancellation of jet fuel and distillate service, and (2) whether Enterprise's tariff filing cancelling jet fuel and distillate service was in violation of its settlement agreement. With respect to the issue of standing, the FERC noted it has "not established [a] bright-line rule that non-parties [to a settlement agreement] do not have the right to enforce a settlement agreement," and it has in fact "allowed non-parties to intervene in complaint proceedings between parties to a settlement agreement."[45] In addition, each complainant filed a verified statement that it was "a past, present and/or future customer" of Enterprise for the "transportation of either jet fuel or distillate."[46] On that basis, the FERC held that all of the complainants had standing to file their respective complaints.[47]

37. 147 F.E.R.C. ¶ 61,249 at PP 1, 11.
38. *Id*. at PP 7, 11.
39. *Id*. at P 11.
40. *Id.*
41. *CHS Inc. v. Enter. TE Products Pipeline Co*., 145 F.E.R.C. ¶ 61,056 (2013).
42. *Id*. at P 2.
43. *Id*. at PP 1, 6.
44. *Id*. at PP 5, 26.
45. *Id*. at P 25.
46. 145 F.E.R.C. ¶ 61,056 at P 25.
47. *Id*.

The FERC also held that Enterprise's tariff filing, cancelling jet fuel and distillate service, was in violation of the settlement agreement.[48] To make this determination, the FERC analyzed the language contained within the settlement agreement itself using general principles of contract interpretation: "(1) a contract should be interpreted as an integrated whole; (2) provisions of a contract should normally not be interpreted as being in conflict; and (3) a more particular and specific clause of a contract should prevail over a more general clause."[49]

Based on the language contained in the settlement agreement, stating that the rates provided therein "shall remain in effect" throughout the settlement period, the FERC determined Enterprise was required to provide transportation of all the services identified in the settlement agreement (including jet fuel and distillate service) for the entirety of the settlement period.[50] Therefore, Enterprise's cancellation of such services was in violation of the settlement agreement. The FERC distinguished its holding in Opinion No. 435[51] that a settlement agreement involving the establishment of rates does not itself obligate an oil pipeline to continue to provide service during the term of the settlement agreement, noting that in the settlement agreement at issue in the Opinion No. 435 proceeding, the oil pipeline had not agreed that the rates set forth in the settlement agreement would remain in effect for a specific length of time.[52]

When addressing the relief requested by the complainants, the FERC noted that, although it does have "jurisdiction to determine whether an abandonment of service" violates a settlement agreement, it does not have the authority or jurisdiction to "prevent or delay the abandonment of service by an oil pipeline."[53] Therefore, it was unable to grant the complainants the requested relief of requiring Enterprise to continue to provide transportation service of jet fuel and distillates. However, under sections 8 and 13(1) of the ICA, the FERC held it does have the authority to hold an oil pipeline "in violation of the law liable for the full amount of damages stemming from [its] violation[s]."[54] Accordingly, the FERC established a limited hearing for the purpose of determining whether the complainants suffered any damages as a result of Enterprise's cancellation of jet fuel and distillate service, and if so, the calculation of such damages.[55]

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48. *Id.* at P 13.

49. *Id*. at P 27 (citing *Sw. Power Pool, Inc.*, 109 F.E.R.C. ¶ 61,010 at P 25 (2004)).

50. *Id*. at PP 27-31 ("A promise that a tariff will remain filed is an explicit promise not to file a replacement tariff to cancel the original tariff so as to abandon the service which the original tariff provided.").

51. *SFPP, L.P.*, Opinion No. 435, 86 F.E.R.C. ¶ 61,022 (1999), *order on reh'g*, Opinion No. 435-A, 91 F.E.R.C. ¶ 61,135 (2000), *order on reh'g*, Opinion No. 435-B, 96 F.E.R.C. ¶ 61,281 (2001), *order granting clarification and reh'g in part*, 97 F.E.R.C. ¶ 61,138 (2001), *order on reh'g*, 100 F.E.R.C. ¶ 61,353 (2002), *aff'd in part, vacated in part and remanded sub nom.*, *BP West Coast Products, LLC v. FERC*, 374 F.3d 1263 (D.C. Cir. 2004).

52. 145 F.E.R.C. ¶ 61,056 at P 30.

53. *Id*. at P 39.

54. *Id*. at P 40.

55. *Id*. at PP 40-41.

C. Tariff and Ratemaking Issues

1. Seaway Crude Pipeline Co., LLC

Seaway Crude Pipeline Co. (Seaway) was originally built to flow south-to-north from the United States Gulf Coast to Cushing, Oklahoma. In April 2012, Seaway filed a tariff with the FERC to initiate a flow reversal and transport crude oil north-to-south in Docket No. IS12-226-000.[56] The ensuing rate case became one of the year's most controversial FERC proceedings.

Seaway's proposed tariff set forth Committed and Uncommitted Shipper rates. Committed Shipper rates are a common rate design for new crude oil pipeline projects that require significant shipper commitments to attract financing. Protestors challenged the rates and the details of the Committed Shipper rate design. The FERC set the proposed transportation rates for hearing for Seaway "to produce a cost of service justification for its rates."[57] The FERC acknowledged its preference for addressing non-rate issues, such as the Committed/Uncommitted shipper rate design, in a petition for declaratory order (PDO) proceeding prior to a pipeline tariff filing.[58] The FERC explained that the PDO process permits it to provide advance "definitive guidance."[59] However, because Seaway had not filed for a PDO, the FERC set the non-rate and rate design matters for hearing as well.[60]

The lack of "definitive guidance" sowed confusion in the Seaway hearing docket. There was disagreement early on as to which of the initial rates had been set for hearing. Seaway proceeded under the assumption that the FERC regulations required it to provide a cost-of-service justification for only the initial Uncommitted Shipper rates. FERC Trial Staff filed testimony proposing cost-based rates for both the Committed and Uncommitted Shippers that would reduce the Committed Shipper rates by nearly 80%.[61] Seaway then filed an emergency PDO in December 2012 asking the FERC to "affirm its policy of honoring" Committed Shipper rates.[62] In March 2013, the FERC denied the PDO because the matter was already set for hearing.[63] However, to remove uncertainty, the FERC clarified its policy that Committed Shipper rates would be upheld and applied during the term of their contracts as long as they were entered into during a valid open season.[64] It clarified that the protested Uncommitted Shipper rates remained subject to a cost-of-service justification in the hearing.[65]

56. Seaway Crude Pipeline Co., 139 F.E.R.C. ¶61,109 (2012) (Hearing Order).

57. *Id.* at P 21.

58. *Id.* at P 25 (quoting *Express Pipeline P'ship*, 75 F.E.R.C. ¶ 61,303 at p. 61,967 (1996)).

59. *Id.*

60. *Id.*

61. Emily Pitlick, Brian O'Neill & Paul Korman, *Seaway Initial Decision on Remand Spurns FERC Holding on Committed Shipper Rates and Finds them Subject to Modification*, VAN NESS FELDMAN (May 12, 2014), http://www.vnf.com/2836.

62. Petition for Declaratory Order of Seaway Crude Pipeline Co. at 1, Docket No. OR13-10 (Dec. 10, 2012).

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

64. *Id.* at P 13.

65. *Id.*

On September 13, 2013, the presiding Administrative Law Judge (ALJ) issued an Initial Decision which found the FERC's clarification of its policy honoring Committed Shipper contracts was not dispositive.[66] Accordingly, the Initial Decision ordered modification of the contracts' rates because a clause in the contracts contemplated the FERC modification.[67] The ALJ reasoned that modifying the rates "honored" the contracts specifically because they contemplated this modification.[68] In addition, modification was necessary because the Hearing Order called explicitly for a cost-of-service justification for Seaway's rates and the contract rates were not cost-based.[69] Numerous industry stakeholders responded with motions to intervene out-of-time, decrying the Initial Decision's impact on the sanctity of contracts, if it was affirmed.

On February 28, 2014, the FERC reversed the Initial Decision.[70] The FERC was highly critical of the ALJ's reasoning. The Remand Order stated that the Hearing Order had not required the Committed Shipper rates to be cost-justified. The FERC also emphasized its PDO Order explicitly stated only the uncommitted rates needed to be supported by cost data.[71] Seaway's failure to seek an advance PDO prior to making its initial tariff filing left the Committed/Uncommitted rate structure subject to hearing but not the rates themselves, unless there was evidence the open season had not been valid.[72] The Initial Decision made no such finding. The FERC criticized the Initial Decision for ignoring its policy on oil pipeline contract rates without any finding that the underlying open season process was unfair or that the Committed Shipper rates harmed third-parties.[73] The FERC found this error to be central to the entire Initial Decision and reversed and remanded the Initial Decision in its entirety.[74] The ALJ was directed to issue a new decision limited to the issues set forth in the Hearing Order, without reopening the record.[75] Hence, the ALJ could review the Uncommitted Shipper rates and the overall rate design, but go no further.

On May 9, 2014, the presiding ALJ issued an initial decision on remand (Remand Decision).[76] Despite the FERC's instructions, the Remand Decision still found it would not be possible to review the cost-of-service justification and adjust the Uncommitted Shipper rates accordingly without also adjusting the Committed Shipper rates, and the Hearing Order did not prohibit that approach.[77] It found that because the revenue collected from the Committed Shipper rates exceeded Seaway's cost-of-service revenue requirement, the Uncommitted Shippers would

66. *Seaway Crude Pipeline Co., LLC*, 144 F.E.R.C. ¶ 63,026 (2013) (Initial Decision), o*rder on initial decision and remand for further action*, 146 F.E.R.C. ¶ 61,151 (2014), *initial decision on remand*, 147 F.E.R.C. ¶ 63,009 (2014).

67. 144 F.E.R.C. ¶ 63,026 at P 22.

68. *Id.* at P 23.

69. *Id.* at P 25.

70. *Seaway Crude Pipeline Co., LLC*, 146 F.E.R.C. ¶ 61,151 at P 1 (2014) (Remand Order).

71. *Id.* at P 20.

72. *Id.* at P 15.

73. *Id.* at P 21.

74. *Id.* at P 40.

75. *Id.* at P 43.

76. *Seaway Crude Pipeline Co., LLC*, 147 F.E.R.C. ¶ 63,009 at P 48 (2014) (Remand Decision).

77. *Id.* at PP 48-50.

need to be assigned a negative rate or a true-up mechanism to reallocate excess revenues between the pipeline and its shippers.[78] However, the Remand Decision rejected a revenue crediting mechanism proposed by Seaway to accomplish this true-up because it failed to conform to the Hearing Order's requirement that Seaway produce cost-justified rates.[79] Yet, the Remand Decision resulted in no finding on the actual rates. It reiterated the Initial Decision's refusal to determine the appropriate level of Uncommitted or Committed Shipper rates, finding the evidentiary record insufficient to support one.[80]

The Remand Decision also made findings on two additional issues on which the Initial Decision had sought FERC guidance, but which the Remand Order declined to provide: the inclusion of an acquisition premium in rate base and the appropriate depreciation rate. First, the Remand Decision explored whether Seaway met the test for including an acquisition premium in rates. It explained that the FERC recognizes an exception to its general prohibition on acquisition premiums "in the case of an arm's-length transaction where (1) the purchased asset will be devoted to a new use and (2) the transaction as a whole clearly has a demonstrable benefit to customers."[81] The Remand Decision found that an acquisition premium was unlawful because the transaction leading to Seaway's current ownership structure had not been at arms-length.[82] It also set a depreciation rate for the regulated facilities.[83]

Finally, the Remand Decision rejected Seaway's proposed revenue-crediting mechanism to credit the cost of service to account for the fact that "the revenues collected through committed shipper contracts exceed Seaway's total cost of service."[84] It found the revenue-crediting method did "not conform to the Hearing Order's requirement for Seaway to produce cost-of-service justifications for its rates."[85] Ultimately, the Remand Decision determined it could not determine the appropriate level of Uncommitted or Committed Shipper rates.

Several parties have filed briefs on exceptions and briefs opposing exceptions in this proceeding, now pending, again, before the FERC.

2. Enterprise Products Partners L.P.

On February 20, 2014, the FERC denied the applications of Enterprise Products Partners L.P. (Enterprise) and Enbridge Inc. (Enbridge) to charge market-based rates on the Seaway Crude Pipeline Company System (February 2014 Order).[86] Seaway, the same pipeline subject to the ongoing rate case described above, sought to charge market-based rates in lieu of cost-based rates once it entered service following a flow reversal to take Western Canadian crude

78. *Id.* at P 350.

79. *Id.* at P 351.

80. *Id.* at P 361.

81. *Id.* at P 100 (citing *Longhorn Partners Pipeline*, 73 F.E.R.C. ¶ 61,355 at p. 62,112 (1995), Missouri Pub. Serv. Comm'n v. FERC, 601 F.3d 581 (D.C. Cir. 2010), and Rio Grande Pipeline Co. v. FERC, 178 F.3d 533 (D.C. Cir. 1999)).

82. *Id.* at P 113.

83. *Id.* at P 302.

84. *Id.* at PP 350-51.

85. *Id.* at P 351.

86. *Enterprise Products Partners L.P. & Enbridge Inc.*, 146 F.E.R.C. ¶ 61,115 (2014).

oil from Cushing, Oklahoma, to an Enterprise terminal on the United States Gulf Coast. Enterprise and Enbridge had filed a request on December 2, 2011, requesting waiver of FERC regulations, which ordinarily do not permit pipelines to charge market-based rates as their initial rates.[87] The February 2014 Order marks the second time the FERC has denied this request.

The FERC issued its initial denial of Enterprise and Enbridge's waiver request on May 7, 2012, in an Order on Application for Market Power Determination (May 2012 Order).[88] The May 2012 Order acknowledged an April 2012 federal appellate court decision, *Mobil Pipeline Co. v. FERC (Mobil)*, that evaluated the FERC's policies and precedents for examining oil pipeline market-based rate authority applications, which had not been considered in the proceeding.[89] On June 28, 2012, the FERC reopened the proceeding *sua sponte* "for the purpose of reconsideration of the effect of the court's *Mobil* decision on the [FERC's] review of Enterprise/Enbridge's market-based rate application."[90]

Ultimately, the February 2014 Order came to the same decision as the May 2012 Order. It found there could be no geographic market analysis—a necessary component of the FERC's market-power determination—without operational data.[91] And, because Seaway was a new pipeline project, it would have no operational data until it entered service.[92] Hence, any market power determination would be "incomplete and potentially erroneous."[93] The FERC again denied the waiver request.

A key issue in the February 2014 Order was whether *Mobil* had ordered changes to FERC policy that would require reversal of the May 2012 Order. The FERC determined that *Mobil* had rejected the application of its longstanding policies to the specific facts in that proceeding, but that it had not altered the FERC's precedent generally.[94] Thus, the FERC determined that it could continue to require applicants seeking market-based rates to follow part 384 of its Rules of Practice and Procedure, including the requirement to: (1) identify relevant markets (geographic markets and product markets); (2) "identify the competitive transportation alternatives for [pipeline] shippers," and (3) "compute the market concentration for the relevant market(s), and other market power measures."[95]

The FERC then walked through how a pipeline would follow these steps to carry its burden of proof. It determined that geographic and product markets would be determined on a case-by-case basis. However, the FERC provided guidance for pipelines to demonstrate the geographic market: "the proper geographic origin market for crude oil pipelines is the production field from where

87. *See, e.g.*, 18 C.F.R. § 342.2 (2014) (stating that initial rates can only be established by filing "cost, revenue, and throughput data," or by filing a "sworn affidavit that the rate is agreed to by at least one non-affiliated person who intends to use the service").

88. *Enterprise Products Partners L.P. & Enbridge Inc.*, 139 F.E.R.C. ¶ 61,099 at P 47 (2012), *order on reh'g*, 139 F.E.R.C. ¶ 61,255 (2012), *order on reh'g*, 146 F.E.R.C. ¶ 61,115 (2014).

89. Mobil Pipeline Co. v. FERC, 676 F.3d 1098 (D.C. Cir. 2012).

90. 139 F.E.R.C. ¶ 61,255 at P 2.

91. 146 F.E.R.C. ¶ 61,115 at P 80.

92. *Id.* at P 81.

93. *Id.*

94. *Id.* at PP 31-32.

95. *Id.* at P 34 (citing 18 C.F.R. pt. 348 (2013)).

the crude oil being shipped on the pipeline derives," which could include an inbound pipeline transporting crude from other production fields.[96] A product market "consists of that service or those services which the pipeline holds itself out as offering."[97] It "includes (1) those services for which the applicant seeks to charge market-based rates, and (2) any product that could discipline the exercise of market power over those products."[98] Also, only transportation of those products available from the geographic market will be included in the product market.[99]

The FERC then discussed competitive alternatives. It explained that "alternatives may include other pipelines, rails, barges, trucks, refiners, and local consumption."[100] Proximity of the alternative to the pipeline in the geographic market is insufficient. The pipeline must provide additional data to demonstrate that the alternative is "good" in terms of availability and price.[101] To be competitive, the alternative must be able to prevent a potential increase in price by the pipeline above the competitive level, and "must be available to receive product diverted from the applicant in response to a price increase, and must be of the same quality as the applicant."[102] The FERC found that *Mobil* had not disrupted the FERC's use of a netback analysis to determine competitive alternatives.[103] Although a netback analysis is not always necessary, "a fundamental element of a market-power analysis[] is that competitive alternatives must be determined competitive in terms of price."[104]

Finally, "[m]arket share and market concentration measures are taken once good alternatives are determined."[105] It is the percentage of the market and not the actual size of the pipeline that is relevant. The FERC explained it would continue to use the Herfindahl-Hirschman Index (HHI) to assess market concentration.[106]

Once the FERC reaffirmed its process for assessing market power, it analyzed whether Enterprise and Enbridge met its test. It determined "that the proper geographic origin market for crude oil pipelines is the production field from where the crude oil actually being shipped on the applicant derives."[107] Because there was no actual operational data, the FERC could not identify the proper geographic market or complete the market power analysis. The FERC invited Enterprise and Enbridge to refile their application for market-based rate authority once such data could be provided.[108]

96. 146 F.E.R.C. ¶ 61,115 at P 39.

97. *Id.* at P 44.

98. *Id.*

99. *Id.*

100. *Id.* at P 45.

101. *Id.*

102. 146 F.E.R.C. ¶ 61,115 at P 45.

103. *Id.* at P 48 (explaining that "[a] traditional netback analysis identifies good alternatives based on a comparison of the netback a shipper receives for a barrel of oil over various alternatives").

104. *Id.* at P 53.

105. *Id.* at P 71.

106. *Id.* at P 74.

107. *Id.* at P 80.

108. *Id.* at P 83.

3. Southwest Airlines Co. & United Airlines, Inc. v. Colonial Pipeline Co.

On April 8, 2014, the FERC issued an Order on Complaint Establishing Hearing in Docket No. OR14-18-000, a complaint proceeding initiated by Southwest Airlines Co. and United Airlines, Inc. (the Airlines) against Colonial Pipeline Co. (Colonial).[109] The Airlines alleged that data in Colonial's 2012 FERC Form 6 provided probable cause that its rates to transport aviation kerosene and jet fuel exceeded just and reasonable maximum levels, including allegations that Colonial was substantially over-recovering its cost-of-service by as much as 39.4%.[110] Colonial's base rates are grandfathered under the Energy Policy Act of 1992 (EPAct).[111] Grandfathered base rates are presumed just and reasonable. However, Colonial has raised the base rates since that time, using the FERC's indexing regulations and through the implementation of market-based rates for some routes.[112] The Airlines' complaint provided expert witness testimony to support removal of the rates' reasonableness presumption, argued for the removal of market-based rate authority in several origin and destination markets, and challenged certain charges for transmix and product losses as unlawful because they were not in Colonial's tariff and the way they were computed was not adequately justified.[113]

The FERC rejected Colonial's request for summary disposition of the complaint. Colonial argued the complaint failed the FERC's test for deciding whether an intervening change in the economic circumstances is sufficient to open a grandfathered rate to challenge. The test "compares the return on equity generated by the rates in question at three points in time: when the rate was established (A); when the EPAct was enacted (B); and when the complaint is filed (C)."[114] The FERC may disregard the presumption of reasonableness EPAct conferred on grandfathered rates if the return on equity has increased substantially since the rates were grandfathered.[115] The FERC determined that the lack of period (A) data and assumptions in the (B) and (C) data in the Airlines' complaint did not warrant its rejection.[116] It found "that a challenge to grandfathered rates, while difficult, is not designed to be impossible or insurmountable, and a lack of publicly available data does not prevent a challenge at hearing, but may in fact require further investigation before a trier of fact and law."[117]

The FERC also rejected Colonial's request to dismiss the Airlines' challenge to its market-based rate authority because its complaint lacked a fully-detailed market power analysis.[118] The FERC found that the uncertainty created by *Mobil* cautioned against dismissal.[119] Instead, the Airlines would be permitted to

109. *Sw. Airlines Co. v. Colonial Pipeline Co.*, 147 F.E.R.C. ¶ 61,024 (2014).
110. *Id.* at P 5.
111. *Id.* at P 2; Energy Policy Act of 1992, 42 U.S.C. §§ 13201-574 (1992).
112. 147 F.E.R.C. ¶ 61,024 at P 9.
113. *Id.* at P 28.
114. 147 F.E.R.C. ¶ 61,024 at P 10.
115. *Id.*
116. *Id.*
117. *Id.* at P 31.
118. *Id.* at P 32.
119. 147 F.E.R.C. ¶ 61,024 at P 34; Mobil Pipeline Co. v. FERC, 676 F.3d 1098 (D.C. Cir. 2012).

supplement their case at a hearing to support their assertions of market power.[120] In addition, the FERC set the challenges to Colonial's transmix and product loss charges for a hearing because the policies were not "filed with the [FERC] so that the [FERC] and shippers can review them before the policies and any changes to them are placed in effect."[121]

An offer of settlement was filed with the FERC on June 30, 2014, and remains pending as of this writing.[122]

4. Shell Pipeline Company LP

On April 10, 2014, the presiding ALJ in Docket No. IS14-106-000 issued a partial initial decision (Partial Decision) that broadly defined "substantial economic interest," the regulatory threshold for standing to protest oil pipeline transportation rates.[123] The finding permits a group of oil producers to protest initial uncommitted rates on one segment of Shell Pipeline Company LP's (Shell) Houston to Houma System (Ho-Ho) despite the fact that the producers had no oil production to actually ship on the pipeline segment in question at that time.[124] As a consequence, Shell will need to provide full cost, revenue, and throughput data supporting the proposed rates unless the Partial Decision is reversed.[125]

In December 2013, Shell filed three related tariffs for service on the Ho-Ho System corresponding to transportation along the entire system, the eastern two-thirds of the system, and the eastern third of the system.[126] A group of producers protested all three tariffs. The FERC issued a hearing order on January 9, 2014, which found the producers had standing to protest two of the three tariffs because they were potential future shippers or suppliers on the Ho-Ho System.[127] But, the FERC found it unclear whether the producers had standing to protest the third tariff covering segmented transportation from Erath, Louisiana to Houma, Clovelly, and St. James, Louisiana (Erath segment)—representing the eastern third of the Ho-Ho System.[128] The Order directed the ALJ to determine the producers' standing "based on whether they are active in the production area supplying Erath."[129] The FERC reasoned that if they were not active, the producers were unlikely to have a "substantial economic interest" in the Erath segment rates.[130] The producers acknowledged they were not currently active in the production area supplying Erath, but could become so in the future.[131]

The Partial Decision granted the producers standing to protest the Erath segment rates, adopting the producers' broad view of "substantial economic

120. *Id.*

121. *Id.* at P 36 (quoting *Enterprise TE Products Pipeline Co., LLC*, 131 F.E.R.C. ¶ 61,134 at P 11 (2010)) (internal quotations omitted).

122. *Sw. Airlines Co. v. Colonial Pipeline Co.*, 148 F.E.R.C. ¶ 61,161 at PP 1, 4.

123. *Shell Pipeline Co.*, 147 F.E.R.C. ¶ 63,002 at P 22 (2014).

124. *Id.* at PP 24, 26.

125. *Id.* at P 28.

126. *Id.* at P 4.

127. *Shell Pipeline Co.*, 146 F.E.R.C. ¶ 61,009 at P 15 (2014).

128. *Id.* at P 17.

129. *Id.*

130. *Id.*

131. *Id.* at P 10.

interest" that was not limited to current activity in the Erath production area.[132] The Partial Decision relied on *Enbridge (Southern Lights) LLC*, a case that granted standing to non-current shippers with a demonstrated intent to become shippers even though the shippers' plan to ship was not "imminent."[133] It also relied on a finding that standing should be based on the "magnitude of the economic stake" of the protesting party and not just shipper status.[134] The Partial Decision also found there was no precedent "limiting standing to activities in 'the production area.'"[135] It was enough that the shippers had standing to protest the tariff covering transportation on the entire Ho-Ho System, which encompassed the Erath Segment at the system's eastern end. The ALJ concluded that the producers' interest was a substantial economic interest because system rates were mutually interdependent.[136] Costs and revenues would need to be allocated among all origin and destination shipments on the system to establish just and reasonable rates for shipments sourced at Houston.[137] The administrative efficiency of reviewing the shorter haul rates in the context of the longer haul ones specifically set for hearing also influenced the Partial Decision[138]

5. Enbridge Pipelines (Southern Lights), LLC

On July 19, 2013, the FERC issued its Order on Initial Decision affirming the holdings in an Initial Decision issued on June 5, 2012,[139] regarding two rate filings made by Enbridge Pipelines (Southern Lights) LLC (ESL).[140] ESL "sought to establish initial rates for the United States portion of a 1,582-mile pipeline from Manhattan, Illinois to Edmonton, Alberta."[141] The FERC had approved the rate structure for ESL by Declaratory Order, under which the rate for committed shipments is calculated in accordance with the agreed-upon Transportation Services Agreement (TSA) entered into between ESL and its committed shippers.[142] That rate structure, approved by the Declaratory Order, set the initial Uncommitted Rate at two times the Committed Rate, subject to review of the Uncommitted Rate when filed, at which point ESL would be required to support it using cost, revenue, and throughput data if it was protested.[143] The FERC added that when a just and reasonable Uncommitted Rate was determined in this manner,

132. 146 F.E.R.C. ¶ 61,009 at P 16.

133. 147 F.E.R.C. ¶ 63,002 at P 22 (citing *Enbridge (Southern Lights) LLC*, 134 F.E.R.C. ¶ 61,067 (2011)).

134. *Id.* at P 23.

135. *Id.*

136. *Id.* at P 26.

137. *Id.*

138. *Id.* at P 27.

139. *Enbridge Pipelines (Southern Lights), LLC*, 139 F.E.R.C. ¶ 63,015 (2012).

140. *Enbridge Pipelines (Southern Lights), LLC*, 144 F.E.R.C. ¶ 61,044 (2013).

141. *Id.* at P 12. "On December 28, 2010, pursuant to the terms of the TSA which require ESL to recalculate and refile the tariff rates each year, the pipeline proposed to increase the uncommitted shippers' rates in Docket No. IS11-146-000." *Id.* at P 4.

142. *Enbridge Pipelines (Southern Lights), LLC*, 121 F.E.R.C. ¶ 61,310 at PP 15-16 (2007), *order granting clarification*, 122 F.E.R.C. ¶ 61,170 (2008).

143. 122 F.E.R.C. ¶ 61,170 at PP 12-13 (citing part 346 of the oil pipeline regulations, 18 C.F.R. pt. 346).

the pipeline could derive the Committed Rate by applying the agreed-upon terms of the TSAs.[144]

In the Initial Decision, the ALJ found that TSA-derived tariff rates proposed by ESL for uncommitted service were just and reasonable.[145] The ALJ found that the FERC had expressly ruled that setting the Uncommitted Rates for hearing did not undermine its approval of the rate structure or the two-to-one ratio between the uncommitted and committed rates in the TSA.[146] "The Initial Decision recognized that the rate design should appropriately allocate the cost-of-service between the [C]ommitted and [U]ncommitted [S]hippers in a way that ensures the appropriate group of shippers pay for the services they receive."[147] Further, the ALJ "found that setting differential rates for the committed and uncommitted Shippers was consistent with [FERC] precedent and the [FERC's] prior rulings for ESL,"[148] and noted that "the [FERC] acknowledged this point when it determined that the two-to-one ratio does not result in undue discrimination,"[149] and was just and reasonable.[150]

The FERC affirmed and adopted the ALJ's finding, affirming its earlier approval in the Declaratory Order of the two-to-one rate design methodology established in the TSA. It held that methodology "must be used in determining the just and reasonable Uncommitted Rate for both 2010 and 2011."[151] The FERC relied on the Declaratory Order's finding that the two-to-one rate structure, providing a discount to the committed shippers, "was not unduly discriminatory or preferential because the rate discount was offered to all interested shippers[,] . . . the rate reflects the differences between firm and non-firm shippers," and the rate structure was unchallenged in the Declaratory Order proceeding.[152]

D. Petitions for Declaratory Order

Numerous Petitions (the Petitions) for Declaratory Order were filed during the reporting period.[153] The Petitions, though varied in their facts and with respect to the infrastructure proposed, in totality sought and received certain common regulatory assurances from the FERC, including: (1) that up to 90% of project

144. *Id.* at P 13.

145. 144 F.E.R.C. ¶ 61,044 at P 127; 139 FERC ¶ 63,015 at P 538.

146. 144 F.E.R.C. ¶ 61,044 at P 17; 139 FERC ¶ 63,015 at P 70.

147. 144 F.E.R.C. ¶ 61,044 at P 19; 139 FERC ¶ 63,015 at P 533.

148. 144 F.E.R.C. ¶ 61,044 at P 19; 139 FERC ¶ 63,015 at P 534.

149. 144 F.E.R.C. ¶ 61,044 at P 19; 121 FERC ¶ 61,310 at P 534.

150. 144 F.E.R.C. ¶ 61,044 at P 19; 139 FERC ¶ 63,015 at P 534 (citing *Imperial Oil & ExxonMobil Oil Corp. v. Enbridge Pipelines (Southern Lights), LLC*, 136 FERC ¶ 61,115 at P 16 (2011)).

151. 144 F.E.R.C. ¶ 61,044 at P 65.

152. *Id.*

153. *North Dakota Pipeline Co.*, 147 F.E.R.C. ¶ 61,121 (2014); *Colonial Pipeline Co.*, 146 F.E.R.C. ¶ 61,206 (2014); *Crosstex NGL Pipeline, L.P.*, 146 F.E.R.C. ¶ 61,182 (2014); *NuStar Crude Oil Pipeline L.P.*, 146 F.E.R.C. ¶ 61,146 (2014); *Shell Pipeline Co.*, 146 F.E.R.C. ¶ 61,051 (2014); *Sunoco Pipeline L.P.*, 145 F.E.R.C. ¶ 61,274 (2013); *Sunoco Pipeline L.P.*, 145 F.E.R.C. ¶ 61,273 (2013); *Dominion NGL Pipelines, LLC*, 145 F.E.R.C. ¶ 61,133 (2013); *Sunoco Pipeline L.P.*, 145 F.E.R.C. ¶ 61,099 (2013); *CenterPoint Energy Bakken Crude Servs., LLC*, 144 F.E.R.C. ¶ 61,130 (2013); *Enbridge Pipeline (Illinois) LLC*, 144 FERC ¶ 61,085 (2013); *TransCanada Keystone Pipeline L.P.*, 144 F.E.R.C. ¶ 61,089 (2013); *Marketlink, LLC*, 144 F.E.R.C. ¶ 61,086 (2013); *Enterprise Liquids Pipeline LLC*, 144 F.E.R.C. ¶ 61,083 (2013); *Tallgrass Pony Express Pipeline LLC*, 147 F.E.R.C. ¶ 61,266 (2014).

capacity could be offered to and reserved for committed shippers entering into transportation agreements in the context of an open season, with 10% reserved for uncommitted shippers; (2) that the terms and conditions of the transportation agreements would govern during their terms; (3) that premium rates could be charged for priority transportation service (i.e., service not subject to apportionment except during force majeure, maintenance, or other operational disruptions); (4) that committed shippers could be charged discounted transportation rates in comparison to uncommitted shippers; (5) that uncommitted shippers paying discounted transportation rates in comparison to uncommitted shippers could nonetheless be provided with preferential capacity rights through the well-established historical apportionment model; (6) that committed shippers could pay discounted rates for their committed volumes but elect to pay a premium rate in exchange for priority service during periods of apportionment; (7) that committed rates may be filed as settlement rates that will not be subject to future revisions other than by agreement of the parties; (8) that a committed shipper's deficiency payments may be "banked" and used to pay for future transportation of the committed shipper's volumes in excess of its volume commitment (subject to any applicable time limitations); (9) that transportation rates paid by a committed shipper for shipment of volumes in excess of its volume commitment may be "banked" and used to pay for future deficiency payments (subject to any applicable time limitations); (10) that committed shipper rates may be escalated during the term pursuant to the FERC's indexing methodology but will not be reduced if the index is negative; and (11) that capacity could be awarded to committed shippers in an open season process on the basis of net present value.[154] The orders below are addressed individually because they were challenged or because they raised new or notable issues.

1. North Dakota Pipeline Co.

On May 15, 2014, the FERC issued its Order on Petition for Declaratory Order for North Dakota Pipeline Company LLC (North Dakota). North Dakota sought approval of committed and uncommitted rates for its Sandpiper Project, which is intended to increase the pipeline capacity available for Bakken crude oil produced in western North Dakota and eastern Montana, to access downstream markets.[155] The expansion was to be divided into an upstream component and a downstream component.[156] Protests to the filing largely centered on whether the additional capacity was wanted or needed by shippers and whether uncommitted shippers would be required to bear a disproportionate share of the costs of the project.[157]

The FERC first discussed the role of the declaratory order process, emphasizing that it is a voluntary, not mandatory process that gives oil pipelines greater certainty with respect to non-traditional rate and tariff structures.[158] However, the FERC also reiterated that it does not regulate the entry or exit of oil

154. *See generally supra* note 153.

155. 147 F.E.R.C. ¶ 61,121 at PP 1-2.

156. *Id.* at P 2.

157. *Id.* at PP 15-17, 20.

158. *Id.* at P 22.

pipelines, so protests asserting a lack of need for the new capacity would have no bearing on the FERC's review of the PDO.[159]

The priority committed rates, which varied based on delivery location, were designed to establish an initial premium over the estimated uncommitted rates, while the non-priority committed rates were "expected to provide a discount below the uncommitted rates."[160] North Dakota stated that it would implement a uniform "Expansion Rate Component" to existing base rates for uncommitted shippers, calculated using the standard Opinion No. 154-B methodology.[161] In addition, in recognition of the premium rate paid by priority committed shippers, North Dakota stated that it would deduct $7.5 million each from the cost of service in calculating the upstream and downstream expansion rate components.[162]

The FERC rejected arguments that the proposed methodology would shift too much of the cost on to uncommitted shippers, holding that "the uncommitted shippers will have the ability to protect their interests by submitting protests when the initial uncommitted rates are filed."[163] The FERC went on to note that "[t]he protestors [were] asking for more process than would be available in the absence of the petition by requesting a hearing on the uncommitted rates prior to those rates even being filed."[164] Accordingly, the FERC held that arguments about specific uncommitted shipper rates, in the absence of final cost information following completion of construction, were "speculative and premature."[165] The FERC held that North Dakota's proposed rate and tariff structure was consistent with FERC precedent, and that the cost and rate issues raised by protestors should be addressed after North Dakota files to implement initial uncommitted rates.[166]

2. Crosstex NGL Pipeline, L.P.

On March 14, 2014, the FERC issued its Order on Petition for Declaratory Order for Crosstex NGL Pipeline, L.P. (Crosstex), in which Crosstex sought approval for a tariff and rate structure for a new interstate pipeline to transport natural gas liquids (NGLs) from Mont Belvieu, Texas to various NGL fractionation facilities in Louisiana.[167] The Crosstex petition, among various typical regulatory assurances, sought two rulings not previously addressed by the FERC. First, although Crosstex offered more than one destination point for commitment in its open season, Crosstex did not require that committed shippers tie their volume commitment to a particular destination point.[168] Instead, committed shippers would have the flexibility to meet their volume commitment by shipping to any combination of the available destination points.[169] Typically, shortfall (or deficiency) payments are calculated by multiplying the committed

159. *Id.* at P 23.
160. 147 F.E.R.C. ¶ 61,121 at P 7.
161. *Id.* at P 9.
162. *Id.* at P 10.
163. *Id.* at P 25.
164. *Id.* at P 26.
165. *Id.*
166. *Id.* at P 9.
167. 146 F.E.R.C. ¶ 61,182 at P 1.
168. *Id.* at P 29.
169. *Id.* at P 6.

volumes the committed shipper failed to ship during a certain period by the effective transportation rate applicable to the volume commitment.[170] In this case, with flexibility in the destination to which committed volumes would be transported and with the committed and uncommitted rates varying among destination points, Crosstex created a new approach to calculating shortfall payments. In particular, if shortfall payments are due before three months of historical shipment data are available, the rate to be applied to committed shipper shortfalls would be the average of the destination point rates. After three months of operational data become available and going forward, the rate to be applied to shortfalls would be the weighted average transportation rate paid for the committed shipper's committed volumes during that preceding three-month period.[171]

Second, because of the telescoping design of Crosstex's system (*i.e.*, pipeline diameter narrowing between the origin and the final destination on the system), Crosstex proposed a methodology by which priority service volumes would be apportioned in the unlikely event that committed shippers nominated unexpectedly high volumes over the relatively smaller diameter pipeline segments.[172]

The FERC granted Crosstex's petition, holding that "[b]oth the provision of higher rates for premium service and discounted rates based on volume commitments are consistent with [FERC] policies and precedent."[173] The FERC also approved the allocation of project capacity, because all shippers were made aware of the allocation methodology and that "such an approach ensures full utilization of the Project's capacity by the shippers that value it the most and who provide the greatest financial value to the system."[174]

3. NuStar Crude Oil Pipeline L.P.

On February 28, 2014, the FERC issued its Order on Petition for Declaratory Order for NuStar Crude Oil Pipeline L.P. (NuStar) related to NuStar's proposed expansion of its South Texas Crude Oil Pipeline System.[175] The NuStar petition, among various typical regulatory assurances, sought approval for certain assignment rights for committed shippers.[176] In particular, the FERC granted the regulatory assurances sought by NuStar, and with respect to the assignment issue, held that allowing committed shippers to assign their contracts was just and reasonable because it would help shippers "mitigate the risks of making a long-term commitment to the [p]roject."[177]

170. *Id.* at P 7.
171. *Id.* at P 8.
172. *Id.* at PP 19, 22. Crosstex stated in the Crosstex PDO that most volumes would flow to the first destination point on the system.
173. *Id.* at P 28.
174. *Id.* at P 29.
175. 146 F.E.R.C. ¶ 61,146 at P 1.
176. *Id.*
177. *Id*. at 14.

4. Dominion NGL Pipelines, LLC

On November 15, 2013, the FERC issued its Declaratory Order in *Dominion NGL Pipelines, LLC*.[178] Dominion NGL Pipelines, LLC (Dominion NGL) had requested that the FERC issue a declaratory order approving the general rate structure, rates and terms of service, and rate design for a new ethane pipeline which will extend "from a natural gas processing and fractionation plant in Marshall County, West Virginia, to an interconnection with Enterprise Products Partners, L.P.'s Appalachia to Texas Express pipeline" near Follensbee, West Virginia.[179]

Specifically, Dominion NGL asked the FERC to approve the key terms of the TSA entered into by the committed shipper, Dominion Natrium, LLC, during the widely publicized open season for the Project.[180] The key terms are, in pertinent part: "[a] minimum volume commitment of 12,500 bpd, which the Committed Shipper . . . must either tender for transportation or make a shortfall payment for committed volumes not transported;"[181] "[t]he shortfall payments [will be] treated as pre-payment for transportation of volumes in excess of the minimum commitment in the future;"[182] [t]he TSA will have an initial term of ten years, with the Committed Shipper having the right "to extend the term for one to five years for a minimum volume commitment of between 50 and 100 percent of the commitment applicable at the end of the term;"[183] the initial rate to be paid by the Committed Shipper "will . . . [increase] annually by any positive adjustment under the [FERC]'s indexing methodology . . . but not decrease[] [the rate] by any negative adjustments to th[e] index;"[184] Dominion NGL will "file an initial uncommitted rate that is at least 50 percent higher than the committed [shipper] rate;"[185] "[i]f the committed rate ever exceeds the uncommitted rate for the same transportation, [Dominion NGL] will reduce the committed rate to equal the uncommitted rate;"[186] the Committed Shipper will have the right, but is not obligated "to tender volumes in excess of its minimum commitment;"[187] "[t]he Committed [Shipper] rate will apply to incremental volumes in any month in which the pipeline is not in pro-rationing; the uncommitted rate will apply to the incremental volumes in any month when [there is] pro-rationing;"[188] the committed rate "may be increased in the future in the event of any new fee resulting from an environmental law or regulation of general applicability; provided that the uncommitted rate also will be increased commensurately;"[189]

178. 145 F.E.R.C. ¶ 61,133 (2013).
179. *Id.* at PP 1, 3.
180. *Id.* at PP 10, 11.
181. *Id.* at P 11.
182. *Id.*
183. 145 F.E.R.C. ¶ 61,133 at P 11.
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.*
188. 145 F.E.R.C. ¶ 61,133 at P 11.
189. *Id.*

and "[t]he rate applicable to the Committed Shipper [will be] subject to a most-favored-nation [clause]."[190]

Dominion NGL asked the FERC to find that the rates agreed to by the committed shipper in the TSA can be treated as settlement rates.[191] Dominion NGL asserted that "ample capacity remains . . . for uncommitted shippers" because the committed shipper contracted for less than 50% of the capacity of the Project.[192] The FERC granted the rulings requested by Dominion NGL.[193]

The FERC approved the TSA with Dominion Natrium, which is currently the sole committed shipper on the Project.[194] The FERC noted that Dominion Natrium's committed "volumes will require less than 50 percent of the [Project's] capacity," and noted that Dominion NGL had specifically reserved 10% of the capacity of the Project for uncommitted shippers.[195] The FERC found "Dominion NGL's proposed rate structure and rate design using revenue crediting to establish rates for uncommitted shippers [to be] consistent with [FERC] policy and precedent."[196] Additionally, the FERC found that Dominion NGL's "proposed methodology for calculating rates for the [Project] will ensure that the cost[s] [of its] facilities are appropriately allocated to shippers in a non-discriminatory manner."[197]

5. CenterPoint Energy Bakken Crude Services

On August 14, 2013, the FERC issued its Order on Petition for Declaratory Order in *CenterPoint Energy Bakken Crude Services, LLC*.[198] CenterPoint Energy Bakken Crude Services, LLC (CPE Bakken) requested that the FERC issue a declaratory order approving "the overall tariff and rate structure for a new crude oil gathering pipeline system [Project]."[199] The Project will "transport Bakken crude to an interconnection with Great Northern Gathering and Marketing, LLC's Watford Terminal . . . , also located in North Dakota, for interstate distribution."[200] Committed Shippers executed a Transportation Service Agreement during the widely publicized open season for the Project.[201]

The CPE Bakken petition was unique in that it was the first petition that sought assurances related to an oil gathering pipeline project. Among various typical regulatory assurances, given the gathering nature of the proposed project, CPE Bakken requested an assurance that Committed Shippers would be permitted to receive firm service for barrels they nominated in excess of their contract volumes each month, provided that the Committed Shippers paid a premium rate for such incremental barrels. CPE Bakken also requested that this allocation

190. *Id.*
191. *Id.* at P 13.
192. *Id.*
193. 145 F.E.R.C. ¶ 61,133 at P 20.
194. *Id.* at P 21.
195. *Id.*
196. *Id.* at P 22.
197. *Id.* at P 23.
198. 144 F.E.R.C. ¶ 61,130.
199. *Id.* at P 1.
200. *Id.*
201. *Id.* at P 5.

would not result in Committed Shippers receiving capacity on a firm basis that exceeded the 90% of capacity reserved for Committed Shippers.[202] The FERC approved the requested regulatory assurances, including the unique request relating to incremental barrels, finding CPE Bakken had complied with the requirements necessary to provide firm service for Committed Shippers' committed volumes, as well as for their incremental barrels.[203]

6. TransCanada Keystone Pipeline L.P.

On July 31, 2013, the FERC issued its Order on Petition for Declaratory Order in *TransCanada Keystone Pipeline L.P*.[204] TransCanada Keystone Pipeline L.P. (TransCanada Keystone) asked the FERC to issue a declaratory order confirming "that certain rate principles previously approved for developing the cost of service underlying the uncommitted rates for transportation service," on its system from the International Border with Canada, at Haskett, Manitoba, to Wood River and Patoka, Illinois and Cushing, Oklahoma, "will also apply to the [derivation of] rates applicable to the transportation service to the new destinations at Port Arthur and Houston, Texas (Gulf Coast)."[205] TransCanada Keystone also sought FERC approval of an uncommitted/committed rate structure and the uncommitted rate calculation methodology for transportation service from the International Border to the Gulf Coast.[206]

The proposed project at issue in this petition for a declaratory order was an extension of the TransCanada Keystone system from Cushing, Oklahoma to the Gulf Coast.[207] TransCanada Keystone stated in its petition for a declaratory order "that it will lease a portion of its pipeline capacity on the Gulf Coast leg to its affiliate, Marketlink LLC (Marketlink)," which will "construct ancillary interconnecting facilities at Cushing, . . . allowing shippers an opportunity to ship crude oil from Cushing to the Gulf Coast."[208] TransCanada Keystone proposed a committed/uncommitted rate structure under which the rate paid by committed shippers will be "lower than the uncommitted rate for service to the Gulf Coast."[209] The "[c]ommitted shippers will be subject to prorationing."[210]

TransCanada Keystone asked the FERC to confirm that certain principles previously approved by the FERC in a 2008 Declaratory Order will also apply to the rates applicable to the transportation service from Cushing to the Gulf Coast.[211] The FERC concluded that TransCanada Keystone's petition for a declaratory order essentially sought "the continuation of the pipeline system rate structure that is already in place and previously approved by the [FERC]."[212] The FERC found

202. *Id.* at PP 8, 28.
203. 144 F.E.R.C. ¶ 61,130 at PP 17, 29.
204. 144 F.E.R.C. ¶ 61,089.
205. *Id.* at P 1.
206. *Id.*
207. *Id.* at P 3.
208. *Id.* at P 4.
209. 144 F.E.R.C. ¶ 61,089 at P 4.
210. *Id.*
211. *Id.* at P 5.
212. *Id.* at P 17.

> the rate structure for the new Gulf Coast leg [to be] consistent with the already operational segments of the TransCanada Keystone pipeline system, which will ensure that [the carrier] will be able to offer transportation service and rates to its shippers in a consistent and non-discriminatory fashion from the International Border to the Gulf Coast.[213]

Specifically, the FERC confirmed that "TransCanada Keystone may continue to utilize the revenue crediting mechanism previously approved in the 2008 [declaratory] [o]rder."[214] The FERC also confirmed that "TransCanada Keystone may utilize the [depreciated original cost (DOC)] rate base rather than the [trended original cost (TOC)] rate base in the calculation of uncommitted rates if it so desires."[215] The FERC confirmed "that the diversion surcharge extend[ed] to the Gulf Coast delivery points for committed shippers will not be subject to [its] indexing methodology, and will be determined under the specific methodology set forth in the contractual rate principles of the individual TSAs."[216] In addition, the FERC found TransCanada Keystone's proposed committed/uncommitted rate structure, under which "uncommitted shippers will pay more than committed shippers," to be consistent with FERC policy.[217]

The FERC confirmed that TransCanada Keystone's "uncommitted rate calculation methodology [can] be utilized when the project goes into service and" it files initial rates for "transportation service from the International Border to the Gulf Coast."[218] The FERC concluded that the methodology ensures that no shipper or group of shippers cross-subsidizes any other shipper.[219] The FERC stated that, as an added protection, if TransCanada Keystone's initial uncommitted rate is protested, it will be required to file "cost, revenue, and throughput data supporting such rate in accordance with [18 C.F.R.] Part 346."[220]

7. Marketlink, LLC

On July 31, 2013, the FERC issued its Order on Petition for Declaratory Order in *Marketlink, LLC*.[221] Marketlink, LLC (Marketlink) requested that the FERC issue a declaratory order approving "the rate structure, cost-of-service calculation, rate principles underlying the uncommitted rates, the methodology to calculate the uncommitted rates and the proposed proration policy for the Cushing Marketlink System Project [(Project)]."[222]

"Marketlink is a new common carrier pipeline that will provide crude oil transportation from Cushing[,] [Oklahoma] to the Texas Gulf Coast."[223] Marketlink will lease its capacity from TransCanada Keystone.[224] One unique

213. *Id.*
214. 144 F.E.R.C. ¶ 61,089 at P 19.
215. *Id.* at P 20.
216. *Id.* at P 21.
217. *Id.*
218. *Id.* at P 22.
219. 144 F.E.R.C. ¶ 61,089 at P 22.
220. *Id.* at P 23.
221. 144 F.E.R.C. ¶ 61,086.
222. *Id.* at P 1.
223. *Id.* at P 2.
224. *Id.*

aspect of the Project is that the amount of capacity available to Marketlink's shippers will be reduced from 400,000 barrels per day (bpd) to "150,000 bpd after an initial service period as TransCanada Keystone's committed shippers come on-line."[225] Marketlink stated that all prospective shippers received notice of this reduction, which "will take place upon the earlier of three years after the in-service date of Marketlink or the in-service date of the Keystone XL Pipeline," as part of the open season held for the Project.[226]

The FERC approved "Marketlink's proposed use of committed and uncommitted rates, pursuant to which committed shippers execute[d] binding commitments in exchange for discounted rates."[227] The FERC approved Marketlink's use of a revenue crediting mechanism as consistent with FERC precedent.[228] The FERC confirmed that "Marketlink's proposed uncommitted rate calculation methodology will be approved when the [P]roject goes into service and Marketlink files [its initial rates]."[229] The FERC approved Marketlink's proposed methodology to calculate the uncommitted rates which utilizes the "capacity that uncommitted shippers would use, and then derives the uncommitted incremental unit cost."[230] The FERC concluded that the proposed calculation methodology ensures the cost of Marketlink's lease of the TransCanada Keystone pipeline capacity and Marketlink-owned facilities are both appropriately allocated to shippers in a non-discriminatory manner.[231] The FERC also approved Marketlink's proposed prorationing policy which "allocates up to 90 percent of the capacity to Historical Shippers and 10 percent to new shippers."[232] The FERC found Marketlink's proposal to give committed shippers historical shipper status upon the in-service date of the Project and to use an eighteen-month qualified period for allocation to be consistent with FERC precedent.[233] Finally, the FERC found it "reasonable to reset shippers' history at the time that Marketlink's total available capacity declines from 400,000 bpd to 150,000 bpd."[234]

8. Tallgrass Pony Express Pipeline LLC

On June 30, 2014, the FERC issued its Order on Petition for Declaratory Order in *Tallgrass Pony Express Pipeline LLC*, approving the regulatory assurances sought by Tallgrass Pony Express Pipeline LLC (Tallgrass) related to a significant expansion of Tallgrass's pipeline system into northeast Colorado (the Northeast Colorado Lateral).[235] The Northeast Colorado Lateral is an expansion and extension of the facilities and services that were the subject of two previous

225. *Id.* at PP 2-3.
226. 144 F.E.R.C. ¶ 61,086 at P 3.
227. *Id.* at P 13.
228. *Id.* at P 14.
229. *Id.* at P 15.
230. *Id.*
231. 144 F.E.R.C. ¶ 61,086 at P 15.
232. *Id.* at P 16.
233. *Id.*
234. *Id.*
235. 147 F.E.R.C. ¶ 61,266 at P 1.

declaratory orders granted by the FERC related to a proposed pipeline system designed to transport Bakken crude oil to Ponca City and Cushing, Oklahoma.[236]

Among other regulatory assurances, Tallgrass requested approval of committed shipper "ramp up" rights. In particular, the open season offered shippers, who were willing to commit at least 20,000 barrels per day (bpd), the right to ramp up their volume commitment in each year of the primary term, provided that such increase would not cause the capacity available to walk-up shippers to fall below 10% of the total system capacity.[237] The FERC approved the requested "ramp ups," stating that all potential committed shippers had the opportunity to participate in the open season and that this approach provides "shippers with the ability to adjust to changing market conditions without being locked into a long term contract."[238]

Tallgrass also requested that the FERC authorize it

> to include in its accounts, reports and its revenue requirement for ratemaking purposes, and for use in justifying the uncommitted rates on the [Tallgrass] system, the $105 million acquisition premium paid for the PXP Asset when Tallgrass Energy purchased the divested Kinder Morgan assets, as being consistent with the FERC's net benefits test for recovery of an acquisition premium for assets being dedicated to a new use.[239]

The FERC reiterated the factors it considers when determining whether an acquisition premium may be included in a pipeline's cost-of-service rates:

> (1) whether the acquired facility is being put to a new use; (2) whether the purchaser has demonstrated specific dollar benefits resulting directly from the sale; […] (3) whether the transaction at issue is an 'arm's length' sale between unaffiliated parties; and (4) whether the purchase price of the asset at issue is less than the cost of constructing a comparable facility.[240]

The FERC: (1) found that Tallgrass met the net benefits test, based on the representations in the Tallgrass PDO; (2) cautioned Tallgrass that the FERC reserves the right to revisit the issue if any relevant circumstances change prior to the Tallgrass in-service date; (3) required Tallgrass, in its initial rate filing with the FERC, to "validate and confirm the representation made in the [Tallgrass PDO];" (4) required Tallgrass, in its initial rate filing, to "reflect no material changes in the acquisition adjustment representations described in [the Tallgrass PDO];" and (5) further cautioned Tallgrass that, if its rates are challenged, Tallgrass must support its acquisition premium, showing appropriate evidence that it meets the net benefits test.[241]

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236. *Id.* at P 2 (citing *Kinder Morgan Pony Express Pipeline LLC*, 141 F.E.R.C. ¶ 61,180 (2012) [hereinafter *KMPXP I*] and *Kinder Morgan Pony Express Pipeline LLC*, 141 F.E.R.C. ¶ 61,249 (2012) hereinafter *KMPXP II*]).

237. *Id.* at P 6.

238. *Id.* at P 20.

239. *KMPXP I*, *supra* note 236, Order on Petition for Declaratory Order (issued Nov. 30, 2012). The PXP Asset is the 432-mile natural gas pipeline acquired by Tallgrass Energy from Kinder Morgan. *Id.* at P 1.

240. 147 F.E.R.C. ¶ 61,266 at P 26 (quoting Mo. Pub. Serv. Comm'n v. FERC, 601 F.3d 581, 586 (D.C. Cir. 2010)).

241. *Id.* at P 30.

9. Enbridge Pipeline (Illinois) LLC

On July 31, 2013, the FERC issued an Order on Petition for Declaratory Order granting Enbridge Pipelines (Illinois) LLC's (Enbridge Illinois) petition supporting its proposed Southern Access Extension Project (Project), including a proposed committed rate design.[242] The FERC confirmed that for the terms of their TSAs, the committed shippers would pay the rates calculated under the TSAs applicable to the open season in which they participated.[243] The FERC approved the TSAs' rate structure, under which 90% of the pipeline's capacity would be reserved for committed shippers with ship-or-pay premium rate obligations for initial ten or fifteen year terms. These shippers would not be subject to proration. The remaining 10% of capacity would be reserved for uncommitted shippers that did not "provide the financial assurances that the committed shippers provide[d]."[244]

The FERC granted the Petition, stating that:

> [t]he proposed terms of service and rate structure for committed and uncommitted shippers [were] permissible under the ICA and [were] consistent with applicable [FERC] policy and precedent regarding priority service terms and rates that can be offered to shippers that commit volumes through an open season to support a new infrastructure project.[245]

The FERC also approved Enbridge Illinois' plan to "implement a lottery provision for allocation of uncommitted capacity . . . to prevent any uncommitted shipper's allocation from falling below the minimum batch size during the period of pro-rationing."[246] The FERC also found that "Enbridge Illinois' proposed rate structure and terms and conditions of service were just and reasonable and not unduly discriminatory."[247] The FERC ordered Enbridge Illinois to "file tariffs pursuant to the applicable provisions of Part 342 and other relevant sections of the [FERC's] Rules and Regulations when it proposed the actual rates to implement the general methodological framework described in the [p]etition and approved by this order."[248]

E. Emergency Orders

1. Enterprise TE Products Pipeline Co., LLC

On February 6, 2014, the National Propane Gas Association (NPGA) filed a request to the FERC to provide priority treatment to propane shipments from Mont

242. *Enbridge Pipeline (Illinois) LLC*, 144 FERC ¶ 61,085 at PP 1-2 (2013). The Southern Access Extension Project was proposed to "provide new pipeline capacity to transport crude petroleum from Flanagan, Illinois, to the pipeline hub at Patoka, Illinois." *Id.* at P 1.

243. *Id.* at P 24.

244. *Id.*

245. *Id* at P 23. "Since its decision in *Express Pipeline P'ship*, [75 F.E.R.C. ¶ 61,303 (1996),] the [FERC] has recognized that shippers making longer-term commitments incur costs and liabilities and undertake risks that make them not similarly situated with shippers that are unwilling or unable to do so." *Id.*

246. *Id.* at P 24.

247. *Id.* at P 25.

248. *Id.*

Belvieu, Texas to the Midwest and Northeast,[249] which had been suffering from severe cold weather. On February 7, 2014, the FERC invoked its emergency authority under the ICA[250] for the first time to direct Enterprise TE Products Pipeline Co. (TEPPCO) to temporarily provide priority to shipments of propane to help address a shortage of supply (Emergency Order).[251] The FERC invoked its authority under the ICA and "direct[ed] Enterprise TEPPCO to provide priority for propane pursuant to its authority in its pro-rationing policy 'to allocate its Available Capacity on any equitable basis, in a manner different from this policy, during a generally recognized emergency period in order to alleviate the emergency conditions.'"[252]

TEPPCO filed a response on February 10, 2014, to NPGA's petition and the Emergency Order from the FERC.[253] TEPPCO stated that if the Emergency Order would be extended an additional seven days, they "will continue to provide temporary priority treatment to propane shipments consistent with maximizing the safe and efficient operation of its pipeline system [and] it will be able to satisfy fully the concerns raised in NPGA's petition."[254]

On February 10, 2014, NPGA filed a notice of withdrawal without prejudice, stating that "an agreement with Enterprise TE [had] been reached whereby Enterprise TE [agreed] to an extension of the FERC's February 7 Order for an additional seven days or through February 21, 2014".[255] The FERC, on February 11, 2014, issued its order extending through February 21, 2014.[256]

F. Temporary Waiver Orders

During the period July 1, 2013 to June 30, 2014, the FERC issued various orders granting requests for temporary waivers of the tariff filing and reporting requirements of sections 6 and 20 of the ICA[257] and parts 341 and 357 of the FERC's regulations.[258] The waivers were requested for NGLs[259] and refined products[260] transportation pipelines, as well as for crude oil transportation pipelines.[261] The pipelines were located in geographically diverse areas ranging from south Texas to North Dakota to eastern Pennsylvania and New Jersey.

249. Notice of Request for Emergency Relief, *Enterprise TE Products Pipeline Co.*, 79 Fed. Reg. 8961 (2014).

250. 49 U.S.C. Appx. § 1(15) (1988).

251. 146 F.E.R.C. ¶ 61,076 at P 1.

252. *Id.* at P 5.

253. 146 F.E.R.C. ¶ 61,085 at P 4.

254. *Id.* at P 4.

255. Notice of Withdrawal without Prejudice at 1, FERC Docket No. OR14-9 (Feb. 10, 2014).

256. 146 F.E.R.C. ¶ 61,085 at P 5.

257. 49 App. U.S.C. §§ 6, 20.

258. 18 C.F.R. §§ 341, 357 (2014).

259. *MarkWest Pipeline Co.*, 146 F.E.R.C. ¶ 61,035 (2014); *Crosstex Processing Servs., LLC*, 144 F.E.R.C. ¶ 61,171 (2013); *MarkWest Bluestone Ethane Pipeline, L.L.C.*, 147 F.E.R.C. ¶ 61,195 (2014).

260. *Valero Terminaling & Distrib. Co.*, 146 F.E.R.C. ¶ 61,089 (2014); *MIPC, LLC*, 145 F.E.R.C. ¶ 61,068 (2013).

261. *Valero Terminaling & Distrib. Co.*, 147 F.E.R.C. ¶ 61,072 (2014); *BKEP Pipeline, L.L.C.*, 146 F.E.R.C. ¶ 61,176 (2014); *Koch Pipeline Co.*, 146 F.E.R.C. ¶ 61,103 (2014); *Targa Badlands LLC*, 144 F.E.R.C. ¶ 61,137 (2013); *Targa Badlands LLC*, 144 F.E.R.C. ¶ 61,138 (2013).

In all orders the FERC noted, without much additional discussion, its four criteria for granting a temporary waiver request: (1) the pipeline applicant requesting the temporary waiver (or its affiliates)[262] owns 100% of the throughput on the line; (2) there is no demonstrated third-party interest in gaining access to or shipping on the line; (3) there is no likelihood that such third-party interest will materialize; and (4) there is no opposition to granting the waiver. The FERC also noted that such temporary waivers are subject to revocation should circumstances change. Each successful applicant is charged with immediately reporting to the FERC any changes, including but not limited to, increased accessibility of other pipelines or refiners to the subject pipeline, changes in the ownership of the pipeline or its contents shipped on the pipeline, and shipment tenders or requests for service by any third person. As another condition of a waiver, the pipelines must keep their books and records in a manner consistent with the FERC's Uniform System of Accounts,[263] with such books and records made available to the FERC or its authorized agents upon request.

The background facts, as described in the FERC's tariff waiver orders during the reporting period, may vary significantly so long as the four above-described requirements for obtaining waivers are met. A temporary tariff waiver request and order can encompass a single pipeline[264] or multiple pipelines,[265] together with meters, valves, pumps, pig traps, and other associated facilities. Neither the diameter nor the length of the pipeline is dispositive as the FERC's orders describe various diameters of pipelines, from four inches[266] to sixteen inches[267] or more in diameter, and lengths of pipelines, ranging from less than five miles to more than 130 miles.[268] Orders were granted for both crude pipelines located upstream[269] of and refined products pipelines located downstream[270] of refineries. Waivers were approved for pipelines that crossed state lines,[271] as well as pipelines that were located wholly within a single state.[272] A waiver was granted for a pipeline containing crude oil barrels originating in Mexico that were trucked to the pipeline.[273] Most of the waivers concerned new pipelines; however, the FERC also approved a waiver encompassing an idled line planned for a return to service,[274] a refined products line which had previously been deactivated from more than 50 years of service that was converted to a crude oil line,[275] as well as pipelines already in service with the waiver sought by the new owner.[276]

262. *See generally* 145 F.E.R.C. ¶ 61,068; 147 F.E.R.C. ¶ 61,195; 146 F.E.R.C. ¶ 61,089.
263. 18 C.F.R. pt. 352 (2014).
264. 147 F.E.R.C. ¶ 61,195 at P 1.
265. 144 F.E.R.C. ¶ 61,171 at P 1.
266. *Id.* at P 1.
267. 146 F.E.R.C. ¶ 61,089 at P 3.
268. 146 F.E.R.C. ¶ 61,103 at P 3.
269. 146 F.E.R.C. ¶ 61,103; 144 F.E.R.C. ¶ 61,138.
270. 145 F.E.R.C. ¶ 61,068.
271. *Id.* at P 2; 146 F.E.R.C. ¶ 61,089 at P 3.
272. 144 F.E.R.C. ¶ 61,137 at P 2; 144 F.E.R.C. ¶ 61,138 at P 2.
273. 146 F.E.R.C. ¶ 61,103 at P 3.
274. 144 F.E.R.C. ¶ 61,171 at P 2.
275. 147 F.E.R.C. ¶ 61,072 at P 2.
276. 145 F.E.R.C. ¶ 61,068.

Perhaps of greatest interest is the order granting a temporary waiver to Valero Terminaling and Distribution Company (Valero) as an owner of a partial and minority ownership interest in a pipeline. Applicant Valero held a one-third undivided interest in the McKee System, with NuStar Logistics, L.P. (NuStar) owning the remaining two-thirds undivided interest and operating the system pursuant to its FERC Tariff.[277] Valero's application showed that its affiliate had been the only shipper on Valero's share of the McKee System since 2008 and that capacity remained available for a third-party shipper on NuStar's part of the McKee System.[278] The FERC determined that Valero met the temporary waiver qualifications given the characteristics of the McKee System, and Valero's minority ownership in that system.[279]

II. SIGNIFICANT LITIGATION WITH THE FERC

A. Colonial Pipeline Co.

On March 20, 2014, the FERC denied Colonial Pipeline Company's (Colonial) petition for declaratory order seeking to expand the FERC's established policy that permits a pipeline carrier regulated under the ICA to offer priority service to its shippers on new or expansion oil pipeline projects to Colonial's existing system.[280] The order denied Colonial's petition seeking a non-traditional rate structure on Colonial's existing system, and announced that the FERC's policy of permitting liquids pipelines to create two classes of shippers, committed and uncommitted, only applies to situations in which the proposals are "essentially in support of new infrastructure to support changing market needs."[281]

1. Colonial's Petition

While the FERC, over the years, has granted a number of declaratory order petitions sought by liquids pipelines under the ICA for non-traditional rate structures, either in the form of discount rates for non-priority service or premium rates for priority service (*i.e.*, firm service), such petitions, up to now, have been related to new pipelines, expansion projects, reversals, or reconfigurations. Colonial's petition, for the first time, sought the FERC's approval of a request to create two classes of shippers, committed and uncommitted, for its existing capacity, while making no commitment to expand its facilities.

Colonial owns and operates a 5,500-mile common carrier pipeline system that transports gasoline, heating oil, aviation fuel, and other refined products between Houston, Texas, and Linden, New Jersey, gathering products from refiners along the Gulf Coast and delivering to markets throughout the Gulf Coast, Southeast, Mid-Atlantic and Northeast regions.[282] Because of increased production and demand, Colonial's main lines have been subject to pro-rationing for the last two years, and Colonial's shippers have experienced reductions in their

277. 146 F.E.R.C. ¶ 61,089 at PP 2-3.
278. *Id.* at P 5.
279. *Id.* at P 11.
280. *Colonial Pipeline Co.*, 146 F.E.R.C. ¶ 61,206 at P 39 (2014).
281. *Id.*
282. *Id.* at P 2.

nominated volumes.[283] The solution Colonial proposed was to create a new class of contract shippers who would enhance their rights to Colonial's current capacity at the expense of shippers declining to sign contracts, and, at the same time, would enhance Colonial's volume and revenue certainty.[284] Armed with this enhanced economic position, Colonial could then turn to consideration of whether to "initiate large-scale and expensive expansion efforts."[285]

In pursuit of its goal, Colonial held an open season that resulted in seventy-six shippers becoming Contract Shippers by signing TSAs, representing 75% of both Colonial's volume and its pipeline-related revenues.[286] Each TSA also included an agreed-to tariff rate structure applicable only to Contract Shippers, terms of service, and pro-rationing methodology.[287] Of particular significance, Contract Shippers were to "receive significant rate discounts based on their volume commitments" and were precluded from protesting or otherwise challenging any of Colonial's rates, including rates for past periods.[288] Colonial asked the FERC to approve the TSA structure, as well as a procedure that would first allocate excess system capacity to eligible Contract Shippers.[289]

2. The Interveners' Positions

Several signers of TSAs intervened in support of Colonial's petition, hoping to slow the erosion of their capacity rights, and hoping that their commitments would encourage Colonial to expand.[290] Several parties intervened that represent crude oil and/or liquids pipeline shippers who are not Colonial shippers but who are, nonetheless, interested in the impact of the FERC's treatment of Colonial's petition on their concerns regarding how common carriers do business.[291] Finally, several current shippers on Colonial protested that, because they chose not to sign TSAs, they would suffer an erosion of their rights as shippers.[292]

3. The FERC's Discussion, Findings, and Order

The FERC identified the threshold question to be whether it should grant a declaratory order approving contract or committed rates for existing capacity.[293] It observed that, should it deny Colonial's request for contract rates, there would be no need to address other issues raised in the petition, such as the "pro-rationing methodology, priority rights for excess capacity, and waiver of the right to challenge Colonial's rates."[294] The FERC also noted that it would be useless to direct Colonial to redo the open season if the central notion were rejected.[295]

283. *Id.* at P 3.
284. *Id.* at PP 3, 22.
285. 146 F.E.R.C. ¶ 61,206 at P 3.
286. *Id.* at P 5.
287. *Id.* at P 8.
288. *Id.* at P 6.
289. *Id.* at P 8.
290. 146 F.E.R.C. ¶ 61,206 at P 16.
291. *Id.* at P 17.
292. *Id.* at PP 26-28.
293. *Id.* at P 33.
294. *Id.*
295. *Id.*

The FERC explained that, under *Sea-Land Service, Inc. v. Interstate Commerce Comm'n*,[296] the United States Circuit Court of Appeals for the District of Columbia (D.C. Circuit) held that although contract rates are not inherently discriminatory, this does not mean the FERC must always approve them or that they are appropriate in all circumstances.[297] It then contrasted Colonial's proposal from all others in the FERC's body of precedents. While Colonial sought to establish contract rates for existing capacity, all other proposals involved new pipelines, expansion projects, or "reversals or reconfigurations of existing pipelines in order to serve new markets or respond to changing market conditions."[298]

The FERC found that Colonial's proposal to create two classes of shippers—committed and uncommitted—receiving different services out of one class in which each member is currently receiving the same service would be unduly discriminatory.[299] The FERC ruled that "approving committed rates for existing capacity as requested by Colonial would essentially legalize undue discrimination."[300] Thus, the FERC denied Colonial's petition, finding it inconsistent with the FERC's policy of entertaining proposals to create different classes of service where differentiation is supported by new infrastructure to meet changing market needs.[301] Having so ruled, the FERC saw no need to address specific objections to particular TSA provisions raised by Colonial's protesting shippers.[302]

The FERC did, however, seek to assuage some of the concerns of the commentators that are not current Colonial shippers by addressing some of the general issues they raised. While declining to institute the rule-making or policy-making proceeding, they sought to establish standards for open seasons and declaratory orders when non-traditional rate structures are being proposed.[303] For this reason, the FERC discussed some broad principles applying to open season confidentiality agreements and duty to support clauses in TSAs.[304]

The FERC acknowledged that a pipeline needs confidentiality agreements to protect against competitive harm, but found that those agreements must be narrowly tailored and should not prevent shippers from disclosing to the FERC issues of law, precedent, or policy arising from the pipeline's proposal.[305] Likewise, the FERC will "look with disfavor on duty to support clauses" that, based on the facts in a specific case, "require too broad a waiver of a shipper's statutory rights to seek [FERC] redress."[306] Recognizing that it is reasonable to expect contract shippers to support the rates to which they agreed, the FERC suggested that a "duty to support" provision would likely be too broad if it were

296. Sea-Land Serv., Inc. v. Interstate Commerce Comm'n, 738 F.2d 1311 (D.C. Cir. 1984).

297. 146 F.E.R.C. ¶ 61,206 at P 34.

298. *Id.* at P 35.

299. *Id.* at P 37.

300. *Id.* at P 38.

301. *Id.* at P 39.

302. *Id.*

303. 146 F.E.R.C. ¶ 61,206 at P 30.

304. *Id.* at PP 31-32.

305. *Id.* at 31.

306. *Id.* at 32.

applicable to past rates or other rates to which such contract shippers had not agreed.[307]

On May 19, 2014, Colonial filed a petition for review at the D.C. Circuit.[308] No briefing schedule has been set.

III. SIGNIFICANT PRESIDENTIAL PERMITS

A. Keystone XL

Executive Order (E.O.) 13337 designates the Department of State to determine whether granting a permit for a cross-border pipeline would serve the national interest.[309] In processing Presidential Permit applications, the Department of State is also directed to review the project's compliance with the National Historic Preservation Act,[310] the Endangered Species Act,[311] and E.O. 12898 concerning environmental justice.[312]

On September 19, 2008, TransCanada Corp. (TransCanada) filed its first application to the Department of State for a cross-border permit for a proposed oil pipeline from Alberta, Canada to Texas.[313] On August 26, 2011, the Department of State issued its final environmental impact statement for the Keystone XL pipeline, stating that the project would not add a significant amount of greenhouse gas (GHG) emissions into the atmosphere.[314] Over concerns regarding route selection, President Barack Obama stated in November 2011 that the pipeline would not be approved until a new route is selected.[315] After signing legislation that requires a decision on the approval of the pipeline within 60 days, President Obama formally rejected the TransCanada's application for a Presidential Permit on January 18, 2012.[316]

On May 4, 2012, the Department of State received an application from TransCanada, re-applying for a Presidential Permit for a proposed pipeline that would run from the Canadian border to connect to a pipeline in Steele City, Nebraska.[317] On June 25, 2013, President, Barack Obama stated that he will only

307. *Id.*

308. Colonial Pipeline Co. v. FERC, No. 14-1078. (D.C. Cir. 2014).

309. *See generally* Exec. Order No. 13337, 69 Fed. Reg. 25,299 (2004).
2004, as amended, and Department of State Delegation of Authority No. 118-2 of January 26, 2006.

310. 16 U.S.C. § 470f (2012).

311. *Id.* §§ 1531-44.

312. Exec. Order No. 12898, 59 Fed. Reg. 7629 (1994).

313. Documents submitted for the initial 2008 Presidential Permit application have been archived by the State Department. Documents related to that original application are available at http://keystonepipeline-xl.state.gov/archive/.

314. U.S. Dept. of State, Executive Summary: Final Environmental Impact Statement for the Proposed Keystone XL Pipeline, (Aug. 26, 2011), *available at* http://keystonepipeline-xl.state.gov/documents/organization/182010.pdf.

315. Press Release, The White House, Office of the Press Sec'y, Statement by the President on the State Department's Keystone XL Pipeline Announcement (Nov. 10, 2011), http://www.whitehouse.gov/the-press-office/2011/11/10/statement-president-state-departments-keystone-xl-pipeline-announcement.

316. Media Note, U.S. Dep't of State, Denial of the Keystone XL Pipeline Application (Jan. 18, 2012), http://www.state.gov/r/pa/prs/ps/2012/01/181473.htm.

317. Application of TransCanada Keystone Pipeline L.P. for a Presidential Permit Authorizing the Construction, Operation, and Maintenance of Pipeline Facilities for the Importation of Crude Oil to be Located

approve Keystone XL if the pipeline does not "significantly exacerbate . . . climate change."[318] On January 31, 2014, the Department of State issued a final supplemental environmental impact statement which found that the pipeline would not be a significant contributor to greenhouse gas (GHG) emissions, and thus, not significantly exacerbate climate change.[319] Awaiting a state court decision in Nebraska, the Keystone XL Presidential Permit process was placed on hold.[320] On February 19, 2014, the District Court of Nebraska, Lancaster County, declared the law that allowed for Keystone XL's route through the state unconstitutional.[321] The State of Nebraska's appeal of the district court decision is currently pending before the Nebraska Supreme Court which is scheduled to hold oral arguments in the case in early September 2014. In April of 2014, the Obama Administration announced that it is indefinitely extending its review of the Keystone XL pipeline, awaiting the decision from the Nebraska Supreme Court.[322]

IV. SIGNIFICANT PHMSA LITIGATION

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

On February 25, 2013, ONEOK Hydrocarbon, L.P. and related ONEOK entities (collectively, ONEOK) filed a petition for review of a series of PHMSA interpretations of the Pipeline Safety Act (PSA) and the Pipeline Safety Regulations in the D.C. Circuit.[323] In its interpretations, PHMSA asserted jurisdiction over an ONEOK Natural Gas Liquids (NGLs) fractionation plant in Kansas.[324] ONEOK asserted a variety of PSA and Administrative Procedure Act challenges to PHMSA's interpretations, including that PHMSA: (1) disregarded the statutory exemption for refining facilities and storage, and in-plant piping

at the United States-Canada Border, U.S. Dep't of State (May 4, 2012), *available at* http://keystonepipeline-xl.state.gov/proj_docs/permitapplication/index.htm.

318. Press Release, The White House, President Barack Obama, Remarks by the President on Climate Change, (June 25, 2013), *available at* http://www.whitehouse.gov/the-press-office/2013/06/25/remarks-president-climate-change.

319. U.S. Dep't of State, Final Supplemental Environmental Impact Statement for the Keystone XL Project (Jan. 2014), *available at* http://keystonepipeline-xl.state.gov/finalseis/index.htm.

320. Plaintiffs bring declaratory judgment action challenging constitutionality of LB 1161, 102d Leg., 2d Spec. Sess. (Neb. 2012). Thompson v. Heineman, 2012 WL 10288677, at *1 (Neb. Dist. Ct. Dec. 31, 2012); Defendants' Motion to Dismiss Second Amended Complaint is sustained as to any claim that LB 1161 violates equal protection. Thompson v. Heineman, 2013 WL 7231172, at *5 (Neb. Dist. Ct. June 11, 2013).

321. Thompson v. Heineman, 2014 WL 631609 at *34 (Neb. Dist. Ct. Feb. 19, 2014). "LB 1161 violates [Neb. Const. art. IV, § 20,] by divesting the PSC of control over the routing decisions of oil pipelines subject to the act and vesting such regulatory control over common carriers in NDEQ and the Governor . . . Plaintiff's request for declaratory judgment [is] granted, and LB 1161 is declared unconstitutional and void. Furthermore, the Governor's actions of January 22, 2013, [having been] predicated on an unconstitutional statute, . . . are declared null and void." *Id.* at *34-35.

322. Steven Mufson, *Obama Administration Postpones Decision on Keystone XL Pipeline*, WASHINGTON POST (Apr. 18, 2014), http://www.washingtonpost.com/business/economy/obama-administration-postpones-decision-on-keystone-xl-pipeline/2014/04/18/0c8d9f04-c72a-11e3-8b9a-8e0977a24aeb_story.html.

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

324. PHMSA Interpretation No. PI-11-0012 (Feb. 28, 2012; Aug. 8, 2012; Nov. 28, 2012), http://www.phmsa.dot.gov/portal/site/PHMSA/menuitem.ebdc7a8a7e39f2e55cf2031050248a0c/?vgnextoid=c269ea5e3eee5310VgnVCM1000001ecb7898RCRD.

systems associated with refining facilities; (2) departed, without explanation, from prior interpretations related to refining facilities; and (3) expanded the scope of its regulatory programs to cover previously unregulated facilities without complying with rulemaking requirements in PSA and Administrative Procedure Act (APA).[325] ONEOK's petition followed the dismissal of related litigation in the United States District Court for the Northern District of Oklahoma, in which the court found that it lacked subject matter jurisdiction to review ONEOK's claims because the PHMSA actions at issue constituted an order under the PSA,[326] subject to review in the Courts of Appeals.[327]

On December 18, 2013, in response to motions by the parties, the D.C. Circuit issued an order placing the petition into abeyance pending PHMSA's resolution of any one of three relevant administrative enforcement proceedings which involved PHMSA's interpretations and PHMSA's statutory jurisdiction at ONEOK's facilities.[328] Informal adjudicatory hearings have been held in all three enforcement proceedings and the parties currently await administrative orders from PHMSA.

Resolution of the jurisdictional question in these proceedings will likely determine the applicability of PHMSA's 49 C.F.R. Part 195 hazardous liquid pipeline safety regulations at NGL fractionation facilities, which may result in significant regulatory compliance implications for the dozens of such existing and planned facilities throughout the United States. Litigation with PHMSA is relatively rare and this matter is one of only a handful of cases brought in the federal courts in the past decade. Recent amendments to the PSA adjusted the judicial review provisions to provide for review of PHMSA orders in the U.S. Courts of Appeal, instead of District Court.[329] Since those amendments, there have been two petitions for review of PHMSA orders filed in the U.S. Courts of Appeals, including the ONEOK petition.[330]

B. Bridger Pipeline, LLC v. Pipeline and Hazardous Materials Safety Administration

On October 25, 2013, PHMSA and Bridger Pipeline, LLC (Bridger) executed a consent agreement resolving a long-standing pipeline safety enforcement action and related litigation in the U.S. Court of Appeals for the Tenth Circuit (Tenth Circuit).[331] Under the agreement, Bridger agreed to pay a reduced civil penalty

325. Petitioners Non-Binding Statement of Issues, ONEOK Hydrocarbon, L.P. v. U.S. Dep't of Transp., No. 13-1040 (D.C. Cir. Sept. 11, 2013).

326. 49 U.S.C. § 60119 (2012).

327. Opinion and Order, ONEOK Hydrocarbon, L.P. v. U.S. Dep't of Transp., No. 12-CV-660-JHP-FHM (N.D. Okla. Apr. 8, 2013).

328. Per Curiam Order, ONEOK Hydrocarbon, L.P. v. U.S. Dep't of Transp., No. 13-1040 (D.C. Cir. Dec. 18, 2013). The related PHMSA administrative enforcement cases are *In re ONEOK NGL Pipeline, L.P.*, CPF Nos. 3-2013-5014, 3-2013-5015, & 3-2013-5020.

329. Pipeline Safety, Regulatory Certainty, and Jobs Creation Act of 2011, Pub. L. No. 112-90, § 2(d), 125 Stat 1904, 1905 (Jan. 3, 2012) (codified as amended at 49 U.S.C. § 60119(a)(2012)) [hereinafter Pipeline Safety].

330. The second is Bridger Pipeline, LLC v. Pipeline & Hazardous Materials Safety Admin., No. 13-9517 (10th Cir. Feb. 15, 2013).

331. *In re Bridger Pipeline, LLC*, C.P.F. No. 5-2009-5034. Access to the materials in the case is available at

related to its actions following a release of crude oil from its pipeline, and to implement certain revisions to its procedures. Bridger also agreed to dismiss a petition for review that it had filed of PHMSA's order in the enforcement case in the Tenth Circuit.[332] That petition, the first action brought under the PSA's revised judicial review provision,[333] challenged PHMSA's order and related civil penalty.[334]

Aside from being the first of its kind, this case is notable because, prior to settlement, the Tenth Circuit raised important jurisdictional issues about the case, namely: (1) whether Bridger's petition for reconsideration was timely filed; (2) whether the filing of that petition tolled the time for filing a separate petition for review of the final order; and (3) whether PHMSA's decision on reconsideration was a separately appealable order under the statute.[335] PHMSA and Bridger settled the case before the Tenth Circuit had an opportunity to rule on these issues. It remains to be seen whether PHMSA will provide guidance on these important procedural points.

C. PEER v. PHMSA

On April 10, 2013, Public Employees for Environmental Responsibility (PEER) filed a complaint against PHMSA in the U.S. District Court for the District of Columbia.[336] The lawsuit alleges that PHMSA failed to comply with the statutory deadline for responding to a pair of Freedom of Information Act (FOIA) requests that PEER sent to PHMSA in October 2012.[337] PEER's FOIA requests seek the release of agency records relating to PHMSA's administration of the Oil Pollution Act of 1990.[338]

Under court order, PHMSA has submitted five status reports identifying, reviewing, and producing responsive documents to PEER's FOIA requests.[339] The recent April 2014 status report indicated that PHMSA has fully responded to PEER's first request, and that in response to PEER's second request, the agency had produced 59,000 pages of documents, including 108 onshore oil spill response plans.[340] The status report explained that PHMSA would provide PEER with ninety-four additional onshore oil spill response plans by October 1, 2014, and produce, on a rolling basis, the sixty-five remaining plans after finishing the

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http://primis.phmsa.dot.gov/comm/reports/enforce/CaseDetail_cpf_520095034.html?nocache=6852#_TP_1_tab_2 (last visited Jan. 10, 2014).

332. Petition for Review of Final Agency Action, Bridger Pipeline LLC v. PHMSA, No. 13-9517 (10th Cir. Feb. 15, 2013).

333. Pipeline Safety, *supra* note 329.

334. Decision on Petition for Reconsideration, *Bridger Pipeline, LLC*, CPF No. 5-2009-5034 (PHMSA Office of Pipeline Safety Dec. 31, 2012); Final Order, *Bridger Pipeline, LLC*, CPF No. 5-2009-5034 (PHMSA Office of Pipeline Safety Aug. 30, 2012).

335. Bridger Pipeline LLC v. PHMSA, No. 13-9517, slip op. at 2 (10th Cir. Mar. 5, 2013).

336. Public Employees for Envtl. Responsibility v. Pipeline & Hazardous Material Safety Admin., No. 13-472 (D.D.C. Apr. 10, 2013), ECF No. 1.

337. *Id.* at 6.

338. *Id.* at 4; Oil Pollution Act of 1990, Pub. L. No. 101–380, 104 Stat. 484 (1990).

339. *See generally* Order No. 13-472 (D.D.C. June 24, 2013), ECF No. 10 (the first order requesting a status report was issued in a Minute Order in the docket on May 9, 2013).

340. Defendant's Status Report at 2-3, No. 13-472 (D.D.C. Apr. 30, 2014), ECF No. 23.

review, approval, and redaction process.[341] PHMSA's next status report is due on or before August 1, 2014.[342]

This litigation has revealed apparent weaknesses in PHMSA's 49 C.F.R. Part 194 oil spill response plan program, following amendments to the Pipeline Safety Act providing PHMSA with enforcement authority for that program.[343] The revelation of these weaknesses, combined with increased public scrutiny, and new enforcement authority, may result in increased compliance and enforcement risks for oil pipelines.

341. *Id.* at 3-4.

342. Order No. 13-472 at 2-3 (D.D.C. May 2, 2014).

343. Pipeline Safety, Regulatory Certainty, and Jobs Creation Act of 2011, Pub. L. No. 112-90, § 10, 125 Stat. 1904, 1912-1913 (Jan. 3, 2012) (codified at 33 U.S.C. § 1321).

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