REPORT OF THE OIL AND LIQUIDS SECTOR

Gas, Oil and Liquids Steering Committee

This report summarizes policy developments and legal decisions that occurred at the Federal Energy Regulatory Commission (FERC or the Commission), the Pipeline and Hazardous Materials Safety Administration (PHMSA), and the United States Courts of Appeals in the area of Oil and Liquids regulation between January 1, 2020 and December 31, 2020.[*]

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I. SIGNIFICANT COURT OPINIONS, FERC RULEMAKINGS, AND ADMINISTRATIVE ORDERS

A. Jurisdictional Issues

1. *Aircraft Serv. Int'l, Inc. v. FERC*, 985 F.3d 1013 (D.C. Cir. 2021)

On January 22, 2021, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) "easily reject[ed]" a petition challenging FERC's finding that jet fuel transported by pipeline to the Orlando airport—after being delivered to the Port of Tampa—moves intrastate, and, therefore, FERC lacks the jurisdiction to regulate the rates for transporting that fuel.[1]

On January 17, 2020, Aircraft Service International Group, Inc., American Airlines, Inc., Delta Air Lines, Inc., Hookers Point Fuel Facilities LLC, Southwest Airlines Co., United Aviation Fuels Corporation, and United Parcel Service, Inc. (collectively, the Complainants) filed a petition with the court challenging FERC Opinion No. 567, the order on initial decision issued by FERC in Docket No. OR16-26-000 (OR16-26).[2] The Complainants alleged that Central Florida Pipeline LLC (Central Florida Pipeline) and its affiliate Kinder Morgan Liquid Terminals LLC were violating the Interstate Commerce Act (ICA) in "providing interstate . . . transportation and break-out tankage services without a tariff on file" with the Commission.[3] "The fundamental issue before the Commission was whether the Central Florida Pipeline—which connects the Tampa and Orlando fuel storage terminals—is one link in continuous movement as determined by the original and persistent intender of the shipper. Or did storage and other activities in Tampa break the continuity of interstate movement?"[4]

Following a full evidentiary hearing, the presiding administrative law judge (ALJ) found there was a sufficient break in the chain such that the transportation of jet fuel on the Central Florida Pipeline is intrastate in character and not subject

1. Aircraft Serv. Int'l, Inc. v. FERC, 985 F.3d 1013, 1016 (D.C. Cir. 2021).
2. Opinion No. 567, *Aircraft Serv. Int'l., Inc. v. Central Florida Pipeline LLC*, 169 F.E.R.C. ¶ 61,119 (2019).
3. *Aircraft Serv. Int'l., Inc. v. Central Florida Pipeline LLC*, 162 F.E.R.C. ¶ 63,012, at PP 1, 17 (2018).
4. *Aircraft Serv. Int'l, Inc.*, 985 F.3d at 1016.

to the Commission's ICA jurisdiction.[5] Having concluded that transportation on the Central Florida Pipeline is intrastate in character, the ALJ found that whether the Tampa Terminal provides service subject to the Commission's ICA jurisdiction was moot and recommended the Commission dismiss the complaint.[6] On November 21, 2019, the Commission issued Opinion No. 567, which "affirm[ed] and adopt[ed] the Presiding Judge's findings that the facts reflect a sufficient break in the continuity of transportation under this Commission's relevant precedent" to render Central Florida Pipeline's service intrastate, and it denied the complaint on this basis.[7]

In denying the petition, the D.C. Circuit found that FERC had properly applied precedent and determined that the fuel was not transporting in interstate commerce.[8] The Complainants argued, among other issues, that the "original and persisting intent" of the shipper should be determinative.[9] But the court rejected this argument, noting that "[a]lthough the Supreme Court and FERC have used the 'original and persisting intent' of the shipper to determine the essential character of the commerce, those words cannot be overread."[10] Moreover, "the phrase does not really refer to the shipper's subjective motive as to the good's ultimate destination. The test refers to whether, using *objective* manifestations of the shipper's intent, an interstate movement has ended, and the goods have continued in intrastate transit."[11] Finding that FERC had properly found such a break here, it denied the petition.[12]

2. *Ship Shoal Pipeline Co.*, 172 F.E.R.C. ¶ 61,116 (2020)

On July 31, 2020, the Commission issued an order accepting a tariff cancellation filed by Ship Shoal Pipeline Company (Ship Shoal) on the grounds that the transportation at issue was entirely over the Outer Continental Shelf (OCS) and thus not subject to FERC jurisdiction.[13] On November 25, 2019, Ship Shoal filed a tariff canceling routes from Ship Shoal Block 28, in the OCS, to certain destinations in the state of Louisiana.[14] Ship Shoal previously had implemented FERC rates for part of these routes, but, in its filing, it asserted that the portion crossing the OCS fell outside of FERC's jurisdiction under the ICA.[15] Intervenors protested

5. 162 F.E.R.C. ¶ 63,012, at PP 2, 90.
6. *Id.* at PP 2, 503, 506.
7. 169 F.E.R.C. ¶ 61,119, at P 1.
8. Aircraft Serv. Int'l, Inc., 985 F.3d at 1019–20.
9. *Id. at 1020.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Ship Shoal Pipeline Co.*, 172 F.E.R.C. ¶ 61,116 (2020) [hereinafter *Ship Shoal I*].
14. FED. ENERGY REG. COMM'N, SHIP SHOAL PIPELINE COMPANY: LOCAL TARIFF, F.E.R.C. NO. 14.18.0 (2020).
15. *Ship Shoal Pipeline Co.*, 169 F.E.R.C. ¶ 61,259, at P 4 (2019).

and contended that shipping from the OCS to state destinations was FERC jurisdictional because the pipeline extended from the OCS to state lands while carrying oil that subsequently moved in continuous interstate commerce.[16]

On December 30, 2019, the Commission issued an order suspending the filing for seven months and setting it for a technical conference.[17] The Commission held a technical conference on March 3, 2020, and subsequently received written comments and reply comments.

In its July 31, 2020 order, FERC accepted the filing effective August 1, 2020.[18] The Commission found that under the specific language of the ICA concerning its jurisdictional scope, transportation solely within the OCS is not subject to the ICA because, the "OCS is not a 'State' or 'Territory' of the United States. ICA section 1(1) states that the statute applies 'to common carriers engaged in . . . (b) the transportation of oil . . . by pipe line . . . from one State or Territory of the United States . . . to any other State or Territory of the United States.'"[19] The Commission further held that the intervenors' contentions, namely that the transportation from the OCS origin to the onshore destinations was continuous without any break or interruption, that the facilities on the OCS were "necessary and integral to the downstream movement," and that the transportation terminated when shipments are ultimately delivered to onshore destinations, could not overcome the fact that FERC lacks jurisdiction over the OCS portion of the movements.[20] The Commission also declined to accept the argument that accepting the cancellation would allow the pipeline to charge excessive rates on the OCS movement, finding this point also could not override the jurisdictional conclusion.[21]

Certain intervenors sought rehearing, and on November 2, 2020, the Commission upheld the initial order and denied rehearing.[22] The Commission summarily denied rehearing on most of the jurisdictional arguments raised by intervenors, finding that the arguments either raised the same issues addressed in the original order or had not been properly preserved.[23] The Commission further found that Supreme Court cases raised by the intervenors did not address the jurisdictional facts before the Commission.[24]

16. *Id.* at P 7.
17. *Id.* at P 13.
18. *Ship Shoal I*, *supra* note 13, at P 1.
19. *Id.* at P 15 (citing 49 U.S.C. § 1).
20. *Id.* at P 17.
21. *Id.* at P 18.
22. *Ship Shoal Pipeline Co.*, 173 F.E.R.C. ¶ 61,121 (2020) [hereinafter *Ship Shoal II*].
23. *Id.* at PP 6, 8.
24. *Id.* at PP 9, 10.

B. Petitions for Declaratory Order

1. *Sunoco Pipeline L.P.*, 171 F.E.R.C. ¶ 61,253 (2020)

On April 3, 2020, Sunoco Pipeline L.P. (Sunoco) filed a petition for declaratory order requesting approval to "recontract previously committed [priority] capacity on the Mariner West Pipeline (Mariner West)."[25] Sunoco noted that because of its priority status, the committed service was not and would "not be subject to prorationing under ordinary operating conditions."[26] Sunoco further averred that recontracting the capacity would "have no impact on the 10% of pipeline capacity set aside for uncommitted shippers."[27] The Commission found the request to be consistent with precedent and authorized the proposal.[28]

2. *Targa NGL Pipeline Company LLC*, 173 F.E.R.C. ¶ 61,001 (2020)

On October 1, 2020, the Commission approved without condition Targa NGL Pipeline Company, LLC's (Targa NGL) petition for a declaratory order, in which Targa sought approval of certain findings relating to an expansion and extension of its pipeline system subject to transportation service agreements (TSAs) executed pursuant to an open season.[29] Specifically, Targa NGL sought FERC's agreement that:

- the terms of the TSA would apply to the rates and service over the life of the contract;[30]
- Targa NGL could utilize unused pipeline capacity to provide the committed service;[31]
- the proposed rate structure for committed and uncommitted rates was consistent with precedent;[32]
- a committed shipper could receive priority service for a premium rate relative to uncommitted service;[33]
- a committed shipper could nominate volumes for transportation in excess of its minimum volume commitment on a priority basis and at a premium rate for such transportation, so long as that nomination would not reduce the amount of capacity reserved for uncommitted shippers;[34]

25. *Sunoco Pipeline L.P.*, 171 F.E.R.C. ¶ 61,253, at P 1 (2020).
26. *Id.* at P 6.
27. *Id.* at P 7.
28. *Id.* at P 15.
29. *Targa NGL Pipeline Co.*, 173 F.E.R.C. ¶ 61,001 (2020).
30. *Id.* at P 12(A).
31. *Id.* at P 12(B).
32. *Id.* at P 12(C).
33. 173 F.E.R.C ¶ 61,001, at P 12(D).
34. *Id.* at P 12(E).

- and that the proposed pro-rationing provisions (which allocated up to 90 percent of capacity to committed shippers and at least 10 percent to uncommitted shippers, and established a lottery for uncommitted shippers) was consistent with Commission precedent.[35]

The Commission found that each of the requested findings were consistent with precedent and approved them.[36]

C. Rulemaking Actions/Public Inquiry Dockets

1. Proposed Policy Statement on Oil Pipeline Affiliate Contracts, 173 F.E.R.C. ¶ 61,063 (2020)

On October 15, 2020, the Commission issued a proposed policy statement to provide guidance for oil pipelines seeking to demonstrate that the proposed terms of an affiliate contract were just, reasonable, and not unduly discriminatory under the ICA.[37] The Commission affirmed that oil pipelines may enter into contracts with an affiliate, but proposed to adopt criteria that would be used to determine whether the oil pipeline gave its affiliate an undue preference.[38] Initial comments were due on December 14, 2020.

On December 17, 2020, the Commission issued an order exercising its discretion to withdraw the proposed policy statement and terminating the proceeding.[39] In so doing, the Commission determined that additional guidance was "not necessary for oil pipelines to demonstrate that [a]ffiliate [c]ontracts are just, reasonable, and not unduly discriminatory under the [ICA]."[40] Then-Commissioner Glick dissented with a separate statement and Commissioner Clements did not participate.

2. Inquiry Regarding the Commission's Policy for Determining Return on Equity, 171 F.E.R.C. ¶ 61,155 (2020)

Following the 2017 remand order by the D.C. Circuit in *Emera Maine v. FERC*,[41] the Commission issued a series of orders discussing and seeking stakeholder input on "whether, and if so how, it should modify its policies concerning the determination of the return on equity (ROE)" for public utility rates.[42] On

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35. *Id*. at P 12(F).
36. *Id.* at PP 14-21.
37. *Proposed Policy Statement on Oil Pipeline Affiliate Contracts*, 173 F.E.R.C. ¶ 61,063 (2020).
38. *Id.* at P 42.
39. *Withdrawal of Proposed Policy Statement on Oil Pipeline Affiliate Contracts,* 173 F.E.R.C. ¶ 61,250 (2020).
40. *Id.*
41. Emera Maine v. FERC, 854 F.3d 9 (D.C. Cir. 2017).
42. *Inquiry Regarding the Commission's Policy for Determining Return on Equity,* 166 F.E.R.C. ¶ 61,207 (2019) [hereinafter PL19 4 NOI]; *Accord*, *Martha Coakley v. Bangor Hydro-Elec. Co.,* 165 F.E.R.C. ¶ 61,030 (2018); *Ass'n of Businesses Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc*., 165 F.E.R.C. ¶ 61,118 (2018).

March 21, 2019, FERC issued a Notice of Inquiry that additionally sought "comment on whether any changes to its policies concerning public utility ROEs should be applied to interstate natural gas and oil pipelines."[43] In 2019 and 2020, the Commission issued Opinion Nos. 569[44] and 569-A,[45] respectively, establishing a revised methodology for determining just and reasonable base ROEs for public utilities under the Federal Power Act. Concurrent with issuance of Opinion No. 569-A, on May 21, 2020, the Commission also issued its final policy statement for determining ROE for natural gas and oil pipelines (PL19-4 Policy Statement).[46] The PL19-4 Policy Statement generally adopted the methodology established for public utilities in Opinion Nos. 569 and 569-A, but carved out certain exceptions to account for the "statutory, operational, organizational and competitive differences among the industries."[47]

Specifically, the PL19-4 Policy Statement ruled that the Commission would determine just and reasonable natural gas and oil pipeline ROEs not solely based on the Discounted Cash Flow Model (DCF) as it had done since the 1980s, but by averaging the results of the DCF model and the Capital Asset Pricing Model (CAPM).[48] The CAPM is based on the theory that the market-required rate of return for a security is equal to the "risk-free rate" plus a risk premium associated with that security.[49] The revised policy indicates that the risk premium added to the risk-free rate should consist of two elements: the premium required to compensate investors for the non-diversifiable market risk associated with investing in securities rather than investing in risk-free assets, and the premium required to compensate investors for the company-specific risk that investment in a particular security will add.[50] Thus, most fundamentally, the three CAPM inputs are (1) the risk-free rate, (2) the market premium, and (3) the premium for investing in a particular security.

The PL19-4 Policy Statement dictates that the risk-free rate should be represented by a six-month average of 30-year Treasury Bond Yields.[51] It also determines that the first component of the risk premium, the expected market return, should be based upon a single-step DCF calculation for all dividend-paying companies of the S&P 500, with high- and low-end outliers removed.[52] Finally, it

43. PL19-4 NOI, *supra* note 42, at P 1.

44. Opinion No. 569, *Ass'n of Bus. Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, 169 F.E.R.C. ¶ 61,129 (2019) [hereinafter Opinion No. 569].

45. Opinion No. 569-A, *Ass'n of Bus. Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, 171 F.E.R.C. ¶ 61,154 (2020) [hereinafter Opinion No. 569-A].

46. *Inquiry Regarding the Commission's Policy for Determining Return on Equity*, 171 F.E.R.C. ¶ 61,155 (2020) [hereinafter PL19-4 Policy Statement].

47. *Id*. at P 2.

48. *Id*. (in doing so, the Commission declined to include in the ROE analysis results from the Expected Earnings Model and the Risk Premium Model.). *See also id*. at PP 67-78.

49. *Id*. at P 8.

50. *Id*.

51. PL19-4 Policy Statement, *supra* note 46, at PP 8, 39.

52. *Id*. at PP 41-42.

requires the second component of the risk premium, the premium associated with company-specific risk, to be captured using a measure known as Beta.[53]

The Commission did not make any substantive changes to the way it would employ the DCF model, and determined that the averages of the two models would be afforded equal weighting when calculating a final ROE for natural gas and oil pipelines.[54] The Commission also provided guidance regarding suitable data sources[55] and proxy group construction.[56] After establishing its new policy for determining ROEs for regulated natural gas and oil pipelines, the Commission encouraged oil pipelines to file an updated FERC Form No. 6, page 700 data for 2019 reflecting the revised ROE methodology.[57] The Commission explained the updated page 700 data may help it better estimate industry-wide cost changes for purposes of its upcoming five-year index review.[58]

3. Five-Year Review of the Oil Pipeline Index, Notice of Inquiry, 171 F.E.R.C. ¶ 61,239 (2020)

In Order No. 561, the Commission established an indexing methodology that allows oil pipelines to change rates based upon an annual index as opposed to making cost-of-service filings.[59] In that order, the Commission also committed to review the index level every five years to ensure that the index level chosen by the Commission adequately reflects changes to industry costs.[60] Pursuant to that commitment, on June 18, 2020, the Commission issued a notice of inquiry initiating its 2020 five-year review of the oil pipeline index (RM20-14 NOI).[61] The RM20-14 NOI proposed to use the Producer Price Index for Finished Goods (PPI-FG) plus 0.09% as the index level for the next five years, beginning July 1, 2021.[62] The RM20-14 NOI explained that the Commission had arrived at this level by employing the Kahn methodology established in Order No. 561, and had trimmed the data considered in that methodology to include the middle 50% of cost changes only.[63]

In seeking comments on this proposal, the Commission noted that that it had adopted two major changes to the cost-of-service methodology used to populate page 700 data since the previous five year review in 2015.[64] First, in 2018, the

53. *Id*. at PP 8, 46.

54. *Id*. at PP 29, 50.

55. PL19-4 Policy Statement, *supra* note 46, at PP 55-57.

56. *Id*. at PP 64-66.

57. *Id*. at PP 2, 92.

58. *Id*. at P 92.

59. *See Revisions to Oil Pipeline Regulations Pursuant to the Energy Policy Act of 1992*, Order No. 561, FERC STATS. & REGS. ¶ 30,985 (1993), *order on reh'g*, Order No. 561-A, FERC STATS. & REGS. ¶ 31,000 (1994), *aff'd*, Ass'n of Oil Pipe Lines v. FERC, 83 F.3d 1424 (D.C. Cir. 1996).

60. *Id*. at 31,093.

61. Notice of Inquiry, Five-Year Review of the Oil Pipeline Index, 171 F.E.R.C. ¶ 61,239 (2020) [hereinafter RM20-14 NOI].

62. *Id*. at P 1.

63. *Id*. at PP 1, 4.

64. *Id*. at P 5.

Commission revised its policy concerning the treatment of income taxes and accumulated deferred income taxes (ADIT) in the rates of master limited partnership (MLP) pipelines.[65] Specifically, following the remand in *United Airlines, Inc. v. FERC*,[66] the Commission determined that an impermissible double recovery results from granting MLP pipelines an income tax allowance when using the discounted cash flow (DCF) methodology.[67] Thus, the Commission instructed MLP oil pipelines to eliminate the income tax allowance from page 700 costs filed on April 18, 2018[68] and clarified that pipelines eliminating an income tax allowance may also eliminate previously-accumulated ADIT from their costs of service.[69] The Commission further stated that it would incorporate the effects of the income tax policy change on industry-wide oil pipeline costs in the 2020 five-year review of the oil pipeline index level.[70]

Second, on May 21, 2020, the Commission issued a policy statement establishing a new methodology for determining ROE for interstate natural gas and oil pipelines, thereby departing from its longstanding policy of determining pipeline ROEs by relying solely on the DCF model and expanding its methodology to afford equal weighting to the results of DCF and Capital Asset Pricing Model analyses.[71] The Commission also encouraged oil pipelines to file updated Form No. 6, page 700 data for 2019 reflecting the revised ROE calculation methodology, explaining that such data may help the Commission better estimate industry-wide cost changes for purposes of the five-year index review.[72] The RM20-14 NOI sought comments regarding whether, and if so how, the Commission should reflect the effects of these two cost-of-service policy changes in the calculation of the index level.[73]

In addition to comments regarding these cost-of-service policy changes, the Commission also broadly solicited comments regarding any other alternative methodologies for calculating the index level, including, but not limited to, different data trimming methodologies.[74]

Following a comment period that concluded on September 11, 2020, the Commission issued on December 17, 2020, its order establishing the index level to be used for the five-year period commencing July 1, 2021 (RM20-14 Order).[75]

65. *Id*.

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

67. RM20-14 NOI, *supra* note 61, at P 5; *Inquiry Regarding the Commission's Policy for Recovery of Income Tax Costs*, 162 F.E.R.C. ¶ 61,227, at P 8 (2018) [hereinafter Income Tax Policy Statement]; *reh'g denied*, 164 F.E.R.C. ¶ 61,030 (2018) [hereinafter Income Tax Policy Statement Rehearing Order].

68. RM20-14 NOI, *supra* note 61, at P 5; Income Tax Policy Statement, *supra* note 67, at P 46.

69. RM20-14 NOI, *supra* note 61, at P 5; Income Tax Policy Statement Rehearing Order, *supra* note 67 at P 13.

70. RM20-14 NOI, *supra* note 61, at P 5; Income Tax Policy Statement, *supra* note 67, at P 46.

71. RM20-14 NOI, *supra* note 61, at P 6; PL19-4 Policy Statement, *supra* note 46.

72. RM20-14 NOI, *supra* note 61, at P 6; PL19-4 Policy Statement, *supra* note 46, at P 92.

73. RM20-14 NOI, *supra* note 61, at P 8.

74. *Id*. at PP 8, 9.

75. *Order Establishing Index Level, Five-Year Review of the Oil Pipeline Index,* 173 F.E.R.C. ¶ 61,245 (2020) [hereinafter RM20-14 Order].

The RM20-14 Order increased the index level proposed in the RM20-14 NOI to PPI-FG plus 0.78%.[76] The RM20-14 Order explained that the departure from the index level proposed by the RM20-14 NOI was due to the Commission's adoption of three proposals presented by commenters.[77]

First, the Commission adjusted the data set to remove the effects of the Commission's 2018 income tax policy change for MLP-owned pipelines.[78] Supporting this ruling, the Commission explained: (1) this approach is better aligned with the purpose of indexing, which is to keep pace with industry-wide cost changes, not to reflect alterations to the Commission's cost-of-service methodology; (2) the index is not an appropriate mechanism for incorporating the post-*United Airlines*' income tax policy changes because the index is not intended to act as a true-up mechanism that would remedy prior over- or under-recoveries in pre-existing rates; and (3) it is not clear that the double recovery of MLP pipelines' income tax costs was ever incorporated into the index.[79]

Second, the Commission calculated the index level by trimming the data set to the middle 80% of cost data rather than the middle 50% previously used.[80] The Commission enumerated three primary considerations that support its use of the middle 80% of data: (1) it is generally appropriate to consider more data in measuring industry-wide cost changes rather than less; (2) in this particular proceeding, "normal" cost changes are best defined by using the inclusive data sample embodied in the middle 80%; and (3) generalized concerns raised by commenters about outlying or unrepresentative data do not justify excluding the experiences of pipelines in the incremental 30% (*i.e.*, those pipelines that are included in the middle 80% but not the middle 50%) from the Commission's review of industry cost changes.[81]

Third, the Commission adjusted the index to reflect certain mergers that took place during the data period but that were not reflected in the data underlying the Commission's proposal in the RM20-14 NOI.[82]

Finally, the Commission's ultimate approach to calculating the index rejected proposals to calculate the composite measure of central tendency using a weighted median, to adopt standardized pipeline ROEs for 2014 and 2019, to quantify the effects of negotiated rate contracts when calculating the index, and to adjust the index to account for cost increases due to pipeline safety and integrity measures.[83]

76. *Id*. at PP 1, 2.
77. *Id*. at PP 2, 9.
78. *Id*. at P 16.
79. *Id*. RM20-14 Order, *supra* note 75, at PP 17-20.
80. *Id*. at P 25.
81. *Id*. at PP 26-28.
82. *Id*. at PP 61-62.
83. *Id*. at PP 33-58.

4. Revisions to Indexing Policies and Page 700 of FERC Form No. 6, 170 F.E.R.C. ¶ 61,134 (2020)

On February 21, 2020, the Commission issued an order regarding FERC's reporting requirements that both withdrew a 2016 Advance Notice of Proposed Rulemaking (ANOPR)[84] and terminated a 2015 rulemaking proceeding.[85] The rulemaking proceeding began after several shippers proposed modifications to the information required in the Commission's Form 6 for oil pipelines, including requiring supplemental page 700s for different rate design segments, requiring pipelines to provide page 700 workpapers to shippers, and requiring separate reporting of crude and refined products systems.[86]

In the February 21 order, the Commission denied these requests, finding either that the requested changes would impose significant burdens on pipelines or would not provide substantial additive information, given the limited number of affected pipelines and the availability of other data.[87]

Additionally, in the ANOPR, the Commission had requested comments on a number of possible changes to both the index regulations and Form 6.[88] In the February 21 order, the Commission declined to impose any of the proposals outlined in the ANOPR and withdrew the ANOPR, terminating the proceeding.[89] First, with respect to Form 6, the Commission found that a proposal to segment non-contiguous systems and rate design systems would impose significant burdens while being inappropriate for the streamlined system for oil pipeline rates and the simplified index system.[90] Additionally, the Commission found that the proposal to disaggregate cost-based and non-cost-based costs and revenues would be complex and could create misleading results.[91] The Commission further supported its dismissal by citing the goals of the Energy Policy Act of 1992 (namely, to create a streamlined and simplified methodology), the other data that pipelines must already file, and the ability of shippers to require the production of more data by filing complaints.[92]

The Commission also declined to pursue the proposals for changes to standards for challenging indexed rates, citing its consideration of potential changes to those policies in a pending complaint proceeding.[93]

The Commission concluded by stating that while it was withdrawing the ANOPR and terminating the rulemaking proceeding, it still planned on reviewing

84. *Revisions to Indexing Policies and Page 700 of FERC Form No. 6*, 157 F.E.R.C. ¶ 61,047 (2016).

85. *Revisions to Indexing Policies and Page 700 of FERC Form No. 6*, 170 F.E.R.C. ¶ 61,134 (2020).

86. *Petition for a Rulemaking of the Liquids Shippers Group, Airlines for America, and the National Propane Gas Association*, Dkt. No. RM15-19-000 [hereinafter Petition].

87. *Revisions to Indexing Policies*, 170 F.E.R.C. ¶ 61,134 at PP 7-8.

88. *Revisions to Indexing Policies and Page 700 of FERC Form No. 6*, 157 F.E.R.C. ¶ 61,047 (2016).

89. *Revisions to Indexing Policies and Page 700 of FERC Form No. 6*, 170 F.E.R.C. ¶ 61,134 (2020).

90. *Id.* at P 9.

91. *Id.*

92. *Id.* at P 10.

93. *Id.* at P 11 (citing *HollyFrontier Ref. & Mktg. LLC v. SFPP, L.P.*, 170 F.E.R.C. ¶ 61,133 (2020)).

its oil pipeline policies and would consider the comments submitted in its ongoing evaluation of changes to those policies.[94]

Then-Commissioner Glick filed a dissent, stating that he would have supported issuing a notice of proposed rulemaking outlining enhanced informational requirements to better allow shippers to evaluate pipeline rates, which he stated was a critical matter given the Commission's reliance on shipper action to enforce just and reasonable rates.[95] He further argued that the increased granularity of the data requirements proposed in the ANOPR would have assisted shippers, and that "[a]bsent greater transparency into the costs underlying a specific rate, shippers are left with no more than a pitiable choice between the rate charged and a costly fishing expedition to obtain the information they need to challenge the rate in the first place."[96] He concluded that, by issuing the February 21 order, the Commission "fail[ed] to fulfill its last remaining responsibility to ensure oil pipeline rates remain just and reasonable."[97]

5. Commission Action to Address Effects of COVID-19 on Oil Pipelines, 171 F.E.R.C. ¶ 61,108 (2020)

On May 8, 2020, the Commission issued a policy statement to provide guidance regarding the "Commission's response to the effects of the national emergency caused by COVID-19 on oil pipelines."[98] The Commission acknowledged that oil pipelines might request temporary waivers of or extension of time to comply with regulations "where necessary and appropriate to address the unforeseen circumstances . . . [relating] from COVID-19."[99] The Commission committed to "review and act on such requests as expeditiously as possible based upon the circumstances and justification described in the pipeline's waiver or extension request."[100] The policy statement also stated an oil pipeline could "request a waiver for tariffs to become effective on less than 30 days' notice" in order "to facilitate changes to operations and services on an expedited basis" pursuant to 18 C.F.R. 341.14.[101] The policy statement also encouraged oil pipelines to seek a "negotiated or mediated resolution" in any disputes with shippers "as a result of the unprecedented circumstances caused by COVID-19."[102]

6. Standard Applied to Complaints against Oil Pipeline Index Rate Changes, 170 F.E.R.C. ¶ 61,252 (2020)

On March 25, 2020, the Commission sought comments regarding its proposal to alter the preliminary screen it applies to evaluate complaints against oil pipeline

94. *Id*. at P 12.
95. Revisions to Indexing Policies, *supra* note 87 (*Glick dissent*).
96. *Id.*
97. *Id.*
98. *Commission Action to Address Effects of COVID-19 on Oil Pipelines*, 171 F.E.R.C. ¶ 61,108 (2020).
99. *Id.* at P 2.
100. *Id.*
101. *Id.* at P 3.
102. *Id.* at P 7.

index rate changes under 18 CFR § 343.2(c)(1) (AD20-10 NOI).[103] The issue raised in the AD20-10 NOI was previously discussed by the Commission in the remand order in *HollyFrontier Refining & Marketing LLC v. SFPP, L.P.*, (HollyFrontier Remand Order).[104]

The HollyFrontier Remand Order was issued in a number of ongoing rate proceedings in which a carrier's index-based rates were challenged as unjust and unreasonable.[105] The complaints that initiated the earliest of these proceedings, Docket Nos. OR14-35-003 *et al*. and OR14-36-003 *et al*. (2014 Complaints), had been dismissed by the Commission in March 2018 because the Commission found the complaints failed the Substantially Exacerbate Test that the Commission has previously employed to evaluate complaints against index rate increases.[106] Pursuant to the Substantially Exacerbate Test, the Commission will investigate a complaint against an index rate increase if the complaint shows that: (1) the pipeline is substantially over-recovering its cost of service (first prong) and (2) the index rate increase so exceeds the actual increase in the pipeline's cost that the resulting rate increase would substantially exacerbate the pipeline's over-recovery (second prong).[107] This is different from the approach the Commission employs when a proposed index rate increase is protested.[108] In this circumstance, the Commission applies the Percentage Comparison Test and will investigate the protested increase if the pipeline's page 700 revenues exceed its costs and there is more than a 10 percentage point differential between (a) the index rate increase and (b) the change in the prior two years' total cost-of-service data reported on page 700, line 9.[109]

In dismissing the 2014 Complaints, the Commission found that the 2014 Complaints failed the second prong of the Substantially Exacerbate Test because data from FERC Form No. 6, Page 700, which became available after the pipeline implemented the challenged rate increases, and before the 2014 Complaints were filed (post-increase data), showed that the difference between pipeline's costs and revenues had actually declined from 2011 to 2013.[110] The Commission reasoned that this continuing decline in the pipeline's cost-revenue differential was inconsistent with the claim that the 2012 and 2013 index rate increases substantially exacerbated the pipeline's pre-existing over-recoveries.[111] The complainants

103. *Standard Applied to Complaints Against Oil Pipeline Index Rate Changes*, 170 F.E.R.C. ¶ 61,252 (2020) (AD20-10 NOI).

104. Order on Remand and Complaints and Directing Briefs, *HollyFrontier Refining & Marketing LLC v. SFPP, L.P.*, 170 F.E.R.C. ¶ 61,133 (2020).

105. *See* Docket Nos. OR14-35-003, *et al.*, OR14-36-003, *et al.*, OR19-21-000, OR19-33-000, OR19-37-000

106. HollyFrontier Remand Order, *supra* note 104; Standard Applied to Pipeline Index Changes, *supra* note 103.

107. Standard Applied to Pipeline Index Changes, *supra* note 103, at P 4.

108. HollyFrontier Remand Order, *supra* note 104, at P 5.

109. *Id*.

110. *Id*. at P 7.

111. *Id*.

sought review by the D.C. Circuit.[112] In *Southwest Airlines*, the D.C. Circuit remanded the Commission's dismissal of the 2014 Complaints, finding that the Commission's use of post-increase data in applying the Substantially Exacerbate Test departed from the Commission previous practice, and that by doing so the Commission had, in effect, reinterpreted the applicable regulation, section 343.2(c)(1).[113] The D.C. Circuit charged FERC on remand to "explain its actions in a way that coheres with the rest of its indexing scheme—namely the manner in which it establishes yearly indexes and the methods it uses to evaluate challenges to index-based rates," and "to provide a reasoned explanation that treats like cases alike."[114]

The Commission issued the HollyFrontier Remand Order in response to *Southwest Airlines* on February 21, 2020.[115] In the HollyFrontier Remand Order, the Commission proposed to modify the Commission's existing policy by eliminating the Substantially Exacerbate Test and applying the Percentage Comparison Test to both protests and complaints under section 343.2(c)(1) of the Commission's regulations.[116] The Commission cited several considerations in support of this proposed change in policy. First, the Commission explained it is "concerned that the Substantially Exacerbate Test has not been defined, suffers from mechanical flaws, and appears to be inconsistent with the purposes of indexing and the language of section 343.2(c)(1)."[117] Second, the Commission stated that "applying the Percentage Comparison Test, which relies upon pre-increase Page 700 data, to both protests and complaints, would better adhere to the purposes of indexing and respond to the *Southwest Airlines* remand by adopting a single standard for governing challenges" that would treat like cases alike.[118] Third, the Commission argued this approach would provide the foregoing benefits without depriving shippers of the ability to challenge a pipeline's rates where the pipeline is substantially over-recovering its cost of service.[119]

The Commission ordered the parties to the rate proceedings in which the HollyFrontier Remand Order was issued to submit briefs addressing the Commission's proposed policy change, which were completed as ordered on July 16, 2020.[120] Comments on the AD20-10 NOI were filed in June 2020, with reply comments submitted in July 2020 and surreply comments submitted in October 2020. The NOI remains pending.

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112. Southwest Airlines Co. v. FERC, 926 F.3d 851 (D.C. Cir. 2019).
113. *Id.* at 856-59.
114. *Id*. at 859.
115. HollyFrontier Remand Order, *supra* note 104, at P 1.
116. *Id.* at P 21.
117. *Id*. at PP 21-31.
118. *Id*. at PP 21, 37.
119. *Id*. at PP 21, 38.
120. *Id*. at P 46.

D. *Tariff and Ratemaking Issues*

1. *Chevron Prods. Co. v. SFPP, L.P.*, Opinion No. 571, 172 F.E.R.C. ¶ 61,207 (2020)

On December 4, 2015, Chevron Products Company, HollyFrontier Refining & Marketing LLC, U.S. Airways, Inc., Valero Marketing and Supply Company, and Western Refining Company, L.P. (Shippers) filed a joint complaint challenging the lawfulness of the SFPP, L.P. (SFPP) East Line rates in Docket No. OR16-6.[121] SFPP's East Line provides transportation of refined petroleum from El Paso, Texas to Tucson and Phoenix, Arizona.[122] The Commission initiated a hearing in January 2017, and Judge Sterner issued an Initial Decision on July 21, 2017.[123] Briefing concluded in October 2017.[124] On December 12, 2018, SFPP filed a motion to reopen the record and supporting testimony on the issue of rate of return on equity (ROE), based on recent Commission rulings in the electric area.[125]

On September 4, 2020, FERC issued Opinion No. 571, affirming Judge Sterner's Initial Decision on all issues except ROE.[126] With regard to ROE, the Commission modified limited aspects of the Initial Decision's ROE calculation.[127] The Commission rejected the Initial Decision's use of the six-month period ending in June 2016 for the ROE data period, instead electing to use the six-month period ending in September 2016, primarily because it is the most recent data period.[128] The Commission also revised the proxy group selected by the Initial Decision to exclude Plains and include Enbridge.[129] The changes the Commission adopted reduced SFPP's nominal DCF ROE from 10.56% to 10.54%, and real DCF ROE from 9.56% to 9.08%, based on an inflation factor of 1.46%.[130]

Opinion No. 571 affirmed the Initial Decision on all other issues, including finding that there should not be any adjustments made to the East Line throughput to account for the February 2015 explosion which caused a temporary shutdown at the Torrance Refinery in California.[131] The Commission found that there was insufficient credible evidence to calculate the impact of the Torrance Refinery outage on the East Line.[132] SFPP and the shippers filed requests for rehearing of Opinion No. 571 on October 5, 2020.[133]

121. 172 F.E.R.C. ¶ 61,207 at P 3.
122. *Id*. at P 2.
123. *Id*. at P 3.
124. *Id*. at P 4.
125. *Id*.
126. *Id.* at P 1.
127. *Chevron Prods. Co.*, 172 F.E.R.C. ¶ 61,207, at P 117.
128. *Id.* at P 136.
129. *Id.* at PP 159, 182-83.
130. *Id.* at PP 187.
131. *Id.* at P 28.
132. *Id.* at P 30.
133. SFPP, L.P. v. FERC, 967 F.3d 788 (D.C. Cir. 2020).

In Opinion No. 571, the Commission also granted SFPP's motion to reopen the record and establish a limited paper hearing to consider, in addition to the DCF model addressed in the hearing, CAPM, an expected earnings analysis, and/or a risk premium model for purposes of determining SFPP's nominal ROE, as discussed in the Commission's October 16, 2018 briefing order in *Coakley v. Bangor Hydro-Electric Company*.[134] SFPP, shippers, and FERC Trial Staff filed briefs in the paper hearing on ROE on October 19, 2020 and November 9, 2020.[135] However, on December 31, 2020, the Commission approved an East Line Offer of Settlement filed in Docket No. IS21-138, which resolved all pending Commission dockets pertaining to SFPP's East Line interstate rates, including this docket, in their entirety.[136]

2. *NGL Supply Wholesale, LLC v. Phillips 66 Pipeline LLC*, 172 F.E.R.C. ¶ 61,016 (2020)

On December 3, 2019, NGL Supply Wholesale, LLC (NGL) filed a complaint against Phillips 66 Pipeline LLC (P66 Pipeline) seeking a determination that its exchange agreement with P66 Pipeline's affiliate, and that affiliate's proprietary interconnection running from a Williams terminal to P66 Pipeline, are FERC jurisdictional.[137] The complaint also alleged that P66 Pipeline's pro-rationing policy discriminates against NGL as a seasonal shipper, and sought to require P66 Pipeline to publish its transmix charges in its tariff.[138] The Commission denied the complaint with respect to all but the transmix claims.[139] As to the exchange agreement, the Commission declined to exercise jurisdiction based on its prior finding that exchange agreements do not constitute transportation under section 1(1) of the ICA.[140] Similarly, with respect to the interconnection, it relied on a prior finding that terminal services are non-jurisdictional and held that the interconnection at issue is used before transportation service has commenced.[141] It further found the pro-rationing policy was reasonable and consistent with other policies using a 12-month base period, and that NGL's alleged inability to obtain regular shipper status was a result of its own business decisions not to ship year round.[142] The Commission set the transmix claim for hearing based on material issues of fact as to whether it is possible for P66 Pipeline to know and state the transmix charges in the tariff before the transmix has been disposed of.[143]

134. *Chevron Prods. Co.*, 172 F.E.R.C. ¶ 61,207, at PP 203-04 (citing *Coakley v. Bangor Hydro-Elec. Co.*, 166 F.E.R.C. ¶ 61,013 (2019)).

135. *Id*.

136. *SFPP, LLP*, 173 F.E.R.C. ¶ 61,295 (2020).

137. *NGL Supply Wholesale, LLC v. Phillips 66 Pipeline LLC*, 172 F.E.R.C. ¶ 61,016, at P 1 (2020)

138. *Id*. at P 5.

139. *Id*. at P 9.

140. *Id*. at P 12

141. *Id*. at P 15.

142. 172 F.E.R.C. ¶ 61,016, at P 19.

143. *Id*. at PP 25-26.

E. *Tax Issues*

1. *SFPP, L.P. v. FERC*, 967 F.3d 788 (D.C. Cir. 2020)

On July 31, 2020, the D.C. Circuit released its opinion regarding the appeal of two FERC orders concerning the application of the Commission's Revised Policy Statement Regarding Recovery of Income to SFPP, L.P.'s (SFPP) rates.[144]

SFPP first challenged the Commission's refusal to grant SFPP an income tax allowance in its rates.[145] The Court upheld the Commission's treatment of income tax allowances, stating that it permissibly solved the problem of double recovery by removing the income tax allowance from master limited partnership (MLP) pipelines, as required by the court's decision in *United Airlines, Inc. v. FERC*.[146]

SFPP also appealed the Commission's denial of its request to reopen the record in the rate proceeding to allow it to provide additional exhibits regarding double recovery of costs.[147] The court found that the Commission reasonably exercised its discretion to deny the motion to reopen the record, and that SFPP was not treated differently from similarly situated pipelines.[148]

SFPP further appealed the Commission's decision to require SFPP to use its originally filed index rates in its compliance filings regarding its rates.[149] The Court also rejected that argument, holding that the Commission's decision was well-reasoned and did not violate the rule against retroactive ratemaking.[150]

Additionally, in a cross appeal, SFPP's shippers challenged FERC's decision to allow SFPP to eliminate accumulated deferred income tax (ADIT) from its rates when making its cost-of-service compliance filing.[151] The shippers requested that FERC allow the ADIT balance to be credited back to shippers through amortizing the amount and including the amortized reduction in costs in SFPP's prospective rates.[152] The court also rejected the shippers' cross appeal, holding that requiring pipelines to refund the ADIT balance to ratepayers "would constitute impermissible retroactive ratemaking," and that the Commission's order denying an ADIT refund was not arbitrary or capricious.[153]

The SFPP shippers also raised whether the Commission acted unlawfully when it approved, without explanation, SFPP's elimination of its ADIT balance

144. SFPP, L.P. v. FERC, 967 F.3d 788 (D.C. Cir. 2020).
145. *Id*. at 792-93,
146. *Id*. at 792-93 (citing United Airlines, Inc. v. FERC, 827 F.3d 122 (D.C. Cir. 2016)).
147. *SFPP, L.P. v. FERC*, 967 F.3d at. 797.
148. *Id*. at 798.
149. *Id.*
150. *Id*. at 799.
151. *Id.*
152. *SFPP, L.P. v. FERC*, 967 F.3d at 800-01.
153. *Id*. at 801.

retroactive to 1992, thereby inflating SFPP's prospective rates from 2008 forward.[154] The court did not address the issue.[155] On September 11, 2020, the shippers sought rehearing of the D.C. Circuit's order on that basis. The petition for rehearing was denied on November 19, 2020.[156]

II. PIPELINE SAFETY

A. Department of Energy and Department of Transportation - Report to Congress on Crude Oil Characterization Research Study

In April 2020, the Department of Energy (DOE) and the Department of Transportation (DOT) issued a Report to Congress in regard to the Crude Oil Characterization Research Study ("study").[157] The study, conducted by Sandia National Laboratories, is in response to high-profile accidents that took place during 2013-2014 involving the movement of crude oil by rail.[158] Specifically, the study investigates "whether crude oils currently transported in North America, including those produced from tight formations, exhibit physical or chemical properties that are distinct from conventional crudes, and further how these properties associate with combustion hazards that may be realized during transportation and handling."[159]

The study describes the experimental sampling and analysis of physical, chemical, and combustion characteristics of crude oil, and how these characteristics associate with thermal hazard distances resulting from pool fires and fireballs.[160] The study found that the oils tested were appropriate for use in combustion experiments and that the similarity of pool fire and fireball characteristics pertinent to thermal hazard distances of the oils indicate that vapor pressure is not a statistically significant factor in affecting these outcomes.[161] The results of the study did not support creating a regulatory "distinction for crude oils based on vapor pressure."[162] Therefore, DOE and DOT found that no further regulations by the Secretary of Transportation or the Secretary of Energy or further legislation is necessary to improve the safe transport of crude oil with specific regard to vapor pressure.[163]

154. *Id*. at 803.
155. *Id*.
156. SFPP, L.P. v. FERC, 967 F.3d at 788.
157. U.S. Dep't of Energy, Crude Oil Characterization Research Study: Report to Congress i (2020).
158. *Id*. at 2.
159. *Id*. at v.
160. *Id*.
161. *Id*.
162. *Id*.
163. U.S. DEP'T OF ENERGY, *supra* note 157, at v.

B. Hazardous Materials: Vapor Pressure of Unrefined Petroleum Products and Class 3 Materials, 85 Fed. Reg. 30673 (May 20, 2020)

On May 20, 2020, in response to comments and subsequent research, the Pipeline and Hazardous Materials Safety administration (PHMSA) withdrew in its entirety a January 18, 2017, Advance Notice of Proposed Rulemaking (ANOPR) concerning vapor pressure for crude oil transported by rail.[164]

Before withdrawing the ANOPR, PHMSA received approximately eighty comments on the proposal.[165] Twenty-one "strongly opposed the proposed vapor pressure limitation on either crude oil or other class 3 flammable liquids by highway or rail."[166]

In addition, the April 2020 Sandia National Laboratories (Sandia) Crude Oil Characterization Research Study (Research Study) determined that vapor pressure of crude oil is not a significant factor in the severity of pool fire or fireball scenarios, such that it did "not support creating a regulatory distinction for crude oils based on vapor pressure."[167]

Based on these comments and the Research Study, PHMSA determined setting a vapor pressure limit for crude oil transportation by rail was not justified because it would not improve the safety of transporting crude oil by rail.[168] PHMSA noted that the Research Study's finding that there was "no meaningful link between crude oil vapor pressures and thermal hazards militates against the imposition of vapor pressure limits for transportation of crude oil in modes other than rail."[169] In addition, PHMSA stated that "establishing a vapor pressure limit for crude oil by rail would unnecessarily impede rail transportation of crude oil without providing justifiable benefits."[170] PHMSA also decided not to impose vapor pressure limits for other unrefined petroleum-based products and class 3 flammable liquid hazardous materials by any mode.[171]

C. Hazardous Materials: The State of Washington Crude Oil by Rail Volatility Requirements, 85 Fed. Reg. 29,511 (May 15, 2020)

On May 15, 2020, PHMSA issued a notice stating that federal law preempts state law regarding rail vapor limits.[172] Specifically, North Dakota and Montana (Applicants), two oil-producing states, filed an application with PHMSA seeking a determination of whether the federal Hazardous Material Transportation Act

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164. *See* Hazardous Materials: Vapor Pressure of Unrefined Petroleum Products and Class 3 Materials, 85 Fed. Reg. 30,673 (May 20, 2020) (to be codified at 49 C.F.R. pts. 171-74, 177-80).

165. *Id.* at 30,674-75.

166. *Id* at 30,675.

167. *Id.* at 30,679.

168. *Id.* at 30,679.

169. *Id.*

170. Hazardous Materials: Vapor Pressure of Unrefined Petroleum Products and Class 3 Materials, 85 Fed. Reg. at 30,679.

171. *Id*.

172. Hazardous Materials: The State of Washington Crude Oil by Rail Volatility Requirements, 85 Fed. Reg. 29,511 (May 15, 2020).

(HMTA) preempted requirements promulgated by Washington State regarding crude oil vapor pressure and requiring advance notice of transfer for facilities that receive crude oil from railroad car.[173] The Applicants alleged the law, which purports to regulate the volatility of crude oil loaded or unloaded from rail cars in Washington State, amounted to a *de facto* ban on Bakken crude.[174] The Applicants further argued that Washington State's vapor pressure law should be preempted "because it is an obstacle to the federal hazardous material legal and regulatory regime," and "it is not substantively the same as the federal regulations governing the classification and handling of crude oil in transportation."[175]

In the May 2020 decision, PHMSA agreed with the Applicants and found that Washington State's vapor pressure requirement was preempted.[176] Specifically, it found that Washington State's limit of "9 psi for crude oil had created a hazardous material classification scheme that was not substantively the same as the federal hazardous materials regulations."[177] Moreover, PHMSA found that the vapor pressure requirement imposed requirements on handling of hazardous material that are not substantively the same as the requirements of the Hazardous Material Regulations (HMR).[178] As such, PHMSA determined that the vapor pressure requirement was an obstacle to accomplishing and carrying out the HTMA and HMR, and was therefore preempted.[179]

173. *Id*.

174. *Id.*

175. *Id.* at 29,512.

176. *Id*. at 29,511.

177. Hazardous Materials: The State of Washington Crude Oil by Rail Volatility Requirements, 85 Fed. Reg. at 29,528.

178. *Id.* at 29,528.

179. *Id.*

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