

## REPORT OF THE OIL AND LIQUIDS COMMITTEE

This report summarizes oil and liquids developments of particular interest to energy law practitioners that occurred from July 1, 2018 to June 30, 2019.\*

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I. SIGNIFICANT FERC RULEMAKINGS AND ADMINISTRATIVE ORDERS;  
RELATED COURT OPINIONS

A. *Tax Issues*

On December 15, 2016, the Federal Energy Regulatory Commission (FERC) issued a Notice of Inquiry (NOI) following the decision of the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) in *United Airlines, Inc. v. FERC (United Airlines)*.<sup>1</sup> In that decision, the D.C. Circuit held that the Commission failed to demonstrate that there was no double recovery of income tax costs when it permitted SFPP, L.P. (SFPP), a master limited partnership (MLP), to recover both an income tax allowance and a return on equity (ROE), determined pursuant to the discounted cash flow (DCF) methodology.<sup>2</sup> As background, under the Commission's 2005 Income Tax Policy Statement, MLPs, which are passed through tax entities paying no taxes themselves, were able to receive an income tax allowance and a ROE in their cost-of-service rates calculated pursuant to the DCF methodology.

In response to the D.C. Circuit Remand and the NOI, the Commission revised the 2005 Income Tax Policy Statement (Revised Policy Statement (RPS)) and will no longer permit MLPs to recover an income tax allowance in their cost of service.<sup>3</sup> Citing the *United Airlines* decision, the Commission found the DCF methodology "determines the pre-tax investor return required to attract investment." Given that the return is a pre-tax return, permitting MLP's to recover both an income tax allowance for the partner's tax costs and a discounted cash flow return on equity leads to a double recovery of income tax costs.<sup>4</sup> The Commission clarified that the RPS would not apply to non-MLP partnerships and stated that potential double recovery for such entities would be addressed in subsequent proceedings.<sup>5</sup> In addition, the RPS instructs oil pipelines organized as MLPs to reflect the Commission's elimination of the income tax allowance in their Form No. 6 page 700 reporting.

In contrast to natural gas pipelines, the overwhelming majority of oil pipelines set their tariff rates using indexing, not cost-of-service ratemaking.<sup>6</sup> Under

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1. *United Airlines, Inc. v. FERC*, 827 F.3d 122, 134, 136 (D.C. Cir. 2016).

2. *Id.* at 135.

3. Tamara Young-Allen, *FERC Revises Policies, Will Disallow Income Tax Allowance Cost Recovery in MLP Pipeline Rates*, FED. ENERGY REG. COMM'N (Oct. 8, 2019), <https://www.ferc.gov/media/news-releases/2018/2018-1/03-15-18-G-2.asp#.XaSgenfMwdU>.

4. *Inquiry Regarding the Commission's Policy for Recovery of Income Tax Costs*, 83 Fed. Reg. 12,362 (2018).

5. *Id.* at 12,366.

6. ASS'N OF OIL PIPE LINES, *OIL PIPELINE RATEMAKING METHODOLOGIES* (Oct. 8, 2019), <http://www.aopl.org/wp-content/uploads/2014/04/Oil-Pipeline-Ratemaking-Methodologies.pdf>.

indexing, oil pipelines may adjust their rates annually so long as those rates remain at or below the applicable ceiling levels published by FERC.<sup>7</sup> The ceiling levels change every July 1 based on an index that tracks industry-wide cost changes.<sup>8</sup> Currently, the index is based upon the Producer's Price Index for Finished Goods, plus 1.23.<sup>9</sup> The index will be reassessed in 2020 based upon industry-wide oil pipeline cost changes between 2014 and 2019.<sup>10</sup> The industry-wide data, filed in the latter years of the 2014-2019 period, should reflect the Commission's post-United Airlines policy changes as well as the Tax Cuts and Jobs Act of 2017 (TCJA).<sup>11</sup> Beginning with the 2018 Form No. 6, oil pipelines were required to report in page 700 data an income tax allowance consistent with *United Airlines* and the Commission's subsequent holdings denying an MLP an income tax allowance.<sup>12</sup> Based upon this data, the Commission will incorporate the effects of the post-*United Airlines*' policy changes (as well as the TCJA) on industry-wide oil pipeline costs in the 2020 five-year review of the oil pipeline index level.<sup>13</sup> The Commission stated that this will ensure that the industry-wide reduced costs are incorporated on an industry-wide basis as part of the index review. To the extent the Commission issues subsequent orders affecting the income tax policy for other partnership or pass-through business forms, oil pipelines will similarly reflect those policy changes on Form No. 6, page 700.

In addition, the Commission emphasized that the post-*United Airlines*' policy changes (as well as TCJA) will be reflected in initial oil and gas pipeline cost-of-service rates and cost-of-service rate changes on a going-forward basis under the Commission's existing ratemaking policies, including cost-of-service rate proceedings resulting from shipper-initiated complaints.

## B. Jurisdictional Issues

### 1. Aircraft Serv. Int'l Group, Inc. v. Central Florida Pipeline LLC, 162 F.E.R.C. ¶ 63,012 (2018)

On January 30, 2018, the presiding administrative law judge (ALJ) issued her initial decision in *Aircraft Service International Group, Inc. v. Central Florida Pipeline LLC*.<sup>14</sup> In this proceeding, American Airlines, Inc., Delta Air Lines,

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7. *SFPP, L.P.*, 163 F.E.R.C. ¶ 61,232 at P 3 (2019).

8. 18 C.F.R. § 342.3 (2004).

9. *Oil Pipeline Index*, FED. ENERGY REG. COMM'N (Oct. 8, 2019), <https://www.ferc.gov/industries/oil/gen-info/pipeline-index.asp>.

10. *See e.g.*, Five-Year Review of the Oil Pipeline Index, 153 F.E.R.C. ¶ 61,312 (2015); *aff'd* Assoc. of Oil Pipe Lines v. FERC, 876 F.3d 336 (D.C. Cir. 2017).

11. *Inquiry Regarding the Commission's Policy for Recovery of Income Tax Costs*, 162 F.E.R.C. ¶ 61,227 at P 46 (2018).

12. *Id.* at P 8.

13. Rattler Midstream LP, *Amendment No. 5 to Form S-1*, U.S. SEC. EXCH. COMM'N (Oct. 8, 2019), <https://www.sec.gov/Archives/edgar/data/1326801/000119312512208192/d287954ds1a.htm>.

14. *Aircraft Serv. Int'l Grp., Inc.*, 162 F.E.R.C. ¶ 63,012 (2018). The complaint in this proceeding raised both jurisdiction and ratemaking issues. *See Id.* at P 17. The ALJ bifurcated the proceeding into two phases,

Inc., Southwest Airlines Co., United Aviation Fuels, and United Parcel Service, Inc. (collectively, the Airlines), Hooker's Point Fuel Facilities, LLC (HKPT), and Aircraft Service International Group, Inc. (ASIG) (collectively, Complainants) brought a complaint against Central Florida Pipeline LLC (CFPL) and its affiliate Kinder Morgan Liquid Terminals LLC (KMLT) alleging that CFPL and KMLT are providing interstate transportation and break out tankage services without a tariff on file at the Commission in violation of the Interstate Commerce Act (ICA).<sup>15</sup>

KMLT owns and operates a terminal facility in Tampa, Florida (Tampa Terminal).<sup>16</sup> CFPL owns and operates a pipeline that transports jet fuel from the Tampa Terminal to the Orlando Airport (CFPL Pipeline).<sup>17</sup> The Airlines are jet fuel consumers operating out of the Orlando Airport and, in some cases, other regional airports.<sup>18</sup> ASIG ships jet fuel on the CFPL Pipeline on behalf of the Airlines and manages the Airlines' jet fuel supplies at the Tampa Terminal and Orlando Airport.<sup>19</sup> HKPT has contracted with KMLT to acquire exclusive rights to five jet fuel tanks at the Tampa Terminal for use by the Airlines (HKPT Tanks).<sup>20</sup>

All jet fuel shipped on the CFPL pipeline is sourced from out-of-state or foreign origins and arrives at the Tampa Terminal via marine vessel.<sup>21</sup> The Airlines contract individually with jet fuel suppliers (*i.e.*, Chevron, Valero, or both), who arrange for deliveries of jet fuel to the Tampa Terminal, where title transfers from the suppliers to the Airlines.<sup>22</sup> The Airlines typically maintain a 10- to 12-day supply of jet fuel in the HKPT Tanks.<sup>23</sup> From the HKPT Tanks, jet fuel is delivered to the Orlando Airport via the CFPL Pipeline or transported to other regional airports via truck.<sup>24</sup> ASIG and contractors working out of the regional airports, rather than the Airlines, determine the timing and quantity of jet fuel shipments over the CFPL Pipeline to the Orlando Airport and by truck to other regional airports, respectively.<sup>25</sup> ASIG's nominations for transportation on the CFPL Pipeline are designed to keep the total jet fuel supply in the Orlando Tanks

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with the first phase addressing jurisdictional issues and the second phase, if necessary, addressing rate issues. *Id.* at P 19.

15. *Id.* at PP 1, 17.

16. *Id.* at P 6.

17. *Id.* at P 11.

18. *Id.* at P 3.

19. 162 F.E.R.C. ¶ 63,012 at P 7.

20. *Id.* at PP 8, 14-15.

21. *Id.* at PP 3-5, 68.

22. *Id.* at P 5, 109.

23. *Id.* at P 271; *see also id.* at PP 212-13.

24. 162 F.E.R.C. ¶ 63,012 at PP 14, 16, 259-263. Approximately 10 percent of jet fuel delivered to the HKPT Tanks is withdrawn over the truck racks. *Id.* at PP 260, 414 n.928.

25. *Id.* at PP 225, 227, 241, 261, 293, 313. One, limited exception is described in paragraph 314. *Id.* at P 314.

within a desired range,<sup>26</sup> and ASIG generally allocates jet fuel among the Airlines only after it is delivered to the Orlando Airport.<sup>27</sup>

The ALJ found there was a sufficient break in the overall interstate and foreign movements at the Tampa Terminal, such that the transportation of jet fuel on the CFPL Pipeline is intrastate in character and not subject to the Commission's ICA jurisdiction.<sup>28</sup> The ALJ first made a threshold determination that "the jet fuel 'comes to rest' at a point of interruption" (*i.e.*, the Tampa Terminal).<sup>29</sup> The ALJ then analyzed and weighed three criteria (*Northville* criteria)<sup>30</sup> and twelve additional factors<sup>31</sup> that the Commission and the Interstate Commerce Commission have historically considered in determining the "essential character" of the transportation (*i.e.*, intrastate vs. interstate).<sup>32</sup> The ALJ found that the transportation at issue satisfied all three *Northville* criteria.<sup>33</sup> First, the ALJ determined, "neither Valero nor Chevron is filling specific orders for specific quantities of jet fuel to be moved through to any specific destination beyond the Tampa Terminal at the time of shipment."<sup>34</sup> Second, "the [HKPT Tanks] are used as a point of inventory and non-operational storage,"<sup>35</sup> and "serve as a distribution point from which specific amounts of jet fuel are allocated . . . ."<sup>36</sup> Third, "transportation on the CFPL Pipeline in furtherance of the distribution of jet fuel from the Tampa Terminal to the Orlando Airport is not specifically arranged until after the jet fuel arrives at Tampa and after ASIG allocates the jet fuel to be shipped from storage."<sup>37</sup> The ALJ also found that "[o]f the twelve additional factors, nine (and for some Airlines ten) weigh toward the conclusion that the continuity of the transportation is sufficiently broken when the jet fuel comes to rest at the Tampa Terminal."<sup>38</sup> "In sum," the ALJ concluded:

an objective assessment of the criteria and factors, based upon all of the facts pertaining to the transportation at issue in this proceeding, indicates that a sufficient break in the continuity of the foreign and interstate transportation occurs when the jet fuel comes to rest in the [HKPT] Tanks, and that there is no fixed and persisting intent at the time of shipment to ship jet fuel through the Tampa Terminal to the Orlando Airport in a single, continuous movement.<sup>39</sup>

Having concluded that transportation of jet fuel on the CFPL Pipeline is intrastate in character, the ALJ found that whether the Tampa Terminal provides

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26. *Id.* at PP 225, 227, 241, 261, 293, 313.

27. 162 F.E.R.C. ¶ 63,012 at PP 307, 324, 326.

28. *Id.* at PP 2, 90.

29. *Id.* at P 79.

30. *Id.* at P 76.

31. *Id.* at P 77.

32. 162 F.E.R.C. ¶ 63,012 at P 78.

33. *Id.* at PP 90, 449, 456.

34. *Id.* at P 450.

35. *Id.* at P 453.

36. *Id.* at P 451.

37. 162 F.E.R.C. ¶ 63,012 at P 455.

38. *Id.* at P 458.

39. *Id.* at P 469.

service subject to the Commission's ICA jurisdiction was moot.<sup>40</sup> Accordingly, the ALJ recommended the Commission dismiss the complaint.<sup>41</sup>

2. Laurel Pipe Line Company, L.P., et al., 167 F.E.R.C. ¶ 61,210 (2019)

On April 30, 2018, Buckeye Pipe Line Company, L.P. (Buckeye) and Laurel Pipe Line Company, L.P. (Laurel) (collectively, Buckeye/Laurel) filed a petition for declaratory order requesting approval of certain terms and rates associated with Transportation Service Agreements (TSAs) for the provision of firm service from origins on Buckeye's Midwest system in Ohio and Michigan to Altoona in Central Pennsylvania, by means of a joint rate with Laurel (PDO), following a 2016 open season. The proposed service included an expansion of the Buckeye system from the Midwest to Pittsburgh, and changes to the Laurel system to allow it to transport refined petroleum products from Pittsburgh to Altoona.<sup>42</sup> Laurel's historical operation had been solely from East Coast origins to the Pittsburgh area; Laurel stated that it would provide the service in a bi-directional manner, while continuing the east-to-west service.<sup>43</sup> The PDO was protested by two eastern Pennsylvania refiners, marketers, and a products purchaser, who contended that the proposal might violate Laurel's intrastate obligations, impair Laurel's east-to-west service, was discriminatory and did not match the open season.<sup>44</sup> The protesting parties also filed a complaint against Laurel in the Pennsylvania Public Utility Commission (PaPUC), contending that the proposed bi-directional service would interfere with the certificated intrastate service by Laurel.

On April 8, 2019, Buckeye and Laurel separately filed tariffs implementing committed and uncommitted rate service as contemplated by the PDO (even though the Commission had not acted on the PDO), including initial FERC tariffs by Laurel.<sup>45</sup> The intervenors in the PDO proceeding filed protests to the tariffs, arguing that the service would impair east-to-west intrastate service, would interfere with an ongoing PaPUC complaint proceeding, and had the same flaws raised in the PDO protests, *inter alia*.<sup>46</sup> Buckeye and Laurel responded to the protests, arguing that no impairment of service would occur and that FERC should act without awaiting the result of the PaPUC proceeding.<sup>47</sup> In addition, on May 1, 2019, the PaPUC filed a letter with FERC contending that the tariffs

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40. *Id.* at P 503.

41. *Id.* at P 506.

42. Laurel Pipe Line Company, L.P. et al., 167 F.E.R.C. ¶ 61,210 at P 2 (2019) [hereinafter Laurel Pipe Line Co.].

43. *Id.*

44. Andrew Maykuth, *Pipeline advances plan to open western Pa. to Midwest refiners; here's what Philly producers stand to lose*, PHILA. INQUIRER (Oct. 8, 2019), <https://www.inquirer.com/philly/business/energy/buckeye-advances-bidirectional-penna-pipeline-detrimental-philly-refiners-20180720.html>.

45. 167 F.E.R.C. ¶ 61,210 at P 1.

46. *Id.* at P 7.

47. *Id.* at P 13.

would impair its investigation of the complaint proceeding, *inter alia*, and Buckeye and Laurel responded to that filing.<sup>48</sup>

On June 6, 2018, FERC issued its “Order Rejecting Tariffs” in *Laurel Pipe Line Company, L.P., et al.*, 167 F.E.R.C. ¶ 61,210 (2019) (Tariff Order).<sup>49</sup> In the Tariff Order, the Commission rejected the tariffs filed by both Buckeye and Laurel without prejudice to the pipelines refiling them after addressing the Tariff Order.<sup>50</sup> The Tariff Order found that Buckeye and Laurel did not demonstrate that the rates and terms of service in the proposed tariffs were just and reasonable, and particularly focused on the concerns that they could not offer the proposed service in light of questions over the legality of the service being litigated in the PaPUC complaint proceeding.<sup>51</sup> The Commission noted the existence of material issues of fact as to whether Laurel could provide the bi-directional service without reducing the existing intrastate service being litigated at the PaPUC, and noted that the service might be found to be a partial abandonment of intrastate service.<sup>52</sup> The Commission further found that these uncertainties made it impossible to resolve the lawfulness of other aspects of the rates and services, such as the proposed prorating rules, or to determine whether Buckeye and Laurel would be able to meet the terms of service in their tariffs.<sup>53</sup> The order was without prejudice to the pipelines’ submitting filings with a “fully-supported proposal resolving the deficiencies discussed above.”<sup>54</sup>

On July 8, 2019, Buckeye and Laurel jointly filed a request for rehearing of the Tariff Order, challenging the factual findings and the Commission’s reliance on the findings of the PaPuC to determine the lawfulness of interstate services, *inter alia*.

### C. Tariff and Ratemaking Issues

#### 1. BridgeTex Pipeline Company, LLC

On June 19, 2019, the Commission issued an order approving BridgeTex Pipeline Company, LLC’s (BridgeTex) petition for declaratory order including proposed tariff modifications and service terms related to an approximately 100,000 barrels per day expansion of the BridgeTex pipeline.<sup>55</sup> The Commission also approved BridgeTex’s proposal to offer discounted volume incentive rates that vary based on volume, origin and term.<sup>56</sup>

The Commission’s order capped a contested proceeding in which an anchor shipper on the pipeline, Occidental Energy Marketing, Inc. (Occidental), argued

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48. *Id.* at P 22.

49. *Id.*

50. 167 F.E.R.C. ¶ 61,210 at P 24.

51. *Id.*

52. *Id.* at P 25.

53. *Id.* at P 23.

54. *Id.* at P 27.

55. *BridgeTex Pipeline Co., LLC*, 167 F.E.R.C. ¶ 61,251 at P 3 (2019).

56. *Id.* at P 16(E).

that existing shippers on the pipeline should receive the expansion rates and service terms.<sup>57</sup> Occidental initially filed a protest on September 15, 2017, related to a BridgeTex tariff filing to implement the rules and regulations and the uncommitted and committed shipper rates for service on the BridgeTex expansion.<sup>58</sup> The protest asserted that the proposed tariff would unjustly impose a separate tariff for a portion of BridgeTex's capacity.<sup>59</sup> BridgeTex subsequently withdrew the contested tariff filing.<sup>60</sup>

After withdrawing the proposed expansion tariff, BridgeTex filed a petition for declaratory order seeking the Commission's approval of the expansion project.<sup>61</sup> Occidental then filed a protest to the petition for declaratory order,<sup>62</sup> and filed a related complaint against BridgeTex claiming that, despite Occidental's sizable commitment to BridgeTex, which provided the economic support for the construction of the pipeline, BridgeTex had refused to provide interstate service to Occidental as a committed shipper under the same rates and terms of service offered to expansion shippers.<sup>63</sup> Occidental argued, therefore, that BridgeTex's proposal unjustly discriminated against existing capacity holders like Occidental.<sup>64</sup> Occidental further argued that BridgeTex's new prorationing policy under the expansion tariff also discriminated against existing shippers.<sup>65</sup> Specifically, Occidental claimed that existing shippers' shipper history would not apply to the prorationing procedures for the expanded capacity.<sup>66</sup> Consequently, expansion shippers would have a priority in the case of a prorationing event over existing shippers who chose to participate in the expanded capacity.<sup>67</sup>

The Commission consolidated the related BridgeTex proceedings and set the matter for hearing before an administrative law judge.<sup>68</sup> Occidental ultimately withdrew its protest and complaint on February 19, 2019, after Occidental and BridgeTex resolved their dispute.<sup>69</sup> Thereafter, the chief administrative law judge terminated the hearing in the consolidated proceedings and the Commission issued its declaratory order approving the BridgeTex expansion project.<sup>70</sup>

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57. *Id.* at P 3.

58. Motion to Intervene and Protest of Occidental Energy Mkt. Inc., at 1, BridgeTex Pipeline Co. (2017) (No. IS17-610-000).

59. *Id.*

60. Withdrawal of BridgeTex FERC Nos. 4.0.0 and 5.0.0, F.E.R.C. (Sept. 18, 2017) (No. IS17-610-000).

61. Notice of Petition for Declaratory Order, *BridgeTex Pipeline Co., LLC*, 82 Fed. Reg. 51,625 (Nov. 7, 2017).

62. Protest and Motion to Consolidate of Occidental Energy Mktg., Inc. at 1, BridgeTex Pipeline Co. (2017) (No. OR18-3-000).

63. 167 F.E.R.C. ¶ 61,210 at PP 2, 7.

64. *Id.* at P 15.

65. *Id.* at P 14.

66. *Id.* at P 4.

67. *Id.*

68. *BridgeTex Pipeline Co., LLC*, 162 F.E.R.C. ¶ 61,036, at P 33 (2018).

69. Notice of Withdrawal of Protest of Occidental Energy Mktg., Inc. at 1, F.E.R.C. (Feb. 19, 2019) (No. 18-3-000).

70. 167 F.E.R.C. ¶ 61,251 at PP 21-22.



## 2. Colonial Pipeline Complaint Cases

On September 20, 2018, FERC consolidated and set for evidentiary hearing the joint complaint of Epsilon Trading, LLC, Chevron Products Company, and Valero Marketing and Supply Company (collectively, Epsilon Complainants), BP Products North America, Inc., Trafigura Trading LLC, and TCPU, Inc. (collectively, BP Complainants), TransMontaigne Product Services LLC (TransMontaigne), and CITGO Petroleum Corporation (CITGO) against Colonial Pipeline Company (Colonial) challenging the lawfulness of Colonial's tariff rates and practices related to transmix and product losses.

On February 5, 2019, FERC consolidated a joint complaint of Southwest Airlines Co. and United Aviation Fuels Corporation against Colonial with the *Epsilon Trading* complaint proceeding.<sup>71</sup> On March 25, 2019, FERC consolidated a complaint of American Airlines, Inc. against Colonial with the *Epsilon Trading* complaint proceeding.<sup>72</sup> On May 22, 2019, FERC consolidated a complaint of Metroplex Energy, Inc. against Colonial with the Epsilon Trading complaint proceeding.<sup>73</sup> Each of the complaints challenged the lawfulness of all of Colonial's tariff rates (grandfathered, indexed, and market-based) for transportation of petroleum products for all origins and destinations on Colonial's system, as well as Colonial's practices and charges related to transmix and product losses.<sup>74</sup> On May 24, 2019, the Commission's chief administrative law judge issued an order extending the Track III procedural time standards to reflect a hearing commencement date of June 16, 2020 and an initial decision deadline of February 26, 2021.<sup>75</sup>

On June 26, 2019, FERC dismissed complaints of CITGO and TransMontaigne, Product Services LLC, and a joint complaint of the BP Complainants, the Epsilon Complainants, Phillips 66 Company, Southwest Airlines Co., and United Aviation Fuels Corporation challenging Colonial's December 1, 2018, notice of an increase related to its product loss allocation charges.<sup>76</sup> The Commission dismissed the complaints because product loss allowance issues had already been set for hearing in the Consolidated Proceeding.

## 3. Guttman Energy, Inc.

In *Guttman Energy, Inc.*<sup>77</sup> the Commission ruled on the Initial Decision<sup>78</sup> of a complaint filed against the rates and market-based rate authority of Buckeye

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71. *Southwest Airlines and United Aviation Fuels Corp., et al. v. Colonial Pipeline Co., et al.*, 166 F.E.R.C. ¶ 61,094 at P 4 (2019).

72. *Am. Airlines, Inc. v. Colonial Pipeline Co. et al.*, 166 FERC ¶ 61,214 at P 9 (2019).

73. *Metroplex Energy, Inc. v. Colonial Pipeline Co.*, 167 FERC ¶ 61,165 at P 9 (2019) (collectively, Consolidated Proceeding).

74. *Id.* at PP 7, 8, 14.

75. Order of Chief Judge Extending Track III Procedural Time Standards, FERC Docket No. OR18-7-002, at 3-4 (May 24, 2019).

76. *CITGO Petroleum Corp., et al. v. Colonial Pipeline Co.*, 167 F.E.R.C. ¶ 61,266 at P 5 (2019).

77. *Guttman Energy Inc., et al. v. Buckeye Pipe Line Co., L.P. et al.*, 161 F.E.R.C. ¶ 61,180 (2017) (Op. No. 558).

Pipe Line Company (Buckeye). In Op. No. 558, the Commission affirmed the Initial Decision's findings that Buckeye had significant market power in the Harrisburg destination market and lacked significant market power in the Philadelphia origin market but reversed the Initial Decision as to the Pittsburgh market, finding that Buckeye had market power in the Pittsburgh market as well.<sup>79</sup> Op. No. 558 also affirmed the Initial Decision's conclusion that the interstate character of shipments that had been challenged were in fact interstate, and not intrastate shipments.

Buckeye filed a request for rehearing regarding a number of the Commission's findings with respect to market power, and in Op. No. 558-A, the Commission denied rehearing as to all issues.<sup>80</sup>

Buckeye argued that Op. No. 558 improperly placed the burden of proof on Buckeye to show which used alternatives were good alternatives, and more broadly placed the burden of justifying the market-based rate authority on the pipeline.<sup>81</sup> In Order No. 558-A, the Commission held that it had properly allowed the complainants to meet their burden of proof under Order No. 572 by requiring them to show reasonable grounds that the pipeline has developed significant market power, and that there was no obligation to show changed circumstances relative to the facts in the original order granting market-based rate authority.<sup>82</sup>

The Commission also reaffirmed its conclusion in Op. No. 558 that it was appropriate to use Buckeye's current market-based rate as an appropriate proxy for the competitive rate in the "SSNIP" test for market power – holding that there was no obligation to require complainants to identify the marginal supplier, that there was no obligation on the complainants to demonstrate that Buckeye's rates were above a competitive level, because market structure and share information could support the conclusion that the pipeline had significant market power.<sup>83</sup> Similarly, the Commission affirmed its conclusion in Op. No. 558 that the presumption that used alternatives were good alternatives did not apply in a complaint case in which the prevailing rate may be a supra-competitive rate due to the exercise of market power,<sup>84</sup> because it was appropriate not to ignore the potential that the presence of monopolistic prices may result in the "improper inclusion of alternatives."<sup>85</sup>

Regarding the Pittsburgh market, the Commission rejected Buckeye's arguments that it had wrongly accepted the complainants' witness' revised market

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78. *Guttman Energy, Inc. et al. v. Buckeye Pipe Line Co., L.P., et al.*, 155 F.E.R.C. ¶ 63,008 (2016) (ID).

79. *Guttman Energy, Inc. et al. v. Buckeye Pipe Line Co., L.P., et al.*, 164 F.E.R.C. ¶ 61,025 at P 2 (2018) (Op. No. 558-A).

80. *Id.* at P 1.

81. *Id.* at P 41.

82. *Id.*

83. *Id.* at P 16.

84. 164 F.E.R.C. ¶ 61,025 at P 15.

85. *Id.* at P 27.

definition on rebuttal,<sup>86</sup> rejected Buckeye's contentions regarding market consumption levels,<sup>87</sup> rejected Buckeye's effective capacity estimate for a local refinery,<sup>88</sup> and rejected Buckeye's arguments for an alternative HHI calculation based on Commission Staff's witness' estimates, also reaffirming that it has the authority to modify the parties' proffered HHI calculations in a market power context.<sup>89</sup>

The Commission denied rehearing on a number of other issues, including its treatment of the pro-competitive effect of waterborne shipments, the significance of planned expansions to Pittsburgh, and the decline in Buckeye shipments that occurred following commencement of service by the competing Sunoco Allegheny Access project.<sup>90</sup> The Commission considered the water competitive issue barred by its absence on exceptions,<sup>91</sup> and on the issue of Allegheny Access, the Commission found that its effects were already incorporated into the HHI calculations, and that to do otherwise would be double-counting the competitor.<sup>92</sup> Regarding the impact on volumes of Allegheny Access, the Commission faulted the use of post-record data, noting that a new application could be filed based on post-record data, and further stated that considering such data could result in double-counting.<sup>93</sup> As to the presence of competitive expansions, the Commission held that expansions alone were not inconsistent with the pipeline having market power due to excess demand.<sup>94</sup>

Buckeye also sought rehearing on the findings as to the Harrisburg market, regarding the changed market definition adopted by the ID and Op. No. 558 (adding Berks county to the Harrisburg market) and the Commission's exclusion of competitive trucking from external supply sources.<sup>95</sup> On the question of market definition, the Commission reaffirmed that it did not require that in every market-based rate case that all counties within "a certain area or circumference must be evaluated," and confirmed its reliance on the methodology of the complainants' witness.<sup>96</sup> As to trucking from external sources, the Commission rejected the contention that it should rely on the findings in the 1990 order on market power, and that it properly relied on the factual findings of the ID that the evidence did not support trucking as an alternative.<sup>97</sup>

The Commission also denied rehearing regarding several other methodological issues.<sup>98</sup> It denied rehearing as to its acceptance of the complainants' wit-

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86. *Id.* at P 29.

87. *Id.* at P 89.

88. *Id.* at P 36.

89. 164 F.E.R.C. ¶ 61,025 at P 42.

90. *Id.* at PP 50-54.

91. *Id.* at P 51.

92. *Id.* at P 52.

93. *Id.* at 53.

94. 164 F.E.R.C. ¶ 61,025 at P 54.

95. *Id.* at PP 55-57.

96. *Id.* at P 62.

97. *Id.* at P 63.

98. *Id.* at P 73.

ness' delivered price methodology, which it found was not inconsistent with prior precedent.<sup>99</sup> Further, the Commission reaffirmed its rejection of Buckeye's effective capacity calculation for HHI purposes,<sup>100</sup> its rejection of a "linear attraction" model,<sup>101</sup> and its rejection of certain comparative rate analyses proffered to show that Buckeye's rates were consistent with competitive pricing.<sup>102</sup>

#### D. Petitions for Declaratory Order

##### 1. Targa NGL Pipeline Company LLC

Following a five-month hiatus in which the Commission did not issue orders addressing petitions for declaratory orders filed by crude oil and liquids pipelines, the Commission issued an order in *Targa NGL Pipeline Company LLC (Targa)*,<sup>103</sup> adopting a new policy regarding initial committed tariff rates offered to prospective committed shippers in a non-discriminatory open season. In recent years, the Commission routinely approved requests to treat initial committed rates as settlement rates under section 342.4 of the Commission's regulations,<sup>104</sup> as opposed to initial rates under section 342.2 of the Commission's regulations,<sup>105</sup> if the rates are set forth in a transportation agreement executed during an open and non-discriminatory open season. In approving these earlier requests, the Commission found that such contract rates entered into pursuant to a valid open season were consistent with the spirit of the Commission's regulations for settlement rates.<sup>106</sup>

In *Targa*, the Commission broke from precedent when it approved Targa NGL Pipeline Company LLC's (Targa's) proposed rate structure and terms of service for a pipeline system to be developed through a combination of newly constructed and leased capacity.<sup>107</sup> Like other petitions for declaratory order, Targa requested that the Commission rule that the committed rates provided in the open season transportation agreement be treated as settlement rates during the term of the agreement.<sup>108</sup>

The Commission determined that the Targa open season had been conducted in an open and non-discriminatory manner and approved the rate structure proposed under the transportation agreements.<sup>109</sup> However, after noting that the only shipper who participated in the open season was an affiliate of Targa, the Commission concluded that section 342.2 of the Commission's regulations ad-

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99. 164 F.E.R.C. ¶ 61,025 at PP 73-80.

100. *Id.* at PP 89-90.

101. *Id.* at PP 91-92.

102. *Id.* at PP 93-95.

103. *Targa NGL Pipeline Co., LLC*, 166 F.E.R.C. ¶ 61,179 (2019).

104. 18 C.F.R. § 342.4(c) (2019).

105. 18 C.F.R. § 342.2 (2019).

106. *Tesoro High Plains Pipeline Co. and Tesoro Logistics Operations, LLC*, 148 F.E.R.C. ¶ 61,129 at PP 14-15 (2014).

107. 166 F.E.R.C. ¶ 61,179 at PP 13-17.

108. *Id.* at P 11.

109. *Id.* at P 14.

“(1) file a cost of service supporting the initial rate under section 342.2(a), or (2) file an affidavit under section 324.2(b) that the rate is agreed to by a non-affiliated shipper who intends to use the service.”<sup>110</sup>

Since the issuance of *Targa*, the Commission has conditioned its approval of petitions for declaratory order on the carrier supporting its proposed initial committed rates by either filing an affidavit stating that the committed rates have been agreed to by a non-affiliated shipper who intends to use the service or by providing a cost of service justification for the initial rates.<sup>111</sup> A Request for Rehearing of the *Targa* order is currently pending before the Commission.<sup>112</sup>

## 2. Cactus II Pipeline LLC

On June 3, 2019, the Commission issued an order approving, in part, a petition for declaratory order filed by Cactus II Pipeline LLC (Cactus) for a new pipeline project consisting of new, leased, and expanded pipeline facilities capable of transporting 585,000 barrels of crude petroleum per day to gulf coast refinery and export markets.<sup>113</sup>

In *Cactus*, the carrier held two open seasons that included different minimum volume commitments and transportation agreement terms.<sup>114</sup> Cactus’ first open season was designed to attract an anchor shipper for the project with a volume commitment of 300,000 barrels per day.<sup>115</sup> The anchor shipper transportation agreement tied the initial term of the agreement to the aggregate number of barrels shipped under the agreement rather than a specified number of years.<sup>116</sup> In addition, the anchor shipper transportation agreement contained an “anticipated time equivalent” term in years based on the aggregate barrels committed, taking into account any ramp-up period, relevant to the rate that the anchor shipper will pay.<sup>117</sup>

Cactus’ second open season commenced on the final day of the first open season and required shippers to transport a fixed quarterly volume of 25,000, 50,000, or 75,000 barrels per day multiplied by the number of days in a quarter.<sup>118</sup> Shippers participating in the second open season were permitted to select

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110. *Id.* at P 19.

111. See *EnLink Crude Pipeline, LLC*, 166 F.E.R.C. ¶ 61,225 (2019); *EPIC Crude Pipeline, LP*, 167 F.E.R.C. ¶ 61,026 (2019); *EnLink NGL Pipeline LP*, 167 F.E.R.C. ¶ 61,024 (2019); *Plantation Pipe Line Co.*, 167 F.E.R.C. ¶ 61,025 (2019); *Sunoco Pipeline, L.P.*, 167 F.E.R.C. ¶ 61,159 (2019); *Cactus II Pipeline LLC*, 167 F.E.R.C. ¶ 61,205 (2019); *BridgeTex Pipeline Co., LLC*, 167 F.E.R.C. ¶ 61,251 (2019); *Medallion Pipeline Co., LLC*, 167 F.E.R.C. ¶ 61,265 (2019).

112. Request for Rehearing, *Targa NGL Pipeline Co., LLC*, FERC Docket No. OR18-30-000 (Apr. 10, 2019).

113. *Cactus II Pipeline LLC.*, 167 F.E.R.C. ¶ 61,205 at PP 1-2 (2019).

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

115. *Id.* at P 3.

116. *Id.* at P 5.

117. Petition for Declaratory Order, *Cactus II Pipeline LLC*, FERC Docket No. OR18-32-000, at P 18 n.21 (Aug. 9, 2018).

118. 167 F.E.R.C. ¶ 61,205 at PP 7, 11-12.

a seven- or ten-year term for the volume commitment with up to three renewal periods.<sup>119</sup> The first renewal period was for a three-year term and the second and third renewal periods were for two-year terms.<sup>120</sup>

Cactus offered a matrix rate structure in the transportation agreements with tiered rates and potential discounts from the tiered rates based on the total annual average shipments on the pipeline, the term of the agreement, whether shipments were made to eligible origin points, and whether the shipper made an acreage dedication in addition to its volume commitment.<sup>121</sup> The transportation agreements also contained most favored nations provisions guaranteeing shippers the right to receive lower committed rates provided to other shippers as specified in their respective transportation agreements.<sup>122</sup>

The Commission approved Cactus' petition for declaratory order, finding that both open seasons offered all interested parties an equal opportunity to become committed shippers, and that Cactus' willingness to offer the anchor shipper new terms and conditions offered in the second open season was consistent with Commission policy.<sup>123</sup> The order further found that basing the initial term of the anchor shipper's transportation agreement on aggregate barrels shipped, rather than on a specified number of years, was reasonable because all potential shippers had an opportunity to accept the terms of the transportation agreement in the first open season.<sup>124</sup> Finally, the Commission approved the tiered rate structure as proposed by Cactus and the most favored nations provisions in the transportation agreements.<sup>125</sup> Following the precedent set in *Targa*, described above,<sup>126</sup> the Commission conditioned approval of Cactus' request for treatment of its committed rates as settlement rates upon Cactus' subsequent provision of a sworn affidavit that the rates were agreed to by at least one non-affiliated shipper or its submission of a cost of service rate.<sup>127</sup>

The Commission denied, however, Cactus' request to approve a provision in the transportation agreements that provided that, upon the expiration of the transportation agreements, Cactus retained the option to offer the capacity underlying the expiring agreement in a future open season.<sup>128</sup> In rejecting Cactus' proposal, the order distinguished the Commission's 2018 ruling in *CCPS Transportation, LLC*, wherein the Commission approved CCPS's proposal to re-contract a portion of capacity on the expiration of the transportation agreements shortly before the contracts were to expire.<sup>129</sup> The order concluded that Cactus'

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119. *Id.* at P 7.

120. *Id.*

121. *Id.* at PP 7-8, 12.

122. *Id.* at P 17.

123. 167 F.E.R.C. ¶ 61,205 at PP 26, 27-28.

124. *Id.* at P 30.

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

126. *See generally* 166 F.E.R.C. ¶ 61,179.

127. *Id.* at P 29.

128. *Id.* at P 38.

129. *Id.* at P 38 n.58 (citing *CCPS Transportation, LLC*, 163 F.E.R.C. ¶ 61,206 (2018)).

request that the Commission approve the carrier's right to re-contract capacity was premature and not ripe for review.<sup>130</sup>

### 3. EnLink NGL Pipeline, LP

The Commission also granted, subject to conditions, a petition for declaratory order filed by Enlink NGL Pipeline, LP (EnLink) relating to an expansion of its existing natural gas liquids (NGL) pipeline to add approximately 54,000 barrels per day of capacity through the addition of pumping stations along the pipeline.<sup>131</sup> In the petition for declaratory order, Enlink took steps to maintain parity between the only existing committed shipper on the pipeline and new committed shippers using expansion capacity; EnLink allowed the only existing committed shipper the opportunity to participate in the open season and to amend its existing transportation agreement to incorporate additional receipt or delivery points, with shipments to or from the new receipt and delivery points, to count toward the volume commitment in the existing transportation agreement.<sup>132</sup>

The Commission granted Enlink's petition, concluding that the open season offered all interested parties an equal opportunity to become committed shippers on the pipeline.<sup>133</sup> The Commission approved the first right of committed shippers to submit binding nominations to ship on an expansion of the EnLink system without first holding an open season,<sup>134</sup> and also approved EnLink's proposed tiered rates, which vary based on the volume commitment and contract term.<sup>135</sup> The order concluded, however, that "service on the expansion capacity is a new service."<sup>136</sup> The effect of this finding is that, when EnLink files to implement initial committed rates for the expansion, Enlink must file either a cost of service rate or a sworn affidavit that the rate is agreed to by at least one non-affiliated shipper,<sup>137</sup> consistent with *Targa*.<sup>138</sup>

### 4. Enterprise Crude Pipeline LLC

The Commission denied an uncontested petition for declaratory order filed by Enterprise Crude Pipeline LLC (Enterprise) on undue discrimination grounds related to a completed 171,000 barrels per day expansion of Enterprise's West Texas and New Mexico system.<sup>139</sup> The order departs from the Commission's practice of approving uncontested petitions for declaratory orders.

In denying the petition for declaratory order, the order concluded that Enterprise failed to show that the minimum open season terms, which required

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130. *Id.* at P 38.

131. 167 F.E.R.C. ¶ 61,024 at PP 2, 16.

132. *Id.* at P 6.

133. *Id.* at PP 16, 17.

134. *Id.* at PP 14, 16.

135. *Id.* at PP 14, 16 (citing *Crosstex NGL Pipeline, L.P.*, 146 F.E.R.C. ¶ 61182, at P 29 (2014)).

136. 167 F.E.R.C. ¶ 61,024 at P 18.

137. *Id.* at P 18.

138. 166 F.E.R.C. ¶ 61,179 at P 19.

139. *Enterprise Crude Pipeline LLC*, 166 F.E.R.C. ¶ 61,224 at P 4 (2019).

shippers to make a minimum ship-or-pay commitment of 100,000 barrels per day for a minimum of ten years,<sup>140</sup> “have met the requirements of the anti-discrimination provisions of the ICA.”<sup>141</sup> Finding that the minimum volume commitment was insufficient to accommodate more than one shipper, the order concluded that “Enterprise has not shown that its minimum tender requirement has not had the effect of giving undue or unreasonable preference or advantage to large shippers.”<sup>142</sup> In so ruling, the Commission did not cite to prior Commission orders rejecting minimum open season criteria.<sup>143</sup> Rather, the Commission cited to a nearly century-old Interstate Commerce Commission case, *Brundred Brothers v. Prairie Pipe Line Co.*,<sup>144</sup> which provided that minimum-tender requirements (as opposed to minimum open criteria) must be “justified by operational reasons.” The order concludes that an excessive minimum tender requirement, whether through a general term of service that applies to monthly nominations for walk-up capacity or through an open season, discriminates against shippers who cannot meet the required minimum.<sup>145</sup>

#### 5. Iron Horse Pipeline, LLC

On April 11, 2019, the Commission approved a petition for declaratory order filed by Iron Horse Pipeline, LLC (Iron Horse) for a pipeline project consisting of 40 miles of new pipeline and the conversion of approximately 40 miles of a natural gas pipeline into a crude oil pipeline.<sup>146</sup> The Commission approved Iron Horse’s proposal to charge committed shippers agreed upon contract rates that vary inversely with the size of a shipper’s volume commitment, with higher volume commitments receiving higher discounts relative to the base committed rate.<sup>147</sup> The Commission noted that Iron Horse had complied with the Commission’s interpretation of 18 C.F.R. § 342.2(b), discussed above in *Targa*,<sup>148</sup> by filing a sworn affidavit stating that the rate was agreed to by at least one non-affiliated shipper who intended to use the service.<sup>149</sup>

#### 6. Plantation Pipe Line Company

The Commission clarified the amount of capacity that must be reserved for uncommitted shippers after an expansion project is placed into service. In *Plantation Pipe Line Company*, the Commission weighed Plantation Pipe Line Com-

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140. *Id.*

141. *Id.* at P 8.

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

143. *See generally id.*

144. 166 F.E.R.C. ¶ 61,224 at P 13 (citing *Brundred Brothers v. Prairie Pipe Line Company*, 68 I.C.C. ¶ 465-66 (1922)).

145. *Id.* at P 12.

146. *Iron Horse Pipeline, LLC*, 167 F.E.R.C. ¶ 61,027 (Apr. 11, 2019).

147. *Id.* at P 6.

148. *Id.* at P 8 n.8.

149. *Id.* at P 14.



pany's (Plantation) proposal to expand its refined product pipeline system.<sup>150</sup> Plantation offered yearly volume commitment transportation agreements during an open season and proposed to allocate 20,000 barrels per day out of 21,000 total barrels per day of expansion capacity to committed shippers.<sup>151</sup> In its petition for declaratory order, Plantation argued that subscribing 100 percent of the expansion capacity is consistent with Commission precedent because uncommitted shippers would still have access to 70 percent of Plantation's total system capacity.<sup>152</sup>

The Commission approved Plantation's proposed allotment of expansion capacity for uncommitted shippers, finding that "Plantation's offer of 100 percent of expansion capacity to committed shippers in its open season was appropriate because the requirement to reserve capacity on the route for uncommitted shippers is fulfilled by existing capacity."<sup>153</sup> Recognizing past holdings in *Marathon-Ozark*,<sup>154</sup> *High Plains*,<sup>155</sup> and *Marathon*,<sup>156</sup> the Commission determined that Plantation reserved sufficient capacity for uncommitted shippers after considering the aggregate, system-wide uncommitted shipper capacity and not by reviewing the expansion capacity in isolation.<sup>157</sup>

#### 7. ONEOK Elk Creek Pipeline, L.L.C.

On December 20, 2018, ONEOK Elk Creek Pipeline, L.L.C. (ONEOK) filed a petition for declaratory order in Docket No. OR19-13 related to a proposed 900-mile NGL pipeline.<sup>158</sup> The petition for declaratory order requested Commission action on the petition by March 31, 2019.<sup>159</sup> As of the date of this report, the petition remains pending before the Commission.

To implement initial rates so that service could commence on the pipeline, ONEOK filed a cost-of-service study to implement initial rates to be effective June 1, 2019.<sup>160</sup> On June 28, 2019, the Commission rejected the tariff filing, finding that the amended tariff "does not meet the requirements of 18 C.F.R. § 342.2 regarding the initial Committed Rates."<sup>161</sup> With little explanation regarding the perceived deficiencies in ONEOK's cost-of-service study, the Commission held that "[a]n oil pipeline bears the burden of demonstrating that proposed rates and changes to its tariff are just and reasonable. Because we find that

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150. 167 F.E.R.C. ¶ 61,025 at P 13.

151. *Id.* at PP 7, 16.

152. *Id.* at P 7.

153. *Id.* at P 13.

154. *Marathon Pipe Line LLC and MPLX Ozark Pipe Line LLC*, 164 F.E.R.C. ¶ 61,014 (2018).

155. *Tesoro High Plains Pipeline Company LLC and Tesoro Logistics Operations, L.L.C.*, 148 F.E.R.C. ¶ 61,129 (2014).

156. *Marathon Pipe Line LLC*, 152 F.E.R.C. ¶ 61,005 (2015).

157. 167 F.E.R.C. ¶ 61,025 at P 13.

158. Notice of Petition for Declaratory Order, *ONEOK Elk Creek Pipeline, LLC*, 84 Fed. Reg. 5 (Jan. 8, 2019).

159. *ONEOK Elk Creek Pipeline, L.L.C.*, 167 F.E.R.C. ¶ 61,227 at PP 2-3 (2019).

160. *Id.* at P 1.

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

ONEOK did not meet its burden, we reject the Tariff without prejudice.”<sup>162</sup> On July 2, 2019, ONEOK refiled separate tariff filings to implement initial uncommitted and committed rates on the pipeline that are pending before the Commission.

Commissioner Glick issued a separate concurrence to the order rejecting ONEOK’s tariff filing to implement initial rates.<sup>163</sup> The concurrence expresses Commissioner Glick’s belief that:

the Interstate Commerce Act and associated Commission regulations do not permit the Commission to accept a long-term contract that a carrier files as part of an initial rate filing under the cost-of-service method that lacks cost-of-service justification and sufficient consumer protections for the duration of the contract. Any such long-term contract necessitates a rigorous, fact-specific review by the Commission to ensure we vigorously defend against the potential for carriers to exercise market power to charge rates that are contrary to the Interstate Commerce Act and detrimental to consumers.<sup>164</sup>

The concurrence also expresses Commissioner Glick’s belief that “the Commission should revisit its settlement rate methodology for rate changes, set forth in 18 C.F.R. section 342.4(c), because it is logically inconsistent with the initial rate regulation.”<sup>165</sup> Specifically, Commissioner Glick opined that it is

illogical and inconsistent with the spirit of the Commission’s oil pipeline rate regulation regime under the Interstate Commerce Act to require consumer protections to justify an initial rate, but to allow a carrier to exercise market power without check beyond the initial rate by entering into a long-term settlement rate devoid of consumer protections.<sup>166</sup>

#### *E. Other*

##### *1. Chevron Pipe Line Co., 165 F.E.R.C. ¶ 61,069 (2018)*

On October 31, 2018, FERC issued an order denying Chevron Pipe Line Company’s (CPL’s) request for rehearing of an order issued in June 2018.<sup>167</sup> The earlier order (Initial CPL Order) rejected CPL’s proposal to implement a rate surcharge on its Breton Sound pipeline system to recover the capital investment and expenses associated with new methanol-treatment facilities.<sup>168</sup> In denying rehearing, FERC reiterated that surcharges are appropriate where the costs at issue are: (i) necessitated by factors beyond the pipeline’s control; (ii) extraordinary and nonrecurring; and (iii) not industry-wide.<sup>169</sup> Noting that it generally disfavors surcharges, FERC found that CPL’s methanol-treatment costs were

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162. *Id.* at P 4.

163. Comm’r Richard Glick, Fed. Reg. Energy Comm’n, Concurrence Regarding ONEOK Elk Creek Pipeline, L.L.C. at P 1 (July 3, 2019).

164. *Id.* at P 3.

165. *Id.* at P 6.

166. *Id.*

167. *Chevron Pipe Line Co.*, 165 F.E.R.C. ¶ 61,069 at P 1 (2018).

168. *Chevron Pipe Line Co.*, 163 F.E.R.C. ¶ 61,238 at P 22 (2018).

169. 165 F.E.R.C. ¶ 61,069 at P 8.

neither extraordinary nor non-recurring and, instead, “represent the continued operational and capital costs associated with oil pipeline operations.”<sup>170</sup>

Among its arguments on rehearing, CPL claimed that, contrary to FERC’s finding in the Initial CPL Order, a change in federal law or regulation is not a stand-alone factor on which FERC should determine the appropriateness of a surcharge.<sup>171</sup> In response, FERC stated that it did not hold that the presence of a federal regulation is itself a stand-alone requirement.<sup>172</sup> Instead, its references to federal regulations in prior surcharge cases simply *supported* the conclusion that the costs in those cases were not suitable for recovery through the oil pipeline index.<sup>173</sup>

FERC also rejected CPL’s assertions that methanol treatment facilities are unique to deep-water production, and that few pipelines face methanol contamination on the scale faced by CPL’s system.<sup>174</sup> To the contrary, FERC concluded that CPL’s costs are capital and operational costs associated with typical oil pipeline transportation operations connected to deep-water production.<sup>175</sup> It stressed that “each pipeline encounters unique cost experiences, which, if taken to the extreme, include costs that should be excluded from the [oil pipeline] index.”<sup>176</sup> It categorized the methanol-treatment costs as associated with “maintaining quality,” a “common function of oil pipeline operations.”<sup>177</sup>

Finally, CPL argued that a surcharge is more consistent with FERC’s cost-causation principles because only a small number of shippers are responsible for the methanol-contaminated crude on its system.<sup>178</sup> Again, FERC disagreed, finding it appropriate to distribute the costs of methanol treatment among all shippers on the CPL system because CPL was unable to identify the specific shippers and platforms causing the methanol contamination issue, and because all shippers on CPL’s Breton Sound pipeline benefit from methanol treatment.<sup>179</sup>

## 2. *Southwest Airlines v. FERC*, 926 F.3d 851 (D.C. Cir. 2019)

On April 12, 2019, the D.C. Circuit remanded FERC’s order dismissing two complaints against oil pipeline index-based rate increases implemented by SFPP.<sup>180</sup> The D.C. Circuit found that FERC departed from its previous practice of evaluating such index increases based on information available prior to the

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170. *Id.* at PP 10, 14-16.

171. *Id.*

172. *Id.*

173. *Id.* at PP 26-27.

174. 165 F.E.R.C. ¶ 61,069 at P 10.

175. *Id.* at P 31.

176. *Id.*

177. *Id.* at P 32.

178. *Id.*

179. 165 F.E.R.C. ¶ 61,069 at P 36.

180. *Southwest Airlines v. FERC*, 926 F.3d 851 (D.C. Cir. 2019).

rate increase and remanded for the Commission to “explain or reconsider its decision to take into account post-rate-increase information.”<sup>181</sup>

The case began in June 2014 when several shippers filed complaints against SFPP’s 2012 and 2013 index-based rate increases, claiming that SFPP was over-recovering its costs at the time it increased its rates and that the data from page 700 of SFPP’s FERC Form 6 showed SFPP’s costs had decreased in the two years preceding each rate increase.<sup>182</sup> Accordingly, the rate increases failed the Commission’s “substantially exacerbate test.”<sup>183</sup> The Commission dismissed the protests because “SFPP’s Page 700s on file at the time of the complaints show[ed] that the difference between SFPP’s costs and revenues declined from . . . 2011 [to] 2012 [to] 2013.”<sup>184</sup> Therefore, based on this trend that included evidence from SFPP’s page 700 at the time of the complaints in 2014, the Commission determined that the index increases “did not, in fact, substantially exacerbate the pre-existing difference between SFPP’s revenues and costs.”<sup>185</sup> Instead of applying its prior policy that the only relevant data for evaluating index rate changes must come from the two years preceding the index change, the Commission stated that policy applied to protests, not complaints filed at least a year after the rate increase.<sup>186</sup> On rehearing, the Commission further explained that “it would be inefficient and inequitable to ‘ignore evidence that was available at the time the . . . [s]hippers filed their complaints’ when that information ‘undermines the basis of the . . . Shippers’ claim.’”<sup>187</sup>

The Court found that FERC presented an inadequate justification for not following its policy for two reasons.<sup>188</sup> First, in several orders, FERC explained that “it relies on pre-rate-increase information not because it lacks more recent evidence, but rather because prior-year data reflects precisely what indexing is supposed to measure: cost changes in the previous year.”<sup>189</sup> Second, the Court pointed out that “in at least three previous complaint cases, the Commission focused solely on pre-rate-increase information from the preceding two years even though post-rate-increase information was presumably available at the time the complaints were filed.”<sup>190</sup> Accordingly, the Court held that the Commission’s rationale, that the shippers waited for at least a year to file their complaints, was insufficient in light of other complaint cases in which the Commission relied on pre-rate-increase data when updated data was also available.<sup>191</sup>

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181. *Id.* at 852.

182. *Id.* at 854.

183. *Id.* at 855.

184. *Id.* (quoting *Hollyfrontier Refining & Mktg., LLC v. SFPP, L.P.*, 157 F.E.R.C. ¶ 61,186, at P 1 (2016)).

185. *Southwest Airlines*, 926 F.3d at 854-855.

186. *Id.*

187. *Id.* (quoting *Hollyfrontier Refining & Marketing*, 162 F.E.R.C. ¶ 61,232 at P 14 (2016)).

188. *Id.* at 856.

189. *Id.* at 856.

190. *Southwest Airlines*, 926 F.3d at 857.

191. *Id.* at 857-858.

The Court also questioned whether the Commission's new interpretation was consistent with the overall purpose of indexing.<sup>192</sup> The shippers contended that use of data for the period after the rate increase becomes effective contravenes the premise of indexing, which is to recover cost increases for the period before the rate increase.<sup>193</sup> Given FERC's new interpretation, the Court wondered, "[a]re index-based rate increases designed to compensate pipelines for cost increases actually incurred in the previous calendar year, costs likely incurred in the current calendar year, or, depending on the type of proceeding, both?"<sup>194</sup>

For all of these reasons, the Court remanded the Order to FERC to allow the Commission an opportunity to "offer a reasoned explanation that either persuasively distinguishes or knowingly abandons its prior inconsistent practice."<sup>195</sup> As part of its explanation, the Commission "must 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."<sup>196</sup> The Court's mandate formally remanding the case to the Commission issued on August 6, 2019, so there has not been sufficient time for FERC to act as of the publication of this report.<sup>197</sup> The Court prescribed no time limit for the Commission's consideration of the remanded issues.

## II. PRESIDENTIAL PERMITS

### A. *Keystone XL Pipeline*

TransCanada, now known as TC Energy, received a presidential permit from President Trump on March 29, 2019 (the Keystone XL Presidential Permit), authorizing the Company to construct, connect, operate, and maintain pipeline facilities for the Keystone XL pipeline at the U.S.-Canada border.<sup>198</sup> The Keystone XL Presidential Permit specifically authorizes TransCanada to construct a portion of the 36-inch diameter Keystone XL pipeline that will carry crude oil from the tar sands in Canada into the U.S. at the international border between the U.S. and Canada, extending about 1.2 miles into the U.S. into Phillips County, Montana to (and including) the first mainline shut-off valve.<sup>199</sup> The Keystone XL pipeline will continue through Montana, South Dakota, and Nebraska where it will connect with the existing Keystone XL pipeline system that serves refineries in Illinois and Texas.

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192. *Id.* at 858.

193. *Id.*

194. *Id.*

195. *Southwest Airlines*, 926 F.3d at 859.

196. *Id.*

197. *Id.* at 815.

198. WHITEHOUSE.GOV, MEMORANDA FROM PRES. DONALD J. TRUMP (Mar. 29, 2019), <https://www.whitehouse.gov/presidential-actions/presidential-permit> [hereinafter *Keystone XL Presidential Permit*].

199. *Id.*

The Keystone XL Presidential Permit expressly supersedes and revokes a prior presidential permit issued by the Department of State on March 23, 2017,<sup>200</sup> and appears to include the entire project within the scope of the Keystone XL Presidential Permit by broadly defining the “Facilities” subject to the permit.<sup>201</sup> The issuance of the Keystone XL Presidential Permit follows lengthy procedural and legal challenges to the Keystone Pipeline XL project, and initiated several new ones.<sup>202</sup> In response to opposition from environmentalists, the Trump administration indicated that it would complete a supplemental analysis under the National Environmental Policy Act (NEPA) although a supplement is not required.<sup>203</sup> The Indigenous Environmental Network and North Coast Rivers Alliance filed suit on April 5, 2019, in federal district court in Montana seeking declaratory and injunctive relief.<sup>204</sup> The complaint makes several arguments, including that the President lacked authority to issue the Presidential Permit because the Constitution’s Property Clause granted *Congress* the authority to regulate federal lands and Congress directed that to the Bureau of Land Management.<sup>205</sup> Based on that argument, the plaintiffs assert that the Bureau of Land Management has authority over the 1.2 miles of land in the U.S. addressed by the Keystone XL Presidential Permit, and that the scope of “Facilities” is so broad as to impermissibly permit the entirety of the pipeline.<sup>206</sup> As to approval of the remainder of the pipeline, plaintiffs further argue that it crosses nearly 50 miles of Bureau of Land Management lands; the authorization conflicted with Congress’s power to regulate foreign and domestic commerce, and it conflicted with executive orders delegating authority to the State Department.<sup>207</sup>

Another lawsuit related to the Keystone XL pipeline system is pending in federal district court, challenging the U.S. Army Corps of Engineers’ issuance of

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200. In light of the issuance of the Keystone Permit and the revocation of the March 2017 presidential permit, TransCanada subsequently filed a motion with the Ninth Circuit Court of Appeals on April 8, 2019, to (1) dismiss a November 8, 2018 injunction granted by the U.S. District Court for the District of Montana to halt construction activities on the Keystone XL in connection with a challenge to the March 2017 presidential permit, that TransCanada had appealed to the Ninth Circuit Court of Appeals; and (2) void the Ninth Circuit appeal. *Indigenous Envtl. Network, v. United States, Dep’t of State*, Case No. 18-36068, 2019 U.S. App. LEXIS 17095 (9th Cir. Jun. 6, 2019). That motion was granted by the Ninth Circuit on June 6, 2019, thereby allowing construction to resume. *Id.*

201. *Keystone XL Presidential Permit, supra* 198.

202. *See, e.g., Indigenous Envtl. Network v. United States, Dep’t of State et al.*, 2019 U.S. App. LEXIS 7733, \*10 (9th Cir. Mar. 15, 2019) (finding on November 8, 2018 that the State Department must prepare a new environmental impact statement to reflect Nebraska regulators’ decision to reject the preferred route and approve an alternate route.); *First Am. Compl. for Decl. & Inj. Relief., Rosebud Sioux Tribe v. Trump*, (Apr. 23, 2019) (No. 4:18-cv-00118-BMM).

203. ASSOCIATED PRESS, U.S. SAYS IT WILL COMPLETE KEYSTONE ENVIRONMENTAL INTERVIEW (May 7, 2019), <https://www.apnews.com/9779f624e0214c649a5b03feb1defa71>.

204. *Compl. Decl. & Inj. Relief, Indigenous Envtl. Network, et al. v. Trump, et al.*, U.S. Dist. LEXIS 115693 (2019) (No. CV-19-28-GF-BMM).

205. *Compl. Decl. & Inj. Relief at 6, Indigenous Envtl. Network, et al. v. Trump, et al.*, (2004) (No. CV-00028-BMM).

206. *Id.* at 22.

207. *Id.* at 6.

Nationwide Permit 12,<sup>208</sup> for failure to adequately evaluate the permit's environmental impacts on waterways and wildlife.<sup>209</sup> Meanwhile with respect to siting of the pipeline in Nebraska, a decade long legal battle was resolved on August 23, 2019 when the Nebraska Supreme Court upheld approval of the pipeline route in the state.<sup>210</sup>

Despite issuance of the Keystone XL Presidential Permit and approval of a request to resume construction of the pipeline from the Ninth Circuit, the project requires other federal and state agency consultations and approvals for various portions of the project, including Section 404 Clean Water Act permits for water crossings along the route, right of way permits from the Bureau of Land Management for portions of the project crossing federal lands, and consultations under the Endangered Species Act (ESA).<sup>211</sup> These are certain to face challenges from third party opposition.

#### B. *Executive Order 13867*

The issuance of a presidential permit directly by the President for a liquids pipeline project is a departure from prior established procedure for presidential permits, which, since 1968, have been issued by the Department of State.<sup>212</sup> The president's authority to grant permits for transboundary projects stems directly from the U.S. Constitution, however,<sup>213</sup> and prior presidents have signed and issued presidential permits in the past.<sup>214</sup> Following President Trump's issuance of the Keystone XL Presidential Permit, the Trump administration issued an executive order on April 10, 2019, to formally revise the presidential permit process.<sup>215</sup> Executive Order 13867 (the Executive Order) limits both the opportunity and timeframe for federal agencies, states, or Indian tribes to comment on presidential permit applications for oil, water, or sewage pipelines and other border crossing infrastructure (such as bridges, rail and surface roads).<sup>216</sup> Further, the Executive Order makes clear that the ultimate decision to grant or deny such permits

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208. Nationwide Permit 12 is a general permit issued for pipelines and other linear projects under Section 404(c) of the Clean Water Act. 33 C.F.R. Part 330, Appendix C; CONG. RES. SERV., THE ARMY CORPS OF ENGINEERS' NATIONWIDE PERMITS PROGRAM: ISSUES AND REGULATORY DEVELOPMENTS (2017).

209. Compl. Dec. & Inj. Relief at 3, 9, N. Plains Resource Council, et al. v. United States Army Corps of Eng'rs, et al., (2019) (No. CV-00044-BMM).

210. TransCanada Keystone Pipeline, LV v. Dunavan, 932 S.W.2d 653 (Neb. 2019).

211. See First Am. Compl. Decl. & Inj. Relief at 2, 57, 59, N. Plains Resource Council, et al. v. United States Army Corps Eng'rs, et al., (2019) (No. CV-00044-BNN).

212. Pursuant to Executive Order 11423 issued by President Lyndon B. Johnson, presidential permit authority for oil pipeline projects (among others) crossing international borders was delegated to the Department of State. Exec. Order No. 11741, 3 C.F.R. 742 (1968).

213. The President's inherent foreign affairs powers are found in Art. II of the U.S. Constitution. U.S. CONST. art. II.

214. See HERITAGE FOUND., EXEC. ORDERS, <https://www.heritage.org/political-process/heritage-explains/executive-orders>.

215. Exec. Order No. 13867, Issuance of Permits with Respect to Facilities and Land Transportation Crossings at the International Boundaries of the United States 84 Fed. Reg. 15,491 (Apr. 10, 2019).

216. *Id.*

remains with the president and constrains the State Department's review.<sup>217</sup> The Executive Order concludes that the State Department's "national interest" determination under prior executive orders is now a determination on whether a presidential permit would serve "the foreign policy interests of the U.S." and the ultimate decision of whether to issue, deny, or amend a permit is made solely by the president.<sup>218</sup> This is significant because the State Department decisions are subject to judicial review under the Administrative Procedure Act (APA) and must comply with NEPA and ESA.<sup>219</sup> The President is not an agency for purposes of the APA, however, and as such his decisions are not subject to judicial review, except for constitutionality, and they need not comply with NEPA, ESA, or other statutes.

### III. PIPELINE SAFETY

#### A. Legal Challenges

##### 1. National Wildlife Federation v. Sec'y of the U.S. Dep't of Transp.

In 2017, the National Wildlife Federation (NWF) filed an amended complaint in the U.S. District Court for the Eastern District of Michigan alleging that the Pipeline and Hazardous Materials Safety Administration's (PHMSA) approval of two Facility Response Plans (FRPs) violated the Clean Water Act (CWA), the National Environmental Policy Act (NEPA), and the Endangered Species Act (ESA) and sought declaratory and injunctive relief related to the FRP approvals.<sup>220</sup> On March 29, 2019, the court held that PHMSA's approvals of the FRPs at issue were not sufficient and remanded the FRPs to PHMSA for revision in compliance with NEPA and the ESA.<sup>221</sup>

The court found that PHMSA did not sufficiently explain why the FRP plans satisfied the CWA's requirements pursuant to amendments from the Oil Pollution Act of 1990.<sup>222</sup> The court also found that PHMSA did not comply with its obligations under NEPA and the ESA which were required because "[PHMSA's] review of response plans included an exercise of environmental judgment for which environmental information imparted by way of statutory processes could well be useful."<sup>223</sup> In making this finding, the court determined that the CWA unambiguously affords PHMSA discretion to require compliance with NEPA and ESA.<sup>224</sup> This is contrary to precedent in the Court of Appeals for the Ninth Circuit, *Alaska Wilderness League v. Jewell*, in which a majority of the panel held that the Bureau of Safety and Environmental Enforcement's

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217. *Id.*

218. *Id.*

219. Todd Garvey, A Brief Overview of Rulemaking and Judicial Review, CONG. RES. SERVICE 6 (2017).

220. National Wildlife Fed'n v. Secretary of the DOT, 374 F. Supp. 3d 634 (E.D. Mich. 2019).

221. *Id.* at 663-64.

222. *Id.* at 634.

223. *Id.* at 655.

224. *Id.* at 661-62.



(BSEE) approval of two oil spill response plans did not require review under NEPA and ESA because BSEE's interpretation that it did not have discretion in the response plan approval process warranted deference under *Chevron v. Natural Resources Defense Council*.<sup>225</sup>

On May 24, 2019, PHMSA (along with Department of Transportation (DOT)) and the pipeline facility operator separately appealed the district court's decision before the United States Court of Appeals for the Sixth Circuit.<sup>226</sup> Briefing has been scheduled through November 2019, and oral argument has been requested.

## B. Legislative and Regulatory Initiatives

### 1. Pipeline Safety Act Reauthorization

The 116<sup>th</sup> United States Congress has taken up reauthorization of the federal Pipeline Safety Act, 49 U.S.C. §§ 60101-60301.<sup>227</sup> Three congressional committees have oversight of reauthorization legislation: the Senate Commerce Committee, the House Transportation and Infrastructure Committee, and the House Energy and Commerce Committee.<sup>228</sup> These committees convened four hearings between April to June 2019, including one before the Senate Commerce Committee, one before the House Transportation and Infrastructure Committee, and two before the House Energy and Commerce Committee.<sup>229</sup>

There are currently three legislative proposals before Congress, including the *Leonel Rondon Pipeline Safety Act* (HR 2139/S 1097) sponsored by Senator Markey and others, the House Energy and Commerce Committee bill, *The Safer Pipelines Act of 2019* (HR 3432), and the Senate Commerce Committee bill, PIPES Act of 2019 (S 2299).<sup>230</sup> *The Leonel Rondon Pipeline Safety Act* focuses almost exclusively on natural gas distribution pipelines in response to the 2018 Merrimack Valley Massachusetts incident, except for provisions to significantly increase civil penalties by a factor of 100.<sup>231</sup> *The Safer Pipelines Act of 2019* pending in the House proposes more broad changes impacting oil and gas pipelines across a variety of subjects, including but not limited to criminal liability,

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225. *Alaska Wilderness League v. Jewell*, 788 F.3d 1212, 1221, 1226 (9th Cir. 2015).

226. See KALLANISH ENERGY, APPEAL FILED BY PHMSA IN ENBRIDGE LINE 5 PIPELINE CASE (May 29, 2019), <http://www.kallanishenergy.com/2019/05/29/appeal-filed-by-phmsa-in-enbridge-line-5-pipeline-case/>.

227. See 49 U.S.C. §§ 60101-301.

228. *Pipeline Safety: Reviewing the Status of Mandates and Examining Additional Safety Needs: Hearing Before the H. Comm. on Transp. and Infrastructure*, 116th Cong. (2019); *Pipeline Safety: Federal Oversight and Stakeholder Perspectives of the S. Comm. on Commerce, Science and Transportation*, 116th Cong. (2019); *The State of Pipeline Safety and Security in America of the H. Comm. on Energy and Commerce*, 116th Cong. (2019); *Legis. Sols. to Make our Nation's Pipelines Safer of the H. Comm. on Energy and Commerce*, 116th Cong., (2019).

229. *Id.*

230. Safer Pipelines Act of 2019, H.R. 3432 116th Cong. [hereinafter Safer Pipelines Act of 2019]; Leonel Rondon Pipeline Safety Act, H.R. 2139 116th Cong. (2019) [hereinafter Leonel Rondon Pipeline Safety Act]; PIPES Act of 2019, S 2299 116th Cong. [hereinafter PIPES Act].

231. Leonel Rondon Pipeline Safety Act, *supra* note 230, at § (2)(a)(7).

eliminating cost benefit analysis requirements, expanded public awareness and community right to know information, and civil penalties.<sup>232</sup> Finally, the *PIPES Act of 2019*, which was passed by the Senate Commerce Committee would address different issues some of which are already in progress.<sup>233</sup> These proposals include: updates to LNG regulations, requiring that PHMSA finalize a gas gathering rule within 90 days, incorporates certain aspects of the *Leonel Rondon Pipeline Safety Act* specific to distribution pipelines, definition of idled pipelines and rulemaking regarding the same, procedural clarifications, and voluntary incentive programs.<sup>234</sup> Reauthorization of the federal Pipeline Safety Act is typically a bipartisan process,<sup>235</sup> but HR 3432 pending in the House and S 2299 pending in the Senate have little in common.<sup>236</sup> A final bill will have to pass in the House, the Senate, and be signed by the President.<sup>237</sup> The current authorization of the Pipeline Safety Act and funding of PHMSA is set to expire on September 30, 2019.<sup>238</sup>

## 2. Pending Rulemakings

There are several final and proposed rulemakings relevant to pipeline safety of hazardous liquids pipelines that have been approved by PHMSA and are pending review by the Office of Management and Budget (OMB).<sup>239</sup> A final rule regarding “*The Safety of Hazardous Liquid Pipelines*,” is currently under review at OMB.<sup>240</sup> It is intended to ensure that operators are increasing the detection and mitigation of unsafe conditions and addressing the adverse effects of liquids pipeline failures and is expected to expand integrity assessment requirements for certain pipelines located outside of High Consequence Areas. A second final rule is also pending, “*Enhanced Emergency Order Procedures*,” federal docket number PHMSA-2016-0091.<sup>241</sup> In 2016, PHMSA established interim regulations for Emergency Orders at 49 C.F.R. Part 190.236 (IFR) as mandated by the *Protecting our Infrastructure of Pipelines and Enhancing Safety Act of 2016*.<sup>242</sup> A final rule is pending on whether to revise the IFR regulations in light

232. Safer Pipelines, *supra* note 230.

233. PIPES Act, *supra* note 230.

234. *Id.*

235. See 49 U.S.C. §§ 60101-60301.

236. Compare Safer Pipelines, *supra* note 230 with PIPES Act, *supra* note 230.

237. U.S. Representative Alan Lowenthal, *How A Bill Becomes A Law*, HOUSE.GOV <https://lowenthal.house.gov/legislation/bill-to-law.htm>.

238. Susan A. Olenchuk & Bryan A. Karas, *Pipeline Safety Update No. 150*, NAT'L. L.R. (June 26, 2019), <https://www.natlawreview.com/article/pipeline-safety-update-issue-no-150>.

239. A notice of proposed rulemaking titled “*Repair Criteria for Hazardous Liquid Pipelines*” pending with PHMSA and DOT’s Significant Rulemaking Update, projects a publication date of June 2020. OFFICE OF MGMT. AND BUDGET, EXEC. OFFICE OF THE PRESIDENT, LIST OF REGULATORY ACTIONS CURRENTLY UNDER REVIEW, <https://www.reginfo.gov/public/jsp/EO/eoDashboard.myjsp>.

240. Notice of Proposed Rulemaking, *Pipeline Safety: Safety of Hazardous Liquid Pipelines*, 80 Fed. Reg. 61,610 (2015).

241. Interim Final Rule, *Pipeline Safety: Enhanced Emergency Order Procedures*, 81 Fed. Reg. 70,980 (2016) (to be codified as 49 C.F.R. pt. 190).

242. *Id.*

of comments received after it was finalized. For example, industry trade groups have requested that PHMSA revise the definition of “emergency order” to better track the statute’s limitations on its application to apply only to the extent necessary to abate the imminent hazard and be narrowly tailored.<sup>243</sup> In addition, a notice of proposed rulemaking titled “*Amendment to Parts 192 and 195 to Require Valve Installation and Minimum Rupture Detection Standards*” is currently under review at OMB.<sup>244</sup> The proposed rule will outline certain performance standards related to rupture identification and pipeline isolation applicable to newly constructed or entirely replaced liquids pipelines.

### 3. Regulatory Initiatives

In late 2018 and early 2019, DOT issued three directives relevant to PHMSA guidance, rulemaking, and enforcement procedures. A December 20, 2018 DOT memorandum regarding the review and clearance of guidance documents, outlined additional requirements for the issuance of guidance documents, including certain documents that must be reviewed by the Office of Chief Counsel, the DOT General Counsel, and significant guidance documents which should be published for notice and comment.<sup>245</sup> That same day, DOT issued an order replacing prior rulemaking policies and procedures with respect to *ex parte* communications to allow for the public to have meetings and other contacts at any stage of the rulemaking process (prior directives sought to limit those communications).<sup>246</sup> On February 15, 2019, DOT issued a memorandum regarding procedural requirements for enforcement actions which expressly states that DOT investigators may not use their authorities as a “game of ‘gotcha’ with regulated entities.”<sup>247</sup> Instead, they must promptly disclose reasons for investigative review and any compliance issue identified or findings made in the course of the review.<sup>248</sup> The directive also states that “DOT will not rely on judge-made rules of judicial discretion, such as the *Chevron* doctrine, as a device or excuse for straining the limits of a statutory grant of enforcement authority.”<sup>249</sup>

On May 1, 2019, PHMSA issued a notice that it would exercise its enforcement discretion regarding the use of American Petroleum Institute (API) Specification 5L (Spec 5L), Specification for Line Pipe, 45<sup>th</sup> edition December

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243. AM. PETROLEUM INSTIT. AND ASSOC. OF OIL PIPE LINES, COMMENTS OF THE AMERICAN PETROLEUM INSTITUTE AND THE ASSOCIATION OF OIL PIPE LINES ON PHMSA INTERIM FINAL RULE, DOCKET No. PHMSA-2016-0091 (Dec. 13, 2016).

244. OFFICE MGMT. AND BUDGET, EXEC. OFFICE OF THE PRESIDENT, LIST OF REGULATORY ACTIONS CURRENTLY UNDER REVIEW, OF, <https://www.reginfo.gov/public/jsp/EO/eoDashboard.myjsp>.

245. Memorandum from Steven G. Bradbury, Gen. Counsel, U.S. Dep’t of Transp. (Dec. 20, 2018) (on file with the U.S. Dep’t of Transp.).

246. U.S. DEP’T OF TRANSP., DOT ORDER NO. 2100.6, POLICIES AND PROCEDURES FOR RULEMAKINGS (Dec. 20, 2018), <https://www.transportation.gov/sites/dot.gov/files/docs/regulations/328561/dot-order-21006-rulemaking-process-signed-122018.pdf>.

247. Memorandum from Steven G. Bradbury, Gen. Counsel, U.S. Dep’t of Transp. (Feb. 15, 2019) (on file with the U.S. Dep’t of Transp.).

248. *Id.*

249. *Id.*

2012, currently incorporated by reference at 49 C.F.R. §§ 195.3(b)(13), 195.106(b), and 195.106(e) (and various provisions of Part 192).<sup>250</sup> Where an operator can demonstrate compliance with the more stringent provisions of API Spec. 51, 46<sup>th</sup> edition, April 2018, including Errata 1 (May 2018), PHMSA does not intend to take any enforcement action for failure to comply with the 45<sup>th</sup> edition because PHMSA has determined that API Spec. 51, 46<sup>th</sup> edition provides a higher level of safety.<sup>251</sup> The notice remains in effect until PHMSA takes final action on a proposed rulemaking regarding whether to incorporate the 46<sup>th</sup> edition.<sup>252</sup> The notice does not make clear whether individual states that are certified to regulate intrastate liquids pipelines may also exercise their enforcement discretion on this issue.

### C. Criminal Enforcement and Pipeline Safety

#### 1. Plains All American Pipeline LP

On September 7, 2018, a jury in a California state court found Plains All American Pipeline LP (Plains) guilty on nine criminal counts, stemming from a release of 140,000 gallons of crude oil from a Plains pipeline near Santa Barbara in 2015.<sup>253</sup> That release reached waters along the coastline, including a state park, and resulted in the loss of a number of birds and marine mammals.<sup>254</sup> In 2016, the state returned an indictment for the incident on 46 criminal charges, none of which were brought under the federal Clean Water Act (CWA) or Pipeline Safety Act.<sup>255</sup> The majority of the criminal charges were misdemeanors based on alleged violations of the California Fish & Game Code, including separate counts for individual animals affected.<sup>256</sup> The only claim based on federal law was a felony charge that Plains knowingly discharged a pollutant into waters of the state, relying on a California statute that adopted section 301 of the federal CWA, known as ‘the discharge prohibition’ for any release of oil to water without a permit.<sup>257</sup>

Of the forty-six initial charges, only thirteen went to trial.<sup>258</sup> Most of the charges were withdrawn related to the multiple, individual wildlife counts.<sup>259</sup> The jury found Plains guilty of nine of the remaining thirteen charges (Counts 1,

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250. U.S. DEP’T OF TRANSP., PHMSA NOTICE TO NATURAL GAS AND HAZARDOUS LIQUID PIPELINE OPERATORS (May 1, 2019), <https://www.phmsa.dot.gov/sites/phmsa.dot.gov/files/docs/standards-rulemaking/pipeline/71236/stay-enforcement-api-specification-51.pdf>.

251. *Id.*

252. *Id.*

253. Press Release, State of Cal. Dep’t of Justice, Attorney General Becerra and Santa Barbara County District Attorney Dudley Announce Guilty Verdicts in Santa Barbara Oil Spill Criminal Trial (Sept. 7, 2018) [hereinafter Santa Barbara Press Release].

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. Santa Barbara Press Release, *supra* note 253.

259. *Id.*

4, 7, 9-12, 14-15). Count 1 alleged a felony violation of California law for ‘knowingly’ engaging in or causing a release of oil to water.<sup>260</sup> Counts 4 and 7 were misdemeanors alleging violation of State release reporting requirements (although Count 4 was initially brought as a felony charge).<sup>261</sup> The remaining six guilty Counts were misdemeanors arising from the California Fish & Game Code.<sup>262</sup>

The jury declared a mistrial on three Counts, including an alleged felony ‘knowing’ discharge of a pollutant to State waters (based on the federal CWA), felony ‘knowing’ deposit of hazardous materials to the environment) and a misdemeanor charge for the alleged take of a sea lion.<sup>263</sup> Plains was acquitted on a final Count, which alleged an ‘unlawful deposit of oil’ in State waters.<sup>264</sup> In a statement on the verdict, Plains emphasized that there was no conviction for knowing misconduct with respect to operation of the pipeline and of the nine counts, eight were misdemeanors including seven counts associated with State strict liability statutes.<sup>265</sup>

## 2. Prosecution of Pipeline Protesters

Opposition to new pipeline construction has grown in recent years, with an increase in physical protests and vandalism. On February 6, 2018, a North Dakota state court sentenced two environmental activists who participated in the #ShutItDown “valve-turners” action coordinated by the group Climate Direct Action.<sup>266</sup> The two activists were part of a coordinated effort to close valves on pipelines in Washington, Montana, Minnesota, and North Dakota.<sup>267</sup> In October 2017, one of the activists was convicted of misdemeanor trespass, felony criminal mischief, and conspiracy to commit criminal mischief, while the other who filmed the action was convicted of felony conspiracy to commit criminal mischief and a misdemeanor for conspiracy trespass.<sup>268</sup> The first was sentenced to three years in prison (with two years deferred), while the second was sentenced to two years in prison, with both years deferred.

In the above North Dakota case and in several others, the defendants sought to raise the “necessity defense,” asserting that the harms of climate change were imminent and therefore justified the actions.<sup>269</sup> The necessity defense derives from common law (i.e., not established by statute, although some states have

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260. *Id.*

261. *Id.*

262. *Id.*

263. Santa Barbara Press Release, *supra* note 253.

264. *Id.*

265. *Id.*

266. Memoranda Decision and Order Granting Motion in Limine, at ¶ 3, State of North Dakota, et al. v. Foster, et al. (2017) (No. 34-2016-CR-00187).

267. *Id.*

268. *Id.*

269. *Id.* at ¶¶ 1, 3.

now codified the defense by statute).<sup>270</sup> A necessity defense is not often invoked, in part because the initial element of the defense is to admit that a crime was committed.<sup>271</sup> A defendant must then persuade the court that the otherwise criminal act was required to prevent a greater harm.<sup>272</sup> The requisite showing is typically that (1) there was a significant threat of imminent hazard; (2) there was an immediate need to act; (3) no other alternative was available to prevent the harm; and (4) no greater harm was caused by the prohibited act(s).

In a Minnesota case, four individuals were criminally charged for turning valves on a crude oil pipeline, in an attempt to stop the flow of crude oil.<sup>273</sup> The defendants admitted that their acts violated state law, but then claimed the necessity defense.<sup>274</sup> The trial court allowed the defendants to assert the defense and present evidence at trial.<sup>275</sup> Prosecutors appealed that ruling, however, and on April 23, 2018, the Minnesota Court of Appeals in a split decision rejected the prosecution's challenge and agreed that the defendants should be allowed to present the defense.<sup>276</sup> The dissenting judge stated that "there is no direct, causal connection between defendants' criminal trespass and global warming."<sup>277</sup> A court in Massachusetts has similarly allowed defendants who trespassed and/or vandalized pipeline property to present a necessity defense.<sup>278</sup> Other courts in Montana, North Dakota, and Washington, however, have rejected the defense.<sup>279</sup>

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270. *Id.* at ¶ 4.

271. North Dakota, et al. v. Foster, et al., at ¶ 8 (No. 34-2016-CR-00187).

272. *Id.* at ¶ 15.

273. State of Min. v. Klapstein, No. A17-1649, 2018 Minn. App. LEXIS 312, at \*2 (Minn. Ct. App. Apr. 23, 2013).

274. *Id.* at \*2-3.

275. *Id.* at \*3.

276. *Id.* at \*8.

277. *Id.* at \*12-13.

278. CLIMATE DEF. PROJ., MASSACHUSETTS JUDGE DISMISSES CHARGES AGAINST CLIMATE ACTIVISTS AND RECOGNIZES NECESSITY OF PROTEST, CLIMATE DEFENSE PROJECT (Mar. 28, 2018), <https://climatedefenseproject.org/massachusetts-judge-dismisses-charges-against-climate-activists-and-recognizes-necessity-of-protest/>.

279. See, e.g., Higgins v. Mont. Twelfth Judicial Dist., No. OP 17-0296, 2017 Mont. LEXIS 450, at \*1 (May 30, 2017).

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