

## REPORT OF THE NATURAL GAS 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 natural gas regulation between July 1, 2016, and June 30, 2017.\*

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### I. RATES, TERMS, AND CONDITIONS OF SERVICE

#### A. Abandonments

1. UGI Storage Co. & UGI Central Penn Gas, Inc., 157 F.E.R.C. ¶ 61,078 (2016).

The FERC granted UGI Central Penn Gas, Inc. (Central Penn) permission and approval to abandon leased capacity on UGI Storage Company's (UGI Storage) system and granted UGI Storage a certificate to require the capacity.<sup>1</sup> The

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\* The Natural Gas Committee is grateful to the following individuals for their contributions to this report: Lawrence Acker, Nicole S. Allen, Bob Ballentine, Jennifer Bruneau, Eli Daniels, Christine Ericson, Hua Fang, Kevin Frank, Kenny Grant, Natalie Karas, John McCaffrey, Phil Mone, Susan Olenchuk, Randy Rich, Kevin M. Sweeney, Wen Tu, Jason Warrington, and Joseph William.

1. *UGI Storage Co.*, 157 F.E.R.C. ¶ 61,078 at P 1 (2016).

FERC found that Central Penn no longer required the leased capacity to meet its gas supply needs.<sup>2</sup> UGI Storage's reacquisition of the leased capacity required certificate authorization because, as FERC explained, "[t]he termination of the applicants' capacity lease agreement ends Central Penn's property interest in the leased capacity, thus UGI Storage requires certificate authorization to reacquire this capacity for use for service under its own tariff."<sup>3</sup> The FERC approved the reacquisition of capacity finding that "[b]ecause UGI Storage provides its storage and wheeling services at market-based rates, the change in status of the 8,362 Dth/d of capacity from leased capacity to system capacity would not affect the rates of any of its customers."<sup>4</sup>

2. High Point Gas Transmission, L.L.C., 159 F.E.R.C. ¶ 62,007 (2017).

The FERC authorized High Point Gas Transmission, L.L.C. (High Point) to abandon by sale its Venice to Toca (VTT) Pipeline to its affiliate Cayenne Pipeline, L.L.C. (Cayenne) for use as a natural gas liquids pipeline.<sup>5</sup> According to High Point, the only firm shipper on the VTT line had agreed to terminate its firm transportation agreement prior to the abandonment.<sup>6</sup> The FERC found that the proposed abandonment was permitted by "public convenience or necessity" since the "conversion of the VTT Pipeline [would] not result in any disruption to the continuity and stability of High Point's existing firm transportation service."<sup>7</sup>

3. Texas E. Transmission, L.P., 159 F.E.R.C. ¶ 62,179 (2017).

The FERC granted Texas Eastern Transmission, L.P. (Texas Eastern) authorization to abandon two 2,500 horsepower reciprocating compressor units and related appurtenances at its Longview Compressor Station.<sup>8</sup> According to Texas Eastern, the units were no longer required to meet its firm service obligations and the associated equipment and parts from the units would be used in other compressor stations on the Texas Eastern system.<sup>9</sup> The FERC granted the abandonment, finding that doing so would "allow Texas [E]astern to eliminate costly expenditures on operation and maintenance of equipment that [was] no longer required for transportation services."<sup>10</sup>

*B. Capacity Release*

1. Rover Pipeline L.L.C.; Panhandle E. Pipe Line Co., L.P.; Trunkline Gas

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2. *Id.* at P 3.

3. *Id.* at P 8.

4. *Id.* at P 10.

5. *High Point Gas Transmission, L.L.C.*, 159 F.E.R.C. ¶ 62,007 (2017).

6. *Id.* at p. 3.

7. *Id.* at pp. 4-5.

8. *Tex. E. Transmission, L.P.*, 159 F.E.R.C. ¶ 62,179 at p. 1 (2017).

9. *Id.* at p. 2.

10. *Id.* at p. 3.

Co., L.L.C., 158 F.E.R.C. ¶ 61,109 (2017).

The FERC approved an application to construct and operate over 510 miles of interstate pipeline submitted by Rover Pipeline L.L.C. (Rover).<sup>11</sup> In approving the project, the Commission reviewed non-conforming provisions from several precedent agreements between Rover and certain shippers.<sup>12</sup> One agreement contained capacity release terms in which Rover agreed to make short-term prearranged releases of capacity to the shipper on the Panhandle Eastern Pipe Line Company, L.P. and Trunkline Gas Co., L.L.C. systems.<sup>13</sup> The Commission found the provision to be consistent with its capacity release regulations, as it placed no restrictions on the replacement shipper's rights.<sup>14</sup> The Commission noted that the instant approval did not waive future review of the non-conforming provisions and required Rover to file executed copies of the agreements within thirty to sixty days before they become effective.<sup>15</sup>

2. Algonquin Gas Transmission, L.L.C., 156 F.E.R.C. ¶ 61,151 (2016).

The FERC accepted in part, subject to condition, and rejected in part tariff changes submitted by Algonquin Gas Transmission L.L.C. (Algonquin) proposing to exempt electric distribution companies (EDC) from FERC capacity release bidding requirements in certain circumstances.<sup>16</sup> First, FERC approved Algonquin's proposed exemption for "capacity releases by . . . an EDC to an asset manager who is required to use the released capacity to carry out the EDC's obligations under the state-regulated electric reliability program."<sup>17</sup>

Second, FERC rejected Algonquin's proposed bidding exemption for capacity releases from an EDC or its "asset manager to a replacement shipper that is required to provide electricity to the market serving the EDC."<sup>18</sup> While Algonquin argued that this exemption was necessary to ensure that released capacity could be used to serve natural gas-fired electric generation, FERC found the proposal would constrict the natural gas market in favor of electric generators.<sup>19</sup> Moreover, FERC found Algonquin failed to show how existing regulations, which allow capacity to be released to a pre-arranged replacement shipper that matches the highest bid, are insufficient to address the issues that this exemption was designed to address.<sup>20</sup>

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11. *Rover Pipeline L.L.C.*, 158 F.E.R.C. ¶ 61,109 at PP 1, 6 (2017).

12. *Id.* at PP 87–91.

13. *See id.* at P 106 (describing contract provision).

14. *See id.* at P 107 (noting, in particular, that shippers retain "rights to request secondary points, to segment capacity, or to re-release capacity").

15. *Id.* at P 108.

16. *Algonquin Gas Transmission, L.L.C.*, 156 F.E.R.C. ¶ 61,151 at PP 1- 2 (2016).

17. *Id.*

18. *Id.* at P 2.

19. *See id.* at PP 26, 34 (discussing anti-competitive effects).

20. *See id.* at P 28 (citing 18 C.F.R. § 284.8(e) (2016)).

### C. Cost Trackers

#### 1. Dominion Carolina Gas Transmission, L.L.C., 157 F.E.R.C. ¶ 61,070 (2016).

The FERC rejected a proposal by Dominion Carolina Gas Transmission, L.L.C. (Dominion Carolina) to set its annual lost or unaccounted for (LAUF) gas recovery percentage at zero rather than apply a negative recovery percentage (*i.e.*, a credit) in calculating Dominion Carolina's overall fuel retainage percentage.<sup>21</sup> The FERC observed that "[t]he bedrock requirement for all variable cost trackers is that they assess shippers no more or less than the cost of service."<sup>22</sup> Although FERC "has recognized a narrow exception when *overall* variable cost rates become negative," it "has consistently ruled that pipelines may not apply this 'never less than zero' convention for individual components of a fuel redetermination filing, because doing so could prevent a positive component from fully offsetting a negative component. . . ."<sup>23</sup> Finding that Dominion Carolina's LAUF percentage was only one component of its fuel reimbursement percentage, FERC directed Dominion Carolina to revise its filing to account for the negative LAUF percentage.<sup>24</sup> On a separate issue, FERC denied a request by a protesting shipper that FERC order Dominion Carolina to implement seasonal fuel rates.<sup>25</sup>

#### 2. Alliance Pipeline L.P., 157 F.E.R.C. ¶ 61,204 (2016).

The FERC approved, as part of a contested settlement agreement, a tracking mechanism to recover the costs of complying with new pipeline safety and greenhouse gas legislation or regulations.<sup>26</sup> The FERC declined to adopt modifications to the settlement proposed by FERC's trial staff that would have specified that only non-recurring costs could be recovered through the tracker.<sup>27</sup> Trial staff argued that its proposed modifications were needed to comply with FERC's 2015 policy statement on recovery of pipeline modernization costs, but FERC clarified that it "did not intend the *Policy Statement* to restrict the ability of parties to reach uncontested settlements concerning tracker mechanisms for the recovery of these costs that do not strictly conform to the guidelines in the Commission's *Policy Statement* on modernization costs."<sup>28</sup> The FERC further observed that the tracker included in the proposed settlement was "substantially similar to mechanisms approved by the Commission" in other proceedings.<sup>29</sup>

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21. *Dominion Carolina Gas Transmission, L.L.C.*, 157 F.E.R.C. ¶ 61,070 (2016).

22. *Id.* at P 13.

23. *Id.* (citing *Sabine Pipe Line L.L.C.*, 125 F.E.R.C. ¶ 61,241 at P 7 (2008)) (emphasis added).

24. *Id.* at PP 14-15.

25. *Id.* at P 16.

26. *Alliance Pipeline L.P.*, 157 F.E.R.C. ¶ 61,204 at PP 76-77 (2016). The FERC severed a separate, contested portion of the settlement and set it for hearing. *Id.* at PP 52-54.

27. *Id.* at PP 76-77.

28. *Id.* at PP 68, 76 (citing *Cost Recovery Mechanisms for Modernization of Nat. Gas Facilities*, 151 F.E.R.C. ¶ 61,047 (2015), *clarification denied*, 152 F.E.R.C. ¶ 61,046 (2015)).

29. *Id.* at P 77 (citing *Nat'l Fuel Gas Supply Corp.*, 153 F.E.R.C. ¶ 61,170 (2015); *Tenn. Gas Pipeline Co.*, 137 F.E.R.C. ¶ 61,182 (2011)).

*D. Fuel*

1. Tallgrass Interstate Gas Transmission, L.L.C., 158 F.E.R.C. ¶ 61,140 (2017).

The FERC issued an order following a technical conference in connection with a general rate proceeding filed by Tallgrass Interstate Gas Transmission, L.L.C. (Tallgrass).<sup>30</sup> Among other things, FERC accepted Tallgrass' proposed definition of LAUF, subject to Tallgrass' deletion of the phrase "gas vented" from the proposed LAUF definition.<sup>31</sup> Tallgrass had agreed to make the change in response to a protest, which had contended that vented gas is not a component of LAUF, but instead was to be recovered under a separate provision of Tallgrass' tariff.<sup>32</sup>

2. Columbia Gas Transmission, L.L.C., 157 F.E.R.C. ¶ 61,247 (2016).

The FERC accepted a proposed tariff revision filed by Columbia Gas Transmission, L.L.C. (Columbia) to provide for correction of metering errors that exceed a threshold of either 1% or 10,000 Dth.<sup>33</sup> The tariff had previously provided for a 2% error threshold.<sup>34</sup> Columbia further proposed to lengthen the correction period from 16 to 90 days.<sup>35</sup> Having found Columbia's proposal just and reasonable, FERC, citing among other things the pipeline's multi-year effort to reduce system LAUF, determined that it did not need to consider an alternative proposal by several parties that would have applied a *de minimis* threshold of 1,800 Dth over a 90-day period, with prospective corrections only.<sup>36</sup>

3. Rockies Express Pipeline L.L.C., 157 F.E.R.C. ¶ 61,129 (2016) and Rockies Express Pipeline L.L.C., 157 F.E.R.C. ¶ 61,243 (2016).

The FERC rejected a proposed interim fuel and LAUF adjustment (F&LU) filing by Rockies Express Pipeline, L.L.C. (Rockies Express) for failing to comply with the regulations and the terms of Rockies Express' tariff.<sup>37</sup> The FERC found that "Rockies Express ha[d] not adequately supported" significant increases in its F&LU percentages and Electric Power Cost (EPC) charges, and that the "only explanation for making the Interim Filing is a vague reference to market forces and operational experience."<sup>38</sup> The FERC concluded that "failure to specifically enumerate the estimates that underlie [Rockies Express'] projections, failure to justify those estimates, and failure to provide a narrative explanation of all the

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30. 15 U.S.C. § 717c (2012); *Tallgrass Interstate Gas Transmission, L.L.C.*, 158 F.E.R.C. ¶ 61,140 (2017).

31. *Id.* at P 28.

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

33. *Columbia Gas Transmission, L.L.C.*, 157 F.E.R.C. ¶ 61,247 at P 2 (2016).

34. *Id.* at P 2.

35. *Id.* at P 3.

36. *Id.* at PP 6, 8-9.

37. *Rockies Express Pipeline L.L.C.*, 157 F.E.R.C. ¶ 61,129 (2016).

38. *Id.* at P 23.

adjustments made, does not satisfy the Commission's regulations or Rockies Express' tariff."<sup>39</sup> The FERC further found that the filing lacked transparency, both in the labeling of monthly data and the use of projected estimates instead of actual experience.<sup>40</sup> The Order additionally stated that Rockies Express' discussion of an operational purchase of line pack was "irrelevant" to F&LU, because such "losses . . . are not recoverable as fuel or as lost-and-unaccounted-for gas."<sup>41</sup> The FERC's rejection was without prejudice to a subsequent interim filing.<sup>42</sup>

In a December 29, 2016 order, FERC accepted Rockies Express' revised interim filing as having addressed satisfactorily the deficiencies of the prior filing.<sup>43</sup> The FERC also granted waiver of the tariff to allow Rockies Express to assess a zero FL&C and EPC charge where the combined total would be negative, stating "that holding reimbursement rates at zero, rather than allowing the overall reimbursement rates to go negative, is reasonable so long as all of the over-recovered amount is eventually returned to the shippers."<sup>44</sup>

4. Millennium Pipeline Co., L.L.C., 157 F.E.R.C. ¶ 61,096 (2016).

In granting Millennium Pipeline Co. (Millennium) a certificate under section 7(c) of the NGA for a new incrementally-priced pipeline lateral, FERC approved Millennium's proposal to charge an initial retainage of 0.00% for service on the lateral because (1) it would operate without compression and (2) there was no basis for calculating LAUF quantities on the lateral.<sup>45</sup> Based on Millennium's assertion that it could not directly determine LAUF quantities on the lateral because there would be no meter at the interconnect between the mainline and the proposed lateral, FERC directed Millennium "to propose a method for assessing LAUF" for "service . . . on the lateral" that would allocate LAUF costs to incremental lateral service.<sup>46</sup>

5. Florida Gas Transmission Co., L.L.C., 156 F.E.R.C. ¶ 61,240 (2016).

The FERC conditionally accepted and suspended a filing by Florida Gas Transmission Co., L.L.C. (FGT) to establish fuel and LAUF rates for the winter period, in accordance with its tariff and a prior rate settlement.<sup>47</sup> In response to a protest, FERC expressed concern that FGT's assignment of fuel and electric costs between its market area and western division had not been adequately supported

39. *Id.* (citing 18 C.F.R. § 154.403(d)(1) (2016)).

40. *Id.*

41. *Id.* at P 24.

42. *Rockies Express Pipeline*, 157 F.E.R.C. ¶ 61,243 at P 26 (2016).

43. *Id.* at P 1.

44. *Id.* at P 15 (citing *ETC Tiger Pipeline, L.L.C.*, 149 F.E.R.C. ¶ 61,179 at P 8 (2014); *Columbia Gulf Transmission Co.*, 132 F.E.R.C. ¶ 61,134 at P 43 (2010)).

45. 15 U.S.C. § 717f(c) (2017); *Millennium Pipeline Co.*, 157 F.E.R.C. ¶ 61,096 at PP 36-37 (2016).

46. *Id.* at P 38.

47. *Fla. Gas Transmission Co.*, 156 F.E.R.C. ¶ 61,240 (2016); *Fla. Gas Transmission Co.*, 153 F.E.R.C. ¶ 61,279 (2015).

and explained.<sup>48</sup> In addition, FERC found the reporting of electric payments unclear.<sup>49</sup> The FERC accordingly required FGT to make a compliance filing addressing those concerns.<sup>50</sup> The FERC subsequently issued an unreported letter order accepting the additional information and explanation provided in FGT's compliance filing in response to the September 30, 2016 order.<sup>51</sup>

6. Ruby Pipeline, L.L.C., 156 F.E.R.C. ¶ 61,068 (2016).

The FERC granted Ruby Pipeline, L.L.C. (Ruby) a waiver of its tariff to permit it to return, on a one-time basis, over-collected fuel and LAUF to shippers on an in-kind basis, through contractual imbalances.<sup>52</sup> Ruby had collected deferred LAUF over more than two years, and with forecast throughput levels that would not require compression, it foresaw little opportunity to offset the over-collected LAUF against under-collected fuel in the near future.<sup>53</sup>

*E. Gas Quality*

1. Texas E. Transmission, L.P., 158 F.E.R.C. ¶ 61,123 (2017).

The FERC staff approved Texas Eastern Transmission, L.P.'s (Texas Eastern) uncontested gas quality settlement.<sup>54</sup> The settlement replaces Texas Eastern's control zone – which permitted receipts into the pipeline between Berne, Ohio and Uniontown, Pennsylvania, of gas with c2+ (Ethanes and heavier hydrocarbons) content up to 17% where the pipeline was able to effectively blend to 12% downstream – with Texas Eastern's agreement to accommodate requests for waiver of its gas quality specifications.<sup>55</sup> Under the settlement, a receipt point operator may request that Texas Eastern grant a waiver for the purpose of transporting a quantity of non-conforming natural gas for a specified term.<sup>56</sup> The pipeline will evaluate such requests in a manner that is not unduly discriminatory and will use commercially reasonable efforts to grant all reasonable requests consistent with its historical practices, provided that Texas Eastern can maintain the integrity of its operations and meet the gas quality specifications at its delivery points.<sup>57</sup> In addition to Texas Eastern's tariff change pursuant to the settlement, Dominion Transmission, Inc. (DTI) agreed to file its own gas quality specifications tracking Texas Eastern's, which were accepted by delegated letter order on May 16, 2017.<sup>58</sup>

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48. *Fla. Gas Transmission Co.*, 156 F.E.R.C. ¶ 61,240 at P 6.

49. *Id.* at PP 13-15.

50. *Id.*

51. Letter Order, *Fla. Gas Transmission, Co., L.L.C.*, Docket No. RP16-1205-001 (Nov. 29, 2016).

52. *Ruby Pipeline, L.L.C.*, 156 F.E.R.C. ¶ 61,068 (2016).

53. *Id.* at PP 5, 9.

54. *Tex. E. Transmission, L.P.*, 158 F.E.R.C. ¶ 61,123 (2017).

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

56. *Id.* at P 5.

57. *Id.*

58. Letter Order, *Dominion Transmission, Inc.*, Docket No. RP17-665-000 (May 16, 2017).

2. Dominion Cove Point LNG, L.P., 159 F.E.R.C. ¶ 62,081 (2017).

FERC staff approved Dominion Cove Point LNG, L.P.'s (DCP) uncontested settlement of gas quality issues.<sup>59</sup> The settlement (1) reduces the permitted level of carbon dioxide in DCP's natural gas stream from 3% to 2% and (2) provides that if DCP waives its gas quality standards and such waiver results in the delivery of natural gas that does not meet the quality standards of DCP's tariff, and actually harms other DCP shippers, the pipeline's obligation to indemnify shippers for such harm shall remain in place regardless of whether DCP chooses to pursue the matter with the shipper that brought the non-conforming gas to the DCP system.<sup>60</sup>

3. Colorado Interstate Gas Co., L.L.C., 156 F.E.R.C. ¶ 61,085 (2016).

The FERC staff approved Colorado Interstate Gas Co., L.L.C.'s (CIG) uncontested settlement, which included a revision of certain gas quality standards in CIG's tariff.<sup>61</sup> Under the settlement, CIG filed a new section 3.2(j) of its general terms and conditions tariff providing that the pipeline

may accept up to 45,000 Mcf per day of [natural] [g]as with a hydrocarbon dew point [(HDP)] in excess of 25 degrees Fahrenheit [on certain segments of its system if] there is an adequate supply of flowing gas, with an [HDP] less than 25 degrees Fahrenheit available for commingling [and such commingling] will not interfere with [CIG's] obligations to: (1) maintain prudent and safe operation, [and] (2) ensure that [high HDP] [g]as does not adversely affect [CIG's] ability to provide service to others [or to] [d]eliver[] gas to a downstream pipeline or end-user.<sup>62</sup>

#### F. Jurisdiction

1. Millennium Pipeline Co., L.L.C., 157 F.E.R.C. ¶ 61,096 (2016).

The FERC rejected arguments that it lacked jurisdiction to grant a certificate of public convenience and necessity for a lateral facility proposed by Millennium Pipeline Company, L.L.C. (Millennium).<sup>63</sup> Protesting landowners argued that FERC did not have jurisdiction over the project pursuant to section 1(b) of the NGA because the proposed facilities would "be located entirely [in] the state of New York and . . . all gas transported on the lateral would enter" the facilities in New York and would "be delivered to a single end user in" the state.<sup>64</sup> While acknowledging that "all of Millennium's existing facilities are located" entirely in New York, the FERC noted that Millennium "receives gas from upstream inter-

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59. *Dominion Cove Point LNG, L.P.*, 159 F.E.R.C. ¶ 62,081 (2017).

60. Uncontested Offer of Partial Settlement at 6, 11, *Dominion Cove Point LNG, L.P.*, Docket No. RP17-197-003 (Mar. 29, 2017).

61. *Colorado Interstate Gas Co.*, 156 F.E.R.C. ¶ 61,085 (2016).

62. Petition for Approval of Stipulation and Agreement, *Colorado Interstate Gas Co.*, Docket No. RP16-1022-000 (June 8, 2016).

63. 157 F.E.R.C. ¶ 61,096 at P 23.

64. *Id.* at P 10.



connections with . . . interstate pipeline systems,” and, thus, Millennium transports gas in interstate commerce subject to the FERC’s jurisdiction.<sup>65</sup> The FERC observed, moreover, that “the courts have consistently held that an interstate pipeline’s transportation of natural gas to end-users is not local distribution, and that the Commission therefore has jurisdiction to grant certificates authorizing interstate pipelines’ construction of facilities to deliver gas directly to end users.”<sup>66</sup> The FERC also rejected the protesting landowners’ argument that the proposed lateral would qualify as an exempt Hinshaw facility because it allegedly would not be operationally integrated with Millennium’s existing system.<sup>67</sup> Finally, the FERC disagreed with the landowners’ “position that NGA jurisdiction does not apply if an interstate pipeline will need to rely on eminent domain to construct a lateral that will be located entirely within a single state.”<sup>68</sup>

2. Trans-Pecos Pipeline, L.L.C., 157 F.E.R.C. ¶ 61,081 (2016).

The FERC denied rehearing of an order authorizing a cross-border facility under section 3 of the NGA, rejecting arguments that FERC’s finding that the pipeline upstream of the cross-border facility would be a non-jurisdictional intrastate pipeline had resulted in an improperly narrow environmental review of the project.<sup>69</sup> The FERC affirmed its finding that the upstream pipeline would only transport gas produced in Texas and would not transport any commingled interstate volumes.<sup>70</sup> Although gas transported on the upstream pipeline ultimately would be delivered to Mexico through the proposed cross-border facility, “the export or import of natural gas constitutes foreign commerce, which is distinct from, and mutually exclusive of, interstate commerce.”<sup>71</sup>

3. BP America Inc., 156 F.E.R.C. ¶ 61,031 (2016).

The FERC affirmed an initial decision finding that BP America Inc. and several affiliated entities (BP) had engaged in market manipulation in violation of the NGA and FERC’s regulations.<sup>72</sup> The FERC addressed a number of issues relating to its jurisdiction in upholding the initial decision’s finding that BP’s market manipulation had been carried out “in connection with” FERC-jurisdictional transactions, as required under section 4A of the NGA and section 1c.1 of FERC’s regulations.<sup>73</sup> In a lengthy analysis, FERC affirmed that it “may exercise [its] anti-manipulation authority when the fraudulent conduct in question (and not the effect) occurred in non-jurisdictional markets,” so long as the unlawful conduct has

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65. *Id.* at P 14.

66. *Id.* at P 15 (citing *Cascade Nat. Gas Corp. v. FERC*, 955 F.2d 1412, 1420-21 (10th Cir. 1992); *Michigan Consol. Gas Co. v. Panhandle E. Pipe Line Co.*, 887 F.2d 1295, 1300-01 (6th Cir. 1989)).

67. *Id.* at PP 16-21. In particular, FERC found that the landowners’ position was not supported by *Oklahoma Nat. Gas Co. v. FERC*, 28 F.3d 1281 (D.C. Cir. 1994) or *City of Fort Morgan v. FERC*, 181 F.3d 1155 (10th Cir. 1999). *Id.*

68. 157 F.E.R.C. ¶ 61,096 at P 23.

69. *Trans-Pecos Pipeline, L.L.C.*, 157 F.E.R.C. ¶ 61,081 at PP 10-11 (2016).

70. *Id.* at P 9.

71. *Id.* at P 8 (citing *Comanche Trail Pipeline, L.L.C.*, 155 F.E.R.C. ¶ 61,182 at P 18 (2016)).

72. *BP America Inc.*, 156 F.E.R.C. ¶ 61,031 (2016).

73. 15 U.S.C. § 717c-1 (2012); 18 C.F.R. § 1c.1 (2015).

“the effect of manipulating the price or terms of sales or transportation transactions that are subject to [the FERC’s] NGA jurisdiction.”<sup>74</sup> The FERC affirmed that BP’s unlawful conduct was within its jurisdiction because it occurred in connection with: (1) third-party wholesale sales priced off an index manipulated by BP; (2) interstate pipeline cash-out transactions priced off the manipulated index; and (3) FERC-jurisdictional sales made by BP.<sup>75</sup> In determining that certain BP sales were FERC-jurisdictional, moreover, FERC affirmed that BP’s downstream sales were jurisdictional because not all the preceding upstream transactions (both sales and transportation) were exempt from NGA jurisdiction.<sup>76</sup>

### G. Market-Based Rates

#### 1. ANR Storage Co., 155 F.E.R.C. ¶ 61,279 (2016).

The FERC denied in part and granted in part rehearing and clarification requests addressing FERC’s denial of ANR Storage Company’s (ANR Storage) request for authorization to charge market-based storage rates.<sup>77</sup> Following the first fully litigated proceeding on market-based rate authority for a storage provider, FERC denied ANR Storage’s request for market-based rate authority.<sup>78</sup> In response to clarification and rehearing requests, FERC addressed a number of matters relating to its finding that ANR Storage had failed to show that it lacked significant market power, including: (1) definition of the relevant product market; (2) the relevant geographic market; (3) identification of competitive alternatives; and (4) calculation of market metrics, including application of the presumption that capacity on a pipeline owned or controlled by an applicant’s affiliate should not be deemed a competitive alternative.<sup>79</sup>

#### 2. Total Peaking Services, L.L.C., 157 F.E.R.C. ¶ 61,209 (2016).

The FERC approved an application under NGA section 7(c) authorizing Total Peaking Services, L.L.C. (Total Peaking) to modify an existing peak-shaving liquefied natural gas (LNG) plant in Milford, Connecticut, to increase the plant’s send-out capacity, and reaffirmed Total Peaking’s authorization to charge market-based rates for its storage and storage-related services.<sup>80</sup> Based on Total Peaking’s updated market power analysis, FERC found that “Total Peaking [would] be unable to exert market power for high-deliverability storage service.”<sup>81</sup> Although the market power analysis for underground storage and combined products markets exceeded the 1,800 Herfindahl-Hirschman Index (HHI) level, FERC nonetheless found that Total Peaking was “unlikely to exert market power for conventional

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74. 156 F.E.R.C. ¶ 61,031 at PP 293, 295.

75. *Id.* at PP 313-16, 321-22, 345-57.

76. *Id.* at PP 348-50.

77. *ANR Storage Co.*, 155 F.E.R.C. ¶ 61,279 (2016), *petition for review pending*, ANR Storage Co. v. FERC, No. 16-1285 (D.C. Cir., filed August 11, 2016).

78. Opinion No. 538, *ANR Storage Co.*, 153 F.E.R.C. ¶ 61,052 (2015).

79. 155 F.E.R.C. ¶ 61,279 at PP 17-35.

80. *Total Peaking Services, L.L.C.*, 157 F.E.R.C. ¶ 61,209 (2016).

81. *Id.* at P 30.

underground storage,” based on Total Peaking’s low market share, competition from regulated cost-based storage services offered by interstate pipelines in New York and Pennsylvania, and the lack of opposition to Total Peaking’s request.<sup>82</sup> The FERC made its approval subject to re-examination in the event of certain specified changes in circumstances, and reserved the right to require an updated power analysis at any time.<sup>83</sup>

3. *Magnum Gas Storage, L.L.C.*, 157 F.E.R.C. ¶ 61,114 (2016).

The FERC approved an application under NGA section 7(c) by Magnum Gas Storage, L.L.C. (Magnum) to amend a March 2011 storage facility authorization to allow the facilities to be relocated within the original footprint in Millard, Juab, and Utah Counties, Utah, and to add a new firm wheeling service at market-based rates.<sup>84</sup> Among other things, FERC “approve[d] Magnum’s proposal to use the Rockies Region as the relevant geographic market for” analyzing the wheeling service, even though it was narrower than the geographic market utilized in evaluating Magnum’s firm and interruptible services, because the origin and destination markets for the wheeling service would be confined to that region.<sup>85</sup> The FERC found that Magnum’s bingo card analysis showed that shippers would have numerous wheeling alternatives.<sup>86</sup> The FERC further found that while the HHI levels for receipt and delivery capacity substantially exceeded the 1,800 HHI level, the presence of other large pipeline providers with cost-based rates, Magnum’s status as a new independent storage provider, its small market share (2.1%) and the lack of opposition all supported approval of Magnum’s request for market-based rate authority.<sup>87</sup>

*H. New Services*

1. *Trailblazer Pipeline Co.*, 156 F.E.R.C. ¶ 61,117 (2016).

The FERC accepted a proposal by Trailblazer Pipeline Company L.L.C. (Trailblazer) to offer a new interruptible park and loan (PAL) service that Trailblazer explained would “provide customers with the flexibility to delay receipts or deliveries of gas, borrow short-term to meet market needs, and aid in balancing customer nominations to avoid imbalances.”<sup>88</sup> In accepting the proposed tariff revisions, FERC granted waiver of the requirement that a pipeline “initiat[ing] a new service must include workpapers showing the estimated effect on revenue and costs over a twelve-month period” based on Trailblazer’s assertion that it was un-

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

83. *Id.* at P 33.

84. *Magnum Gas Storage, L.L.C.*, 134 F.E.R.C. ¶ 61,197 (2011); *Magnum Gas Storage, L.L.C.*, 157 F.E.R.C. ¶ 61,114 (2016).

85. *Magnum Gas Storage*, 157 F.E.R.C. ¶ 61,114 at PP 16-17.

86. *Id.* at PP 19-20, 27.

87. *Id.* at PP 23, 27.

88. *Trailblazer Pipeline Co. L.L.C.*, 156 F.E.R.C. ¶ 61,117 at PP 1, 3 (2016).

able to forecast with any accuracy the costs and revenues related to the new services.<sup>89</sup> The FERC directed Trailblazer to “file an activity report after one year of service, detailing its experience with the implementation of PAL service.”<sup>90</sup>

2. Gulf South Pipeline Co., 157 F.E.R.C. ¶ 61,054 (2016).

The FERC conditionally accepted a proposal by Gulf South Pipeline Company, L.P. (Gulf South) “to establish a new firm rate schedule, Ambient Winter Firm Transportation Service (FTS-A).”<sup>91</sup> Gulf South explained that the proposed service would “be limited to the Coastal Bend Header [pipeline] and ‘would be available during . . . December, January, and February to the extent that cold ambient temperatures create available capacity.’”<sup>92</sup> The FERC explained that it “encourages pipelines to develop new services to use their systems more efficiently, and has previously recognized a pipeline’s ability to establish seasonal rates.”<sup>93</sup> The FERC conditioned its acceptance upon Gulf South revising its tariff to state that, “to the extent that Gulf South is operating over its certificated capacity, FTS-A customers will be curtailed before” firm customers under Rate Schedule FCB.<sup>94</sup>

3. Florida Southeast Connection, L.L.C., 156 F.E.R.C. ¶ 61,160 (2016).

Sabal Trail Transmission, L.L.C. (Sabal Trail) proposed Usage-1 and Usage-2 rates for interruptible transportation service (ITS), “as well as a daily Usage Rate for park and loan (PAL) service equal to a 100 percent load factor daily derivative of the 6 percent maximum hourly flow . . . Rate Schedule FTS reservation rate,” a premium-based rate.<sup>95</sup> In a February 2, 2016 order, FERC “requir[ed] Sabal Trail to re-examine the interruptible services it wish[ed] to offer,” finding that it was “not appropriate for Sabal Trail to charge ITS or PALS interruptible [customers] a premium-based rate if Sabal Trail does not propose to offer those customers premium hourly service.”<sup>96</sup> Sabal Trail argued that its tariff permits it “to provide its ITS and PALS shippers with service that is more flexible than uniform hourly services if system conditions permit,” noting that its “system is designed to support . . . electric generators, which do not typically take deliveries at a uniform hourly rate.”<sup>97</sup> The FERC denied Sabal Trail’s request for rehearing, finding that Sabal Trail did not “propose[] . . . tariff language providing a description of how this premium service will operate in the context of interruptible service and its obligations thereunder.”<sup>98</sup> The FERC noted that “a premium service [of this kind]

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89. *Id.* at P 9. Trailblazer argued that the PAL service rate and cost allocation issues could be addressed in its next rate case after a reasonable amount of operating experience. *Id.*

90. *Id.* at P 11.

91. *Gulf South Pipeline Co.*, 157 F.E.R.C. ¶ 61,054 at P 1 (2016).

92. *Id.* at P 3.

93. *Id.* at P 7.

94. *Id.* at P 8.

95. *Fla. Se. Connection, L.L.C.*, 156 F.E.R.C. ¶ 61,160 at P 35 (2016).

96. *Fla. Se. Connection, L.L.C.*, 154 F.E.R.C. ¶ 61,080 at P 122 (2016).

97. *Fla. Se. Connection, L.L.C.*, 156 F.E.R.C. ¶ 61,160 at P 36, n.75.

98. *Id.* at P 37.

would require tariff language providing for Sabal Trail’s premium IT service obligations,” such as “metering, pre-determination allocation provisions, and billing.”<sup>99</sup>

### *I. Open Seasons*

#### 1. *BP Energy Company v. FERC*, 828 F.3d 959 (D.C. Cir. 2016).

The United States Court of Appeals for the District of Columbia Circuit remanded to FERC for further explanation on a petition for review of orders wherein FERC had determined that Dominion Cove Point LNG, L.P. (Dominion) did not unduly discriminate against open-access customers, in violation of the NGA.<sup>100</sup> BP Energy Company (BP Energy) alleged that Dominion acted in a discriminatory manner under NGA section 3(e)(4) by permitting Statoil Natural Gas, L.L.C. (Statoil) to turn back both pipeline and terminal services, whereas open season customers such as BP Energy were only offered the opportunity to turn back pipeline services.<sup>101</sup> The FERC ruled on rehearing that the agreement was not unduly discriminatory under NGA section 3(e)(4) because “BP Energy and Statoil [are] not similarly situated because of statutory and regulatory protections [available] to BP Energy but not Statoil.”<sup>102</sup> Specifically, FERC maintained that “BP Energy receives greater regulatory protections as an NGA [section] 7 customer than does Statoil as an NGA [section] 3 customer.”<sup>103</sup> The Court rejected this view, stating that it “would come close to depriving NGA [section] 3(e)(4)’s protection against undue discrimination of any legal effect.”<sup>104</sup> In doing so, the Court remanded the matter to FERC for further explanation as to why the agreement was not unduly discriminatory to BP Energy under NGA section 3(e)(4), noting that “[e]ven assuming . . . such protections [under NGA section 7] are ‘significant’ and ‘relevant[,]’ [FERC] has not adequately explained why they provide a ‘rational basis’ for permitting the 2012 turn back agreement only to Statoil.”<sup>105</sup> Specifically, the Court found that while FERC’s “interpretation of the scope of the NGA [section] 3(e)(4)’s protection against undue discrimination may prove to be permissible,” FERC had not shown that Statoil received “the same or comparable benefits” by way of its contract or shipper status with Dominion.<sup>106</sup>

#### 2. *Tennessee Gas Pipeline, L.L.C.*, 157 F.E.R.C. ¶ 61,254 (2016).

The FERC denied the request of UGI Penn Natural Gas Inc. (UGI Penn) to compel Tennessee Gas Pipeline Company, L.L.C. (Tennessee) to accept its turn back offer submitted as part of an open season for Tennessee’s Triad Expansion Project, which involves a seventeen-mile contract path transporting 180,000 Dth/

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99. *Id.*

100. *BP Energy Co. v. FERC*, 828 F.3d 959 (D.C. Cir. 2016).

101. *Id.* at 962.

102. *Id.* at 963.

103. *Id.* at 967.

104. *Id.* at 968.

105. *BP Energy Co.*, 828 F.3d at 968.

106. *Id.* at 965, 968.

d of natural gas for Lackawanna Energy Center, L.L.C. (Lackawanna).<sup>107</sup> “Tennessee rejected UGI Penn’s request to turn back” 30,000 Dth/d across a 275-mile contract path because the turn back capacity was not comparable in location, term, and price to Lackawanna’s requested service.<sup>108</sup> UGI Penn petitioned on the grounds that these issues are secondary to whether the turn back proposal would “reduce the scope of the project,” would eliminate unnecessary construction, and would keep the pipeline company financially whole, which UGI Penn proposed to do through a make-whole payment.<sup>109</sup> The FERC noted that its “turn-back policy does not require a pipeline to consider an existing shipper’s offer . . . if, among other considerations, accepting the offer would result in economic loss to the pipeline with respect to the turn-back capacity.”<sup>110</sup> Here, FERC found that UGI Penn’s proposal “would not result in [s]ignificant benefits, either to the environment or to the public.”<sup>111</sup> The FERC emphasized that its recognition for the potential of stranding of upstream capacity as a consideration in such matters “perhaps takes on added significance in situations where the capacity . . . was constructed at the shipper’s request,” noting that the capacity offered by UGI Penn “was created at [the shipper’s] behest . . . six months prior to [its] offer to turn back the capacity.”<sup>112</sup>

3. *Equitrans, L.P.*, 157 F.E.R.C. ¶ 61,018 (2016).

The FERC conditioned its approval of *Equitrans, L.P.*’s (*Equitrans*) non-conforming negotiated rate transportation with *EQT Energy L.L.C.* (*EQT Energy*) on the removal of the provisions that provided *EQT Energy* with preferential rights to become a Foundational Shipper in future expansions.<sup>113</sup> The FERC pointed to the section of the agreement that read:

[I]n consideration of [EQT Energy] committing to be a Foundation[al] Shipper on the Ohio Valley Connector Project, [EQT Energy] shall have the right to participate in any OVC Expansion Project as a Foundation Shipper and to receive Foundation Shipper benefits, regardless of the level of transportation service capacity [EQT Energy] chooses in that project.<sup>114</sup>

*Equitrans* argued that the provision would neither have adverse effects on existing shippers nor result in any shipper receiving a different quality of service.<sup>115</sup> In rejecting this argument, FERC called attention to provisions granting

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107. *Tenn. Gas Pipeline, L.L.C.*, 157 F.E.R.C. ¶ 61,254 at P 3 (2016).

108. *Id.* at P 24.

109. *Id.* at P 25.

110. *Id.* at P 34.

111. *Id.* at P 36.

112. 157 F.E.R.C. ¶ 61,254 at P 35.

113. *Equitrans, L.P.*, 157 F.E.R.C. ¶ 61,018 at P 1 (2016).

114. *Id.* at P 6.

115. *Id.* at P 7.

EQT Energy “all [the] special rights granted to a Foundation Shipper, without being required to meet the contract level necessary for a prospective shipper to be recognized as a Foundation Shipper.”<sup>116</sup>

### J. Rate Cases

#### 1. ANR Storage Co., 156 F.E.R.C. ¶ 61,074 (2016).

The FERC approved a revised settlement submitted by ANR Storage Company (ANR).<sup>117</sup> ANR submitted the revised settlement in response to a 2012 settlement, reached after the Commission initiated rate proceedings under NGA section 5.<sup>118</sup> Though the 2012 settlement originally required ANR to file a new NGA section 4 general rate case, in 2016 ANR reached an agreement with its shippers and subsequently petitioned the Commission to accept the 2016 settlement in lieu of the NGA general section 4 rate case.<sup>119</sup> The Commission determined that the 2016 settlement fulfilled ANR’s obligations from the 2012 settlement.<sup>120</sup> The 2016 settlement, among other things, immediately reduced ANR’s current rates and provided rate stability until 2019.<sup>121</sup>

#### 2. Colorado Interstate Gas Company, L.L.C., 156 F.E.R.C. ¶ 61,085 (2016).

The FERC approved Colorado Interstate Gas Company, L.L.C.’s (CIG) petition for approval of an uncontested settlement which would obviate the need to file a general NGA section 4 rate case, as required under a previous settlement.<sup>122</sup> The settlement, among other things, established new rates for CIG’s transportation and storage services and established CIG’s depreciation rates.<sup>123</sup>

#### 3. Dominion Cove Point LNG, L.P., 157 F.E.R.C. ¶ 61,249 (2016).

Dominion Cove Point LNG, L.P. (Cove Point) filed a general NGA section 4 rate case on November 23, 2016 that reflected an overall rate decrease and some rate schedule increases, as well as tariff changes.<sup>124</sup> Effective January 1, 2017, FERC accepted the revised rate schedules that resulted in overall rate decreases while accepting and suspending the revised rate schedules that resulted in overall rate increases, subject to the outcome of a hearing.<sup>125</sup> The FERC suspended Cove Point’s revised tariff records regarding its cooling mechanism provisions for the minimal period, due to it only allowing the current mechanism in Cove Point’s

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116. *Id.*

117. *ANR Storage Co.*, 156 F.E.R.C. ¶ 61,074 at P 16 (2016).

118. *Id.* at P 2 (citing *ANR Storage Co.*, 140 F.E.R.C. ¶ 61,134 (2012)).

119. *Id.* (citing *ANR Storage Co.*, 155 F.E.R.C. ¶ 61,155 (2016)).

120. *Id.* (noting the Commission previously ruled that ANR’s obligations would be fulfilled if the Commission approved the 2016 settlement).

121. *Id.* at P 15; *see also id.* at PP 6–12 (summarizing terms of 2016 settlement).

122. *Colorado Interstate Gas Co.*, 156 F.E.R.C. ¶ 61,085 at P 1 (2016).

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

124. *Dominion Cove Point LNG, L.P.*, 157 F.E.R.C. ¶ 61,249 at P 1 (2016).

125. *Id.*

tariff to remain in effect, and other tariff changes, subject to the outcome of a technical conference.<sup>126</sup>

4. Tallgrass Interstate Gas Transmission, L.L.C., 157 F.E.R.C. ¶ 61,082 (2016).

The FERC approved Tallgrass Interstate Gas Transmission, L.L.C.'s (Tallgrass) uncontested settlement resolving all issues related to its general NGA section 4 rate case.<sup>127</sup> The FERC noted that the settlement specifically addressed depreciation and negative salvage rates, treatment of surcharges, fuel and power cost trackers, roll-in of certain facilities, the disposition of the proposed non-Electric Flow Meter delivery point charge, and odorization.<sup>128</sup> The order noted that the settlement rates will not take into account the "Cost Recovery Mechanism" Tallgrass had proposed in its original filing, but Tallgrass, at any time, can make a new filing to apply a modernization charge pursuant to the Commission's *Modernization Cost Policy Statement*.<sup>129</sup> Additionally, the settlement created a two-part zone rate design, comprised of an "East Zone" and a "West Zone," that reduced the reservation charges in Tallgrass' maximum firm transportation rates.<sup>130</sup>

5. ANR Pipeline Co., 157 F.E.R.C. ¶ 61,205 (2016).

The FERC approved ANR Pipeline Company's (ANR) uncontested settlement of its general rate case filing under section 4 of the NGA.<sup>131</sup> The order stated that the settlement rates and the depreciation rates are "black box" rates and maintain the current incremental rates for certain services.<sup>132</sup>

6. Kern River Gas Transmission Co., 158 F.E.R.C. ¶ 61,078 (2016).

The FERC approved Kern River Gas Transmission Company's (Kern River) petition for approval of an uncontested stipulation and agreement (Settlement) proposing a reduced rate option for Kern River's "Period Two" shippers.<sup>133</sup> The Settlement provided certain shippers the option to pay lower transportation rates calculated using a regulatory depreciation levelization period longer than the depreciation life underlying Kern River's regular Period Two rates.<sup>134</sup> In exchange, shippers selecting this option would agree to pay Period Two rates for an extended period of time matching the longer regulatory depreciation levelization period.<sup>135</sup>

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126. *Id.* at P 31.

127. *Tallgrass Interstate Gas Transmission, L.L.C.*, 157 F.E.R.C. ¶ 61,082 at P 1 (2016).

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

129. *Id.* at P 2.

130. *Id.* at P 7.

131. *ANR Storage Co.*, 157 F.E.R.C. ¶ 61,205 at P 1 (2016).

132. *Id.* at P 5.

133. *Kern River Gas Transmission Co.*, 158 F.E.R.C. ¶ 61,078 at P 1 (2017).

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

135. *Id.*



*K. Rate Investigations*

## 1. Nat. Gas Pipeline Co. of Am., 158 F.E.R.C. ¶ 61,044 (2017).

The FERC initiated an NGA section 5 investigation of Natural Gas Pipeline Company of America, L.L.C. (Natural) to determine if Natural is “substantially over-recovering its cost of service.”<sup>136</sup> The Commission reviewed the cost and revenue information Natural provided in its FERC Form No. 2 annual reports for 2014 and 2015, and estimated Natural’s return of equity to be 28.5% and 20.8%, respectively.<sup>137</sup> The Commission, however, issued a subsequent order correcting these figures and estimating the return of equity to be 17.7% and 15.7%, respectively.<sup>138</sup> Based on these findings, “the Commission is concerned that Natural’s level of earnings may substantially exceed its actual cost of service, including a reasonable return on equity.”<sup>139</sup> Accordingly, Natural was directed to file a cost and revenue study based on financial information from the latest twelve months.<sup>140</sup>

## 2. Wyoming Interstate Co., 158 F.E.R.C. ¶ 61,040 (2017).

The FERC initiated an NGA section 5 investigation of Wyoming Interstate Company, L.L.C. (WIC) to determine if WIC is “substantially over-recovering its cost of service.”<sup>141</sup> The Commission reviewed the cost and revenue information in WIC’s FERC Form No. 2 annual reports for 2014 and 2015, and estimated WIC’s return of equity to be 17.7% and 19%, respectively.<sup>142</sup> “Based upon these [findings], the Commission is concerned that WIC’s level of earnings may substantially exceed its actual cost of service, including a reasonable return on equity.”<sup>143</sup> Accordingly, WIC was directed to file a cost and revenue study based on financial information from the latest twelve months.<sup>144</sup>

## 3. Iroquois Gas Transmission Sys., L.P., 157 F.E.R.C. ¶ 61,035 (2016).

The FERC approved an uncontested settlement submitted by Iroquois Gas Transmission System, L.P., resolving all issues arising from an NGA section 5 rate investigation, initiated by the Commission in 2016.<sup>145</sup>

## 4. Empire Pipeline, Inc., 157 F.E.R.C. ¶ 61,034 (2016).

The FERC conditionally approved an uncontested settlement submitted by Empire Pipeline, Inc. (Empire) resolving all issues arising from an NGA section 5 investigation of Empire’s rates initiated by the Commission in 2016.<sup>146</sup> One of

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136. *Nat. Gas Pipeline Co. of Am.*, 158 F.E.R.C. ¶ 61,044 at P 1 (2017).

137. *Id.* at P 5.

138. *Nat. Gas Pipeline Co. of Am.*, 158 F.E.R.C. ¶ 61,111 at P 1 (2017).

139. *Nat. Gas Pipeline Co. of Am.*, 158 F.E.R.C. ¶ 61,044 at P 5.

140. *Id.* at P 9.

141. *Wyo. Interstate Co.*, 158 F.E.R.C. ¶ 61,040 at P 1 (2017).

142. *Id.* at P 5.

143. *Id.*

144. *Id.* at P 9.

145. *Iroquois Gas Transmission Sys., L.P.*, 157 F.E.R.C. ¶ 61,035 at P 13 (2016).

146. *Empire Pipeline, Inc.*, 157 F.E.R.C. ¶ 61,034 at PP 1-2 (2016).

the settlement's provisions stated that third-party requests for future changes to the settlement would be subject to the "public interest" standard of review.<sup>147</sup> The Commission determined that this provision "appear[ed] to invoke the *Mobile-Sierra* 'public interest' presumption with respect to third parties."<sup>148</sup> The Commission declined to impose this heightened standard of review "with respect to future changes to the Settlement sought by the Commission acting *sua sponte*, or at the request of a non-settling third party."<sup>149</sup> Accordingly, approval was conditioned on Empire resubmitting its settlement to include a revised standard of review applicable to third-parties.<sup>150</sup>

5. *Tuscarora Gas Transmission Co.*, 156 F.E.R.C. ¶ 61,188 (2016).

The FERC approved an uncontested settlement submitted by Tuscarora Gas Transmission Company resolving all issues arising from an NGA section 5 rate investigation, initiated by the Commission in 2016.<sup>151</sup>

6. *Columbia Gulf Transmission, L.L.C.*, 156 F.E.R.C. ¶ 61,189 (2016).

The FERC approved an uncontested settlement submitted by Columbia Gulf Transmission, L.L.C., resolving all issues arising from an NGA section 5 rate investigation, initiated by the Commission in 2016.<sup>152</sup>

#### L. Scheduling

In the wake of the April 1, 2016 effective date for Orders No. 587-W and Order No. 809, FERC issued a number of orders implementing its new rules to ensure that pipeline tariffs conformed to the standards adopted from the North American Energy Standards Board (NAESB).<sup>153</sup> The FERC partially conditioned its acceptance of MoGas Pipeline L.L.C.'s revised tariff filing on the company making changes to the scheduling language of the general terms and conditions section of its tariff.<sup>154</sup> When FERC issued certificates for the Rover Pipeline L.L.C. (Rover) project to Rover, Panhandle Eastern Pipe Line Company, L.P. and Trunkline Gas Company, L.L.C., it required Rover to strictly conform to NAESB WGQ standard 1.3.2 in its tariff and rejected all of Rover's proposed nomination cycle specific provisions that were not provided for by the NAESB standards, writing "[i]f Rover wishes to propose changes to the NAESB standards (which are

147. *Id.* at P 12.

148. *Id.*

149. *Id.* at P 15.

150. *Id.* at P 16.

151. *Tuscarora Gas Transmission Co.*, 156 F.E.R.C. ¶ 61,188 at PP 1-2, 14 (2016).

152. *Columbia Gulf Transmission, L.L.C.*, 156 F.E.R.C. ¶ 61,189 at P 10 (2016).

153. Order No. 587-W, *Standards for Bus. Practices of Interstate Nat. Gas Pipelines; Coordination of the Scheduling Processes of Interstate Nat. Gas Pipelines & Pub. Utils.*, 153 F.E.R.C. ¶ 61,061, III F.E.R.C. STATS. & REGS. ¶ 31,373, 80 Fed. Reg. 67,302 (2015); Order No. 809, *Coordination of the Scheduling Processes of Interstate Nat. Gas Pipelines & Pub. Utils.*, 151 F.E.R.C. ¶ 61,049, III F.E.R.C. STATS. & REGS. ¶ 31,368; 80 Fed. Reg. 23,198 (2015).

154. *MoGas Pipeline L.L.C.*, 157 F.E.R.C. ¶ 61,036 at P 14 (2016); *see also First ECA Midstream L.L.C.*, 158 F.E.R.C. ¶ 61,113 at P 30 (2017) (FERC required tariff revisions for newly operational small pipeline to conform to Order No. 809).

applicable industry-wide), the instant [certificate] proceeding is not the appropriate forum.<sup>155</sup>

### *M. Termination*

#### 1. Gulf Crossing Pipeline Co., 156 F.E.R.C. ¶ 61,149 (2016).

Gulf Crossing Pipeline Company L.L.C. (Gulf Crossing) filed a mutually supported tariff record to prematurely terminate a negotiated firm service agreement with Chesapeake Energy Marketing, Inc. (Chesapeake), stating that Chesapeake was selling off its natural gas production assets, and termination of the agreement was necessary in the transfer of Chesapeake's assets.<sup>156</sup> Gulf Crossing desired that the termination be subject to a lump sum payment by Chesapeake equal to the present value of all future reservation chargers that Chesapeake would owe under the firm agreement.<sup>157</sup> The FERC found that Gulf Crossing's proposed lump sum payment arrangement constituted an exit fee, but that Gulf Crossing's filed tariff did not contain an exit fee provision.<sup>158</sup> The FERC accepted Gulf Crossing's tariff record on the condition that Gulf Crossing incorporate a generally applicable exit fee provision into its tariff.<sup>159</sup>

#### 2. Midcontinent Express Pipeline L.L.C., 156 F.E.R.C. ¶ 61,165 (2016).

Midcontinent Express Pipeline L.L.C. (MEP) filed revised tariff records proposing to allow MEP and shippers to reduce the maximum daily quantity (MDQ) of an existing rate schedule FTS transportation agreement; or terminate an existing rate schedule FTS transportation agreement prior to the expiration of the agreement in the following scenarios: (1) as part of a transfer of producing acreage or other producing assets from an existing shipper or another entity; or (2) in response to an observable deterioration of a shipper's financial ability to perform.<sup>160</sup> Such action could be subject to an exit fee payment to MEP of all or a portion of the reservation charges remaining under the agreement.<sup>161</sup> MEP proposed the provision to provide flexibility to its shippers in dealing with the financial ramifications of changes in gas production and commodity markets.<sup>162</sup> The FERC accepted MEP's proposal subject to MEP's revision of the proposed section to ensure that it is not unduly discriminatory.<sup>163</sup> The FERC found that allowing an MDQ buy-out or reduction to be just and reasonable, and not unduly discriminatory, in scenario 2 but not scenario 1.<sup>164</sup> Scenario 2 was just and reasonable because *all* shippers who have experienced credit downgrades or financial hardship were eligible

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155. *Rover Pipeline L.L.C.*, 158 F.E.R.C. ¶ 61,109, at P 114 (2017).

156. *Gulf Crossing Pipeline Co.*, 156 F.E.R.C. ¶ 61,149 at PP 2-3 (2016).

157. *Id.*

158. *Id.* at P 7.

159. *Id.*

160. *Midcontinent Express Pipeline L.L.C.*, 156 F.E.R.C. ¶ 61,165 at P 4 (2016).

161. *Id.*

162. *Id.* at P 1.

163. *Id.* at P 16.

164. *Id.* at P 18.

to renegotiate their contracts.<sup>165</sup> In scenario 1, FERC found that MEP did not adequately demonstrate why providing special negotiation rights to shippers who have producing acreage or assets but have not experienced a credit downgrade was not unduly discriminatory if that right was not provided to all similarly situated shippers.<sup>166</sup> In conditionally approving the filing, FERC rejected the argument that MEP's proposal was problematic because it did not require a shipper to attempt to release its capacity before negotiating a reduction.<sup>167</sup>

3. Texas Eastern Transmission, L.P., 158 F.E.R.C. ¶ 61,070 (2017).

Texas Eastern Transmission, L.P. (Texas Eastern) filed revised tariff records to amend a non-conforming agreement with EQT Energy (EQT Energy).<sup>168</sup> The proposed amended agreement contained a new term for the contract, beginning January 1, 2017 and ending October 31, 2019, and provided EQT Energy with the sole right to terminate the contract, effective October 31, 2018, so long as it provided one year's written notice.<sup>169</sup> Texas Eastern sought to include this termination provision to aid EQT Energy in the development of its Marcellus Shale acreage and "state[d] that it would be willing to offer such a provision" to any other similarly situated customer.<sup>170</sup> However, FERC found no indication in its tariff that Texas Eastern would negotiate an early termination with its other customers.<sup>171</sup> Rather, FERC found the provision to be an impermissible material deviation that provided EQT Energy with a sole unconditional right to terminate a contract that was not provided to other pipeline customers.<sup>172</sup> The FERC directed Texas Eastern to either remove the proposed provision from the agreement or to modify its tariff to allow for early termination negotiations for other similarly situated shippers.<sup>173</sup>

*N. Force Majeure*

1. WBI Energy Transmission, Inc., 157 F.E.R.C. ¶ 61,184 (2016).

The Commission accepted proposed tariff revisions filed by WBI Energy Transmission, Inc. to adopt reservation charge crediting provisions distinguishing between service interruptions attributable to non-*force majeure* and *force majeure* events, consistent with the Commission's current reservation charge crediting policies.<sup>174</sup>

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165. 156 F.E.R.C. ¶ 61,165 at P 18.

166. *Id.*

167. *Id.* at P 20.

168. *Tex. E. Transmission, L.P.*, 158 F.E.R.C. ¶ 61,070 at P 1 (2017).

169. *Id.* at P 4.

170. *Id.* at P 5.

171. *Id.*

172. *Id.*

173. 158 F.E.R.C. ¶ 61,070 at P 5.

174. *WBI Energy Transmission, Inc.*, 157 F.E.R.C. ¶ 61,184 (2016).

2. Destin Pipeline Co., L.L.C., 157 F.E.R.C. ¶ 61,161 (2016).

The FERC directed Destin Pipeline Company, L.L.C. (Destin), pursuant to NGA section 5, to revise the definition of *force majeure* in Destin's tariff to clarify that routine and scheduled maintenance were not included within the definition.<sup>175</sup> The FERC, however, accepted Destin's proposal to include within the definition of *force majeure* "[o]utages resulting from one-time, non-recurring government requirements. . . ."<sup>176</sup> The FERC also conditionally accepted Destin's proposed *force majeure* reservation charge crediting tariff provision, which Destin had filed in response to an audit report by the FERC Office of Enforcement.<sup>177</sup>

3. First ECA Midstream L.L.C., 158 F.E.R.C. ¶ 61,113 (2017).

The FERC conditionally accepted a filing by First ECA Midstream L.L.C. (FECAM) modifying the definition of *force majeure* in FECAM's tariff.<sup>178</sup> In an earlier order, FERC had directed FECAM to revise the definition "to clarify that planned or scheduled testing, repairs, or maintenance do not constitute a *force majeure* event."<sup>179</sup> The FERC found that the pipeline had partially complied, directing FECAM to make a further compliance filing to remove remaining language that would have included planned or scheduled testing, repairs, or maintenance pursuant to certain government restraints within the *force majeure* definition.<sup>180</sup> The FERC also rejected FECAM's proposal to exempt firm shippers from reservation charge crediting when an operational flow order (OFO) is issued because of a *force majeure* event outside FECAM's control, finding this revision to be inconsistent with FERC policy that firm shippers be provided partial reservation charge credits in such situations.<sup>181</sup>

4. Rover Pipeline L.L.C., 158 F.E.R.C. ¶ 61,109 (2017).

The FERC required Rover Pipeline L.L.C. (Rover) to remove proposed tariff language that would have allowed Rover to curtail scheduled transportation "when, in [its] sole judgment, capacity, supply, or operating conditions so require or it is desirable or necessary to make modifications, repairs or operating changes to its system."<sup>182</sup> The FERC observed that this language would "permit Rover to curtail scheduled volumes for normal operating requirements such as modifications, repairs, and operating changes that should be known to Rover prior to scheduling a gas day," and explained that "Rover should not schedule transportation for which it does not have the ability to provide."<sup>183</sup> The FERC also required Rover

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175. *Destin Pipeline Co.*, 157 F.E.R.C. ¶ 61,161 (2016).

176. *Id.* at PP 12, 17.

177. *Id.* at PP 1-2, 9.

178. *First ECA Midstream L.L.C.*, 158 F.E.R.C. ¶ 61,113 (2017).

179. *First ECA Midstream L.L.C.*, 155 F.E.R.C. ¶ 61,222 at P 38 (2016).

180. *First ECA Midstream L.L.C.*, 158 F.E.R.C. ¶ 61,113 at P 19.

181. *Id.* at P 22.

182. *Rover Pipeline L.L.C.*, 158 F.E.R.C. ¶ 61,109 at P 119 (2017).

183. *Id.* at P 120.

to provide additional details concerning its proposed “safe harbor” *force majeure* reservation charge crediting proposal.<sup>184</sup>

## II. INFRASTRUCTURE

### A. Pipelines

1. Delaware Riverkeeper Network v. FERC, No. 16-1092 (D.C. Cir. May 23, 2017).

The U.S. Court of Appeals for the District of Columbia Circuit denied a petition for review from the Delaware Riverkeeper Network (Riverkeeper) challenging the sequence of FERC’s action in the Leidy Southeast Project (Leidy Project) FERC proceeding.<sup>185</sup> Riverkeeper primarily contended that FERC’s Certificate of Public Convenience and Necessity (Certificate Order) for the Project was premature because FERC issued it prior to the Project’s receipt of Pennsylvania’s Clean Water Act (CWA) section 401 water quality certification.<sup>186</sup> The Court disagreed with FERC’s argument that the claim was moot because the water quality certificate had been issued and found lawful during the pendency of the appeal, explaining that “[w]e could provide Riverkeeper the remedy it seeks by rescinding the conditional Certificate Order. That would halt the project and force FERC to follow the proper sequence of action.”<sup>187</sup> However, the Court found that FERC did not issue the Certificate Order prematurely because the Certificate Order made clear that the Leidy Project had received conditional FERC approval to perform construction so long as the work would not result in any discharge into navigable waters.<sup>188</sup>

2. Millennium Pipeline Co. v. Seggos, No. 16-1415 (D.C. Cir. June 23, 2017).

The U.S. Court of Appeals for the District of Columbia Circuit dismissed Millennium Pipeline Company’s (Millennium) petition for review regarding its pending New York State Department of Environmental Conservation (NYSDEC) Clean Water Act (CWA) section 401 water quality certification (WQC).<sup>189</sup> Millennium asked the Court to compel NYSDEC to act on its application because more than a year had passed since Millennium submitted its application.<sup>190</sup> Millennium argued that this delay was in contravention of the CWA’s requirement that an application be acted upon within one year and therefore triggered waiver provisions of the CWA.<sup>191</sup>

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184. *Id.* at P 145.

185. Delaware Riverkeeper Network v. FERC, 857 F.3d 388 (D.C. Cir. 2017).

186. *Id.* at 396.

187. *Id.* at 396-97.

188. *Id.* at 399.

189. Millennium Pipeline Co. v. Seggos, 860 F.3d 696 (D.C. Cir. 2017).

190. *Id.*

191. *Id.* at 702.

The Court found that Millennium did not have standing to sue because the appropriate course of action would be for Millennium to present its request to FERC.<sup>192</sup> The NGA includes a general requirement that agencies issue a decision on required federal permits within 90 days of FERC's issuance of a Final Environmental Impact Statement, "unless [another] schedule is otherwise established by [f]ederal law."<sup>193</sup> The Court found that the CWA's one-year deadline qualifies as "another schedule" and therefore trumps the NGA.<sup>194</sup> The CWA also establishes that if a state agency fails to act on a Section 401 application within the one year period, the agency will be deemed to have waived the WQC requirement.<sup>195</sup> The Court concluded that if NYSDEC failed to act within the one year period, then NYSDEC waived the WQC and Millennium did not suffer any injury because it could use that waiver to seek authorization from FERC to commence construction.<sup>196</sup> The Court did not opine on when the one-year deadline begins to run (*i.e.*, upon submission of an application or upon a determination that the application is "complete") or on whether NYSDEC waived the WQC requirement, explaining that these issues could be raised at FERC.<sup>197</sup> Only after a FERC determination of no waiver could Millennium file an appeal with a federal appeals Court.<sup>198</sup> On July 5, 2017, NYSDEC issued a determination that Millennium's application was complete.<sup>199</sup>

3. Delaware Riverkeeper Network v. FERC, No. 17-5084 (D.D.C. Mar. 22 2017).

The U.S. District Court for the District of Columbia granted FERC's motion to dismiss a claim by the Delaware Riverkeeper Network (Riverkeeper), which had sought declaratory and injunctive relief against FERC from issuing a Certificate of Public Convenience and Necessity (Certificate Order) for the PennEast Project.<sup>200</sup> Under the Omnibus Budget Reconciliation Act of 1986 (Omnibus Act), FERC is obligated "to recover its annual operating costs" through a proportional charge from its regulated entities.<sup>201</sup> Citing this funding mechanism, Riverkeeper alleged that FERC is "unconstitutionally structurally biased" in violation of the Fifth Amendment due process rights belonging to environmental organizations.<sup>202</sup> Riverkeeper argued that the funding mechanism, as evidence of actual bias, supports an ancillary claim for structural bias demonstrated by FERC's 100% approval rate of natural gas company requests, a systemic failure to enforce the terms

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192. *Id.* at 698.

193. *Id.* at 702.

194. *Id.*

195. *Millennium Pipeline Co.*, 860 F.3d at 698.

196. *Id.* at 700.

197. *Id.* at 701.

198. *Id.*

199. Notice of Complete Application, Docket No. CP16-17-000, N.Y. State Dep't of Conservation (July 5, 2017).

200. Delaware Riverkeeper Network v. FERC, No. 16-cv-416 (TSC), 2017 WL 1080929 (D.D.C. Mar. 22, 2017).

201. *Id.* at \*1, \*8; 42 U.S.C. § 7178 (1986).

202. *Delaware Riverkeeper Network*, 2017 WL 1080929 at \*2.

of issued certificates, and the prevalence of indefinite tolling orders, among other practices.<sup>203</sup>

The Court granted FERC's motion to dismiss on the grounds that Riverkeeper "failed to state a claim upon which relief [could] be granted."<sup>204</sup> First, the Court found that the complaint did not identify any cognizable liberty or property interest under the Fifth Amendment's due process clause.<sup>205</sup> The Court also denied the existence of inherent structural bias or appearance of structural bias in FERC's funding system.<sup>206</sup> The Court noted that Congress determines FERC's budget, and despite receiving additional funding through the Omnibus Act, "FERC stands to gain no direct benefit from the approval of a particular pipeline project."<sup>207</sup> Absent an individual Commissioner's direct financial interest in a pipeline project, "[t]he connection between the act of approving an individual pipeline and the financial sustainability of the Commission as a whole is simply too remote to create any such bias."<sup>208</sup> Further, the Court did not find it plausible that FERC's continued existence was jeopardized by its reliance on this funding structure such that it would create structural bias.<sup>209</sup>

#### 4. Rover Pipeline L.L.C., 158 F.E.R.C. ¶ 61,109 (2017).

The FERC issued a Certificate of Public Convenience and Necessity (Certificate Order) for Rover Pipeline L.L.C. (Rover) in which it denied Rover a blanket certificate for routine construction operations based on Rover's failure to properly disclose the purchase and demolition of a house that was eligible for listing on the National Register of Historic Places.<sup>210</sup> The FERC explained that it only grants blanket certificates to projects in which it holds "confidence that a natural gas company will not act contrary to the Commission's regulations and other environmental statutes," and FERC found that Rover's purchase and knowing demolition of the historic house "raises the question of whether Rover would fully comply with our environmental regulations in future construction activities under a blanket certificate."<sup>211</sup> The FERC also ordered Rover to engage in continued consultation required under the National Historic Places Act and referred the matter to the FERC Office of Enforcement to investigate and take action as needed.<sup>212</sup> Further, in the Certificate Order's pre-construction conditions, FERC included a condition requiring resolution of the adverse effects of the historic property demolition.<sup>213</sup>

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203. *Id.*

204. *Id.* at \*8-9.

205. *Id.* at \*8.

206. *Id.* at \*9.

207. *Delaware Riverkeeper Network* at \*9.

208. *Id.*

209. *Id.*

210. *Rover Pipeline L.L.C.*, 158 F.E.R.C. ¶ 61,109 at P 6 (2017).

211. *Id.* at P 254. The FERC stated it will allow Rover's reapplication for a blanket certificate after 18 months of commercial operation. *Id.*

212. *Id.* at P 249.

213. *Id.* at App. B, Condition 41.



5. *Downeast Liquefaction, L.L.C.*, 156 F.E.R.C. ¶ 61,114 (2016).

The FERC dismissed and terminated a joint application by Downeast LNG, Inc. and Downeast Pipeline, L.L.C. (collectively, Downeast) for a LNG import terminal, an associated take-away pipeline facility, and an export terminal in Washington County, Maine.<sup>214</sup> The FERC determined that Downeast’s multi-facility proposal had become stale because it had been pending before FERC for over 10 years.<sup>215</sup> Downeast first filed its application to construct a LNG import terminal and take-away facility in 2006.<sup>216</sup> In August 2014, FERC approved Downeast’s request to use the pre-filing process for conversion of its import terminal to a bidirectional import/export terminal.<sup>217</sup> After twice granting requests by Downeast to hold the pre-filing process in abeyance, FERC denied Downeast’s request to hold the process in abeyance for an additional period of time, noting that since it had approved Downeast’s request to use the pre-filing process in August 2014, Downeast “ha[d] not demonstrated meaningful progress . . . toward a single, integrated proposal.”<sup>218</sup> After this prolonged delay, both Downeast and FERC had “lost any benefit of the early identification and resolution of environmental and stakeholder issues the pre-filing process was initiated to achieve.”<sup>219</sup> The FERC denied Downeast’s applications without prejudice to a future application “when [Downeast] is in a position to commit to actively pursuing development and authorization of its project.”<sup>220</sup>

6. *Transcontinental Gas Pipe Line Co.*, 157 F.E.R.C. ¶ 61,095 (2016).

The FERC denied requests by the Bordertown and Chesterfield townships to reconsider its April 2016 Certificate of Public Convenience and Necessity issued to Transcontinental Gas Pipe Line Company, L.L.C. (Transco) for the construction of Transco’s Garden State Project.<sup>221</sup> The towns argued that Transco’s precedent agreement with gas supplier New Jersey Natural Gas (NJNG) for 100% of the project capacity was an inadequate basis to show need for the project.<sup>222</sup> Although NJNG held an ownership interest in a connected pipeline, FERC declined to discount the importance of the NJNG precedent agreement, finding that it provided “significant evidence of demand for the project.”<sup>223</sup> The FERC noted, moreover, that it is not its practice to “look behind such agreements to evaluate shippers’ business decisions to acquire capacity.”<sup>224</sup>

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214. *Downeast Liquefaction, L.L.C.*, 156 F.E.R.C. ¶ 61,114 (2016).

215. *Id.* at P 4.

216. *Id.* at P 1.

217. *Id.*

218. *Id.* at P 3.

219. 156 F.E.R.C. ¶ 61,114 at P 3.

220. *Id.* at P 2.

221. *Transcon. Gas Pipe Line Company, L.L.C.*, 157 F.E.R.C. ¶ 61,095 (2016).

222. *Id.* at P 3.

223. *Id.* at P 5 (internal quotations and citation omitted).

224. *Id.*

### B. Storage Projects

#### 1. Tallulah Gas Storage, L.L.C., 156 F.E.R.C. ¶ 61,141 (2016).

On August 29, 2016, FERC vacated Tallulah Gas Storage, L.L.C.'s (Tallulah) certificate authorization for construction and operation of a gas storage project.<sup>225</sup> Tallulah had been granted certificate authorization to construct and operate a salt dome natural gas storage facility and associated pipeline facilities on March 18, 2011.<sup>226</sup> The March 2011 order required Tallulah to complete and place in service the gas storage project's facilities by March 18, 2015.<sup>227</sup> On February 11, 2015, FERC granted Tallulah an extension until March 18, 2016.<sup>228</sup> In its August 29, 2016 Order, FERC noted that Tallulah's certificate authorization had lapsed and Tallulah had not filed any further requests for extension of time to construct.<sup>229</sup> Further, Tallulah had not filed any construction updates since its earlier extension request.<sup>230</sup>

#### 2. Magnum Gas Storage, L.L.C., 157 F.E.R.C. ¶ 61,114 (2016).

The FERC authorized Magnum Gas Storage, L.L.C. (Magnum) to: (1) move the previously authorized locations for proposed natural gas storage caverns; (2) extend the in-service date to be within four years from the date of FERC's order; and (3) add a new wheeling transportation service.<sup>231</sup> Magnum had applied to amend its previously-issued certificate to change the layout of its approved natural gas storage facilities' site due to construction activities associated with a non-jurisdictional natural gas liquids (NGL) storage facility.<sup>232</sup> Owing to changes in market dynamics that drove a strong demand for new NGLs storage and suppressed demand for natural gas storage, Magnum proposed to construct non-jurisdictional NGL storage facilities prior to constructing the natural gas storage facility.<sup>233</sup>

## III. PHMSA & PIPELINE SAFETY

### A. Enforcement Under the Pipeline Safety Laws

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

On August 9, 2016, a federal jury returned a mixed verdict against Pacific Gas & Electric (PG&E) in the criminal trial involving the fatal pipeline rupture

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225. *Tallulah Gas Storage, L.L.C.*, 156 F.E.R.C. ¶ 61,141 at P 5 (2016).

226. *Tallulah Gas Storage, L.L.C.*, 134 F.E.R.C. ¶ 61,221 at P 3 (2011).

227. *Id.* at P 33.

228. Delegated Letter Order, *Tallulah Gas Storage, L.L.C.*, Docket No. CP10-494-000 (Feb. 11, 2015).

229. 156 F.E.R.C. ¶ 61,141 at P 2.

230. *Id.* at P 4.

231. *Magnum Gas Storage, L.L.C.*, 157 F.E.R.C. ¶ 61,114 at P 1-2 (2016).

232. *Id.* at P 1.

233. *Id.* at P 2.

and explosion of a gas transmission pipeline in San Bruno, California, in 2010.<sup>234</sup> The company was found guilty on five counts of knowingly and willfully violating gas transmission integrity management requirements of the federal pipeline safety regulations of the PHMSA and one count of obstructing the National Transportation Safety Board's (NTSB) investigation of the incident in violation of 18 U.S.C. § 1505.<sup>235</sup> The jury found PG&E not guilty of knowingly and willfully violating regulations requiring the maintenance of repair records and pressure test records.<sup>236</sup> With respect to the "knowingly and willful" criminal liability standard of the Pipeline Safety Act, the judge instructed the jury that the term "willful" requires only a finding that the company disregarded the statute and displayed an indifference to its requirements.<sup>237</sup> The jury was not required to find specific intent to disregard or disobey the law to reach a guilty verdict.<sup>238</sup>

At sentencing, PG&E was ordered to pay a \$3 million fine and a \$2,400 special assessment; perform 10,000 hours of community service, 2,000 of which must be performed by high-level personnel; and advertise on television and in the newspaper the offenses, convictions, punishment and steps taken to prevent recurrence.<sup>239</sup> PG&E also was sentenced to five years' probation and required to retain an independent monitor for five years to ensure the company takes reasonable and appropriate steps to maintain the safety of its pipeline system, performs appropriate assessment testing, and maintains an effective ethics and compliance program.<sup>240</sup> These penalties are in addition to the \$1.6 billion civil penalty assessed against PG&E by the California Public Utilities Commission for violations related to the San Bruno incident.<sup>241</sup>

## 2. PHMSA Issues Interim Final Rule Implementing New Emergency Order Authority.

On October 14, 2016, PHMSA issued an interim final rule (IFR) establishing temporary regulations implementing the new emergency order authority conferred under the Protecting Our Infrastructure of Pipelines and Enhancing Safety Act of

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234. Transcript of Proceedings at 3-6, *United States v. Pac. Gas & Elec. Co.*, No. 14-CR-00175-TEH (N.D. Cal. Aug. 9, 2016); Verdict Form, *United States v. Pac. Gas & Elec. Co.*, Case No. 14-CR-00175-TEH 2016 WL 8793579 (N.D. Cal. Aug. 9, 2016).

235. 49 C.F.R. §§ 192.901-192.951 (2016); 18 U.S.C. § 1505 (2012).

236. 49 C.F.R. § 192.709(a) (2016); 49 C.F.R. § 192.517(a) (2016).

237. Order Regarding Jury Instructions on Intent Elements for Regulatory Counts at 3, *United States v. Pac. Gas & Elec. Co.*, No. 14-CR-00175-TEH (July 26, 2016).

238. *Id.*

239. Judgment in a Criminal Case at 3-4, *United States v. Pac. Gas & Elec. Co.*, No. 14-CR-00175-TH (Jan. 31, 2017).

240. *Id.* at 3.

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

2016 (PIPES Act).<sup>242</sup> The PIPES Act expanded PHMSA's enforcement authority to include written emergency orders addressing "imminent hazards" caused by unsafe conditions or practices.<sup>243</sup> Unlike PHMSA's existing authorities to issue pipeline-specific corrective action orders or safety orders, an emergency order may be issued to multiple pipeline owners or operators.<sup>244</sup> An emergency order may prohibit an unsafe condition or practice or impose an affirmative requirement when an unsafe condition, practice, or other activity poses a threat to life or significant harm to property or the environment.<sup>245</sup> Before issuing an emergency order, PHMSA must consider the impacts on public health and safety, the economy or national security, and service reliability.<sup>246</sup> As appropriate, PHMSA must consult with federal and state agencies and entities knowledgeable in pipeline safety or operations.<sup>247</sup> The interim final rule contains hearing procedures to be conducted by an Administrative Law Judge (ALJ) in the Department of Transportation's Office of Hearings who must issue a report and recommendation.<sup>248</sup>

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

On April 27, 2017, PHMSA issued a final rule increasing the maximum civil penalties for violations of the federal pipeline safety laws to \$209,002 per violation per day, up to a maximum of \$2,090,022 for a related series of violations.<sup>249</sup> The increase complies with the Federal Civil Penalties Inflation Adjustment Act Improvement Act of 2015 which requires that executive agencies annually adjust civil penalties to account for inflation.<sup>250</sup> On October 17, 2016, PHMSA released a policy statement advising pipeline owners and operators of the availability of the agency's framework for calculating civil penalties in pipeline enforcement cases.<sup>251</sup> PHMSA stated that it intends to assess higher civil penalties, consistent with the authority conferred by the Pipeline Safety, Regulatory Certainty and Job Creation Act of 2011 (2011 Act) which increased maximum federal civil penalties PHMSA may assess for violations of the Pipeline Safety Act.<sup>252</sup> PHMSA stated that it intends to use increased penalty authority to deter violations and will give

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242. Interim Final Rule, *Pipeline Safety: Enhanced Emergency Order Procedures*, 81 Fed. Reg. 70,980 (Oct. 14, 2016) (to be codified at 49 C.F.R. pt. 190). PHMSA issued the interim final rule without prior notice and opportunity to comment because the PIPES Act required issuance of temporary regulations within 60 days of enactment. Upon issuance of a final rule, the temporary regulations will expire.

243. Protecting Our Infrastructure of Pipelines and Enhancing Safety Act of 2016, Pub. L. No. 114-183, 130 Stat. 514, 525.

244. 49 C.F.R. §§ 190.233, 190.239 (2015).

245. 49 C.F.R. § 190.233(a) (2015).

246. *Id.* § 190.236(a).

247. *Id.*

248. *Id.* § 190.236(d).

249. Final Rule, *Pipeline Safety: Inflation Adjustment of Maximum Civil Penalties*, 82 Fed. Reg. 19,325, 19,328 (Apr. 27, 2017) (to be codified at 49 C.F.R. § 190.223).

250. Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 701, 129 Stat. 599, 599.

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

252. Pipeline Safety Regulatory Certainty and Job Creation Act of 2011, Pub. L. No. 112-90, § 2, 125 Stat. 1904, 1905.

greater weight to the following factors when assessing civil penalties: violations that cause or “increase the severity of incidents, including those involving smaller hazardous liquid spills or resulting in methane releases[;]” violations that are repeat offenses within a 5 year window; and “multiple instances of the same [regulatory] violation.”<sup>253</sup>

### B. PHMSA Pipeline Safety Regulatory Initiatives

#### 1. PHMSA Issues Interim Final Rule Addressing the Safety of Underground Natural Gas Storage Facilities.

On December 19, 2016, PHMSA issued an interim final rule (Storage Interim Final Rule) adopting federal safety regulations and reporting requirements for underground natural gas storage facilities to implement section 12 of the PIPES Act.<sup>254</sup> PHMSA incorporated by reference into its regulations American Petroleum Institute (API) recommended practice (RP) 1170 “Design and Operation of Solution-mined Salt Caverns used for Natural Gas Storage,” and API RP 1171, “Functional Integrity of Natural Gas Storage in Depleted Hydrocarbon Reservoirs and Aquifer Reservoirs.”<sup>255</sup> The Storage Interim Final Rule directs operators to treat both mandatory and non-mandatory provisions of API RP 1170 and 1171 as requirements and to modify written procedures to include the operations, maintenance, and emergencies provisions of each RP.<sup>256</sup> An operator can deviate from the RPs by providing a written technical and safety justification explaining why compliance with a provision is not practicable and necessary for the safety of a particular facility or piece of equipment.<sup>257</sup> The Storage Interim Final Rule also will require that operators of underground natural gas storage facilities file annual reports, obtain Operator Identification Numbers, and file incident reports and safety-related reports.<sup>258</sup>

The Storage Interim Final Rule applies to intrastate underground gas storage facilities.<sup>259</sup> States must update their safety regulations to include the provisions of the RPs and ensure that the state authority responsible for overseeing the safety of underground natural gas storage facilities has submitted a certification to PHMSA pursuant to section 60105 of the Pipeline Safety Act.<sup>260</sup> States may adopt additional or more stringent requirements, as long as they are consistent with federal requirements.<sup>261</sup>

As published, operators of underground natural gas storage facilities were required to implement certain parts of the new standards no later than January 18,

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253. 81 Fed. Reg. at 71,566.

254. Interim Final Rule, *Pipeline Safety: Safety of Underground Natural Gas Storage Facilities*, 81 Fed. Reg. 91,860; Pub. L. No. 114-183, § 12, 130 Stat. 514, 522 ((Dec. 19, 2016).

255. *Id.* at 91,861

256. *Id.* at 91,873.

257. *Id.*

258. *Id.* at 91,866.

259. 81 Fed. Reg. 91,860, at 91,861.

260. 49 U.S.C. § 60105 (2017).

261. 81 Fed. Reg. 91,860, at 91,861.

2018.<sup>262</sup> Operators of storage facilities constructed after July 18, 2017 will be required to satisfy all of the requirements and recommendations of either API RP 1170 or API RP 1171, as applicable.<sup>263</sup> In response to public comments and petitions for reconsideration filed with respect to the Storage Interim Final Rule, on June 20, 2017, PHMSA issued a partial stay of enforcement with respect to the non-mandatory provisions of API RP 1170 and RP 1171.<sup>264</sup> The agency stated it would not initiate enforcement for failure to comply with the RPs' non-mandatory provisions until a final rule is issued and for one year after its publication.<sup>265</sup> Operators must comply with mandatory provisions by January 18, 2018 as contemplated in the Storage Interim Final Rule.<sup>266</sup>

## 2. PHMSA Proposes User Fee Structure for Underground Gas Storage Facilities.

In anticipation of issuing pipeline safety standards for underground natural gas storage facilities, and pursuant to section 12 of the PIPES Act which provides for the imposition of user fees on operators of these facilities and prescribes procedures for collecting the fee, PHMSA published a notice advising operators of such facilities of a proposed user fee assessment and rate structure that PHMSA would adopt to recover the costs of inspecting and regulating interstate and intrastate natural gas storage facilities by PHMSA and state regulators.<sup>267</sup> Section 2 of the PIPES Act authorized \$8 million to be appropriated from user fees for each of fiscal years 2017-2019.<sup>268</sup> PHMSA cannot collect the user fee unless the expenditure of the fee is provided in advance in an appropriations act.<sup>269</sup> If Congress appropriates funds to this account for fiscal years 2017-2019, PHMSA will collect the funds from facility operators using a tiered fee assessment approach based on each operator's amount of working gas storage capacity.<sup>270</sup>

## 3. PHMSA Expands Installation Requirement for Excess Flow Valves.

On October 14, 2016, PHMSA published a final rule expanding the requirement to install either excess flow valves (EFVs) or manual service line shut-off valves (*e.g.*, curb valves) on new or replaced service lines.<sup>271</sup> Effective April 14,

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262. *Id.* at 91,873.

263. *Id.* at 91,863.

264. Notice, *Pipeline Safety: Safety of Underground Natural Gas Storage Facilities; Petition for Reconsideration*, 82 Fed. Reg. 28,224, 28,225 (June 20, 2017).

265. *Id.* at 28,225.

266. *Id.*

267. Protecting Our Infrastructure of Pipelines and Enhancing Safety Act of 2016, Pub. L. No. 114-183 § 12(c), 130 Stat. 514, 523; Pipeline Safety: Underground Natural Gas Storage Facility User Fee, 82 Fed. Reg. 16,874 (Apr. 6, 2017).

268. *Id.* § 2(a)(2), 130 Stat. 514, 515.

269. Notice of Agency Action, *Pipeline Safety: Underground Natural Gas Storage Facility User Fee*, 82 Fed. Reg. 16,874.

270. *Id.*

271. Final Rule, *Pipeline Safety, Expanding the Use of Excess Flow Valves in Gas Distribution Systems to Applications Other Than Single-Family Residences*, 81 Fed. Reg. 70,987 (Oct. 14, 2016), *correction*, 81 Fed. Reg. 72,739 (Oct. 21, 2016) (to be codified at 49 C.F.R. pt. 192).

2017, operators must install EFVs on new or replaced branched service lines servicing single family residences, multifamily residences and small commercial entities consuming gas volumes not exceeding 1,000 standard cubic feet per hour (SCGH), subject to certain exceptions.<sup>272</sup> For new or replaced service lines with meter capacities above 1,000 SCGH, operators must use either manual service line shut-off valves (curb valves) or EFVs.<sup>273</sup> The final rule requires that curb valves be accessible to qualified and authorized first responders during emergencies.<sup>274</sup> Operators also must notify customers of their right to request installation of an EFV on existing service lines.<sup>275</sup> The operator's rate-setter will determine who is responsible for installation costs.<sup>276</sup>

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

On January 23, 2017, PHMSA issued a final rule adopting numerous amendments to the federal pipeline safety regulations.<sup>277</sup> The amended regulations affect operators of hazardous liquid pipelines, gas distribution, transmission and gathering pipelines, and liquefied natural gas facilities.<sup>278</sup> Matters addressed in the final rule include tightened accident notification requirements, new PHMSA notification requirements for certain system changes, training requirements for control room personnel, a new cost recovery fee for facility design or construction safety revisions, and modified requirements for farm taps.<sup>279</sup> The rule also adds procedures for renewing expiring special permits, narrows exemptions from the requirement to perform drug and alcohol testing of employees after an accident, establishes procedures for requesting protection of confidential commercial information submitted to PHMSA and incorporates by reference new procedures for welding and qualifying welders.<sup>280</sup>

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272. 81 Fed. Reg. at 71,001-04 (to be codified at 49 C.F.R. § 192.383).

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.*

277. Final Rulemaking, Pipeline Safety: Operator Qualification, Cost Recovery, Accident and Incident Notification, and Other Pipeline Safety Changes, 82 Fed. Reg. 7972 (2017) (to be codified at 49 C.F.R. pts. 190-92, 195, 199).

278. *Id.*

279. *Id.* at 7996-99 (to be codified at 49 C.F.R. §§ 191.3, 195.52).

280. *Id.* at 7995, 7997, 8001.

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