

## 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, 2017 through June 30, 2018.\*

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## I. SIGNIFICANT FERC ADMINISTRATIVE ORDERS

A. *Notice of Proposed Rulemaking*

## 1. Interstate and Intrastate Natural Gas Pipelines; Rate Changes Relating to Federal Income Tax Rate

On March 15, 2018, the Federal Energy Regulatory Commission (FERC or Commission) issued a Notice of Proposed Rulemaking (NOPR), seeking comments regarding a process that would determine which interstate natural gas pipelines are “collecting unjust and unreasonable rates” as a result of the corporate income tax reductions authorized by the Tax Cuts and Jobs Act (TCJA).<sup>1</sup> The FERC concurrently released a supporting Revised Policy Statement on Treatment of Income Taxes (Revised Policy Statement) and an Order on Remand, both in response to *United Airlines, Inc. v. FERC*, and in all of which addressed the double-recovery concern if a pipeline is claiming an income tax allowance.<sup>2</sup>

Among other things, the TCJA reduced the federal corporate income tax rate from 35% to 21% when it took effect in January, resulting in a reduction in accumulated deferred income taxes (ADIT) on the books of pipelines.<sup>3</sup> To remain in compliance with normalization, pipelines must flow the excess ADIT, which is no longer payable to the IRS, back to ratepayers using the average rate assumption method.<sup>4</sup>

Together, the TCJA and policy directive emerging from the *United Airlines* decision prompted the Commission to propose a process requiring interstate natural gas pipelines under the Natural Gas Act (NGA) to submit an informational filing with the Commission.<sup>5</sup> The Commission intends for this filing, Form No. 501-G, “to collect financial information to evaluate the impact of the [TCJA] and the Revised Policy Statement on interstate natural gas pipelines’ revenue requirement.”<sup>6</sup>

In addition to requiring Form No. 501-G, the Commission proposed four options for each interstate natural gas pipeline to address the changes to the pipeline’s recovery of tax costs:

- (1) file a limited NGA section 4 filing to reduce the pipeline’s rates to reflect the decrease in the federal corporate income tax rate pursuant to the TCJA and the elimination of the income tax allowance for [partnerships] consistent with the Revised Policy Statement, (2) make a commitment to file a general NGA section 4 rate case in the near future, (3) file a statement explaining why an adjustment to its rates is not needed, or (4) take no action other than filing [Form No. 501-G].<sup>7</sup>

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1. *Interstate and Intrastate Natural Gas Pipelines; Rate Changes Relating to Federal Income Tax Rate*, 162 F.E.R.C. ¶ 61,226 at P 1 (2018).

2. *Inquiry Regarding the Commission’s Policy for Recovery of Income Tax Costs*, 162 F.E.R.C. ¶ 61,227 (2018); Opinion No. 511-C, *SFPP, L.P.*, 162 FERC ¶ 61,228 (2018); *United Airlines, Inc. v. FERC*, 827 F.3d 122 (D.C. Cir. 2016); 162 F.E.R.C. ¶ 61,226 at P 2.

3. 162 F.E.R.C. ¶ 61,226 at P 4; *see also* Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 13001, 80 Stat. 2054, 2096 (2017).

4. 162 F.E.R.C. ¶ 61,226 at P 7.

5. *Id.* at P 3.

6. *Id.* at P 3.

7. *Id.*

If a pipeline opts for option (3) or (4), the Commission will consider, based on the information provided in Form No. 501-G, “comments by interested parties, whether to issue an order to show cause under NGA section 5 requiring the pipeline either to reduce its rates to reflect the income tax reduction or explain why it should not be required to do so.”<sup>8</sup> The Commission proposed to assign to each pipeline’s Form No. 501-G filing an RP docket number and to notice the filing, which would allow for interventions, comments, and protests.<sup>9</sup>

Most of the data needed to complete Form No. 501-G can be taken from a pipeline’s 2017 FERC Form Nos. 2 or 2-1A.<sup>10</sup> The FERC proposed to require each pipeline’s Form No. 501-G be completed using an indicative return on equity of 10.55%.<sup>11</sup> Form No. 501-G also outlined additional assumptions for each filing party to use, such as capital structure.<sup>12</sup>

Depending on where a new project is in development, the FERC intends to address initial rates in a variety of ways to ensure rates are appropriate.<sup>13</sup> Furthermore, the FERC proposed that intrastate pipelines with interstate service pursuant to section 311 of the Natural Gas Policy Act of 1978 (NGPA) and Hinshaw pipelines would not be required to file a Form No. 501-G.<sup>14</sup> Instead, the FERC intends to evaluate whether these pipelines were charging fair and equitable rates during its 5-year rate review/election, or through a new rate election triggered by a change in state-derived rates.<sup>15</sup> However, for those NGPA section 311 and Hinshaw pipelines with Commission-established interstate rates, the FERC proposed to require all to file a new rate election for interstate service if and when they reduce their intrastate service rates to reflect the lowered corporate income tax.<sup>16</sup> Pipelines with market-based rates and negotiated rates (unless expressly providing otherwise) would not be subject to the NOPR.<sup>17</sup>

The FERC proposed a staggered implementation timeline, with all interstate natural gas pipelines with cost-based rates being split into four groups and the first group being required to file Form No. 501-G 28 days after the final rule enters into effect.<sup>18</sup> Each subsequent group would be required to file no later than 28 days from the previous group’s due date.<sup>19</sup>

Interested parties submitted comments to the FERC by April 25, 2018.<sup>20</sup> On July 18, 2018, the FERC issued a final rule.<sup>21</sup> While very similar to the NOPR,

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8. *Id.*

9. 162 F.E.R.C. ¶ 61,226 at P 29.

10. *Id.* at P 32.

11. *Id.* at P 34.

12. *Id.* at P 35.

13. *Id.* at PP 52-53.

14. 162 F.E.R.C. ¶ 61,226 at P 54.

15. *Id.* at P 56.

16. *Id.* at P 59.

17. *Id.* at PP 45, 61.

18. *Id.* at P 62.

19. 162 F.E.R.C. ¶ 61,226 at 62.

20. *Id.* at P 83.

21. *Interstate and Intrastate Natural Gas Pipelines; Rate Changes Relating to Federal Income Tax Rate*, 164 F.E.R.C. ¶ 61,031 (2018).

the FERC provided clarification on several aspects, including the four options for filing discussed above, and adopted some changes, mostly to Form No. 501-G, based on feedback the Commission received from commenters.<sup>22</sup> With regards to how capital structure must be reported on Form No. 501-G, the FERC implemented two changes: (1) instead of asking whether a respondent believes its capital structure complies with Commission's capital structure policies, "the form now includes a statement explaining how the Commission will use the respondent's data to perform [a capital structure analysis]" and asks a series of factual question about its actual capital structure; and (2) the FERC modified the hypothetical capital structure to be 57 % equity and 43 % debt, as some pipelines' capital structure was previously ineligible.<sup>23</sup>

The FERC also amended FERC Form No. 501-G to eliminate both income tax allowance and ADIT if a pass-through entity states that it does not pay taxes, which is consistent with the FERC's Revised Policy Statement and retroactive ratemaking principles, among other things.<sup>24</sup> Furthermore, the Commission modified Form No. 501-G, "to reflect a reduction to Other Regulatory Liabilities for the Net Amortization of Excess and/or Deficient ADIT in the Form No. 501-G," as previously proposed amortization of excess ADIT balances in the cost of service in combination with a rate base adjustment reflecting the full ADIT balance reduces rates twice.<sup>25</sup>

Finally, the FERC amended the staggered implementation timeline to ensure that all interstate pipelines required to file Form No. 501-G would be required to do so by early January 2019.<sup>26</sup>

The final rule becomes effective on September 13, 2018.<sup>27</sup>

## B. Notice of Inquiry

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

On March 15, 2018, the FERC issued the Revised Policy Statement revising its 2005 Income Tax Policy Statement and finding that it will no longer allow pipelines organized as master limited partnerships (MLPs) to recover an income tax allowance in their costs of service.<sup>28</sup> The Commission found that allowing MLPs to receive both an income tax allowance and a rate of return on equity (ROE) calculated pursuant to the Commission's discounted cash flow (DCF) methodology results in a double recovery of income tax costs.<sup>29</sup>

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22. *Id.* at PP 4, 113-47.

23. *Id.* at PP 114-15.

24. *Id.* at PP 130-33.

25. *Id.* at PP 150-51.

26. 164 F.E.R.C. ¶ 61,031 at PP 265-66.

27. Interstate and Intrastate Natural Gas Pipelines; Rate Changes Relating to Federal Income Tax Rate; American Forest & Paper Association, 83 Fed. Reg. 36,672, 36,672 (2018).

28. *Policy Statement on Income Tax Allowances*, 111 F.E.R.C. ¶ 61,139 (2005) ("2005 Income Tax Policy Statement"); 162 F.E.R.C. ¶ 61,227 at P 2.

29. 162 F.E.R.C. ¶ 61,227 at P 2.

In Docket No. IS08-390 involving SFPP, L.P. (SFPP), the Commission applied its 2005 Income Tax Policy Statement in Opinion Nos. 511, 511-A, 511-B to grant SFPP, a pipeline owned by a MLP, an income tax allowance in its cost of service.<sup>30</sup> Certain participants in Docket No. IS08-390 filed Petitions for Review at the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) claiming that the FERC erred in granting SFPP an income tax allowance because they alleged there to be a double recovery of the income tax allowance for a pipeline organized as a MLP when the ROE is set using the FERC's DCF methodology with a proxy group of MLPs.<sup>31</sup> On July 1, 2016, the D.C. Circuit, in *United Airlines v. FERC*, granted the shippers' petition, vacated the FERC's orders regarding the issue, and remanded for the FERC to "demonstrate that there is no double recovery."<sup>32</sup>

Following the remand of *United Airlines* from the Court of Appeals, the FERC initiated a Notice of Inquiry in Docket No. PL17-1, seeking comments from interested stakeholders on "how to resolve any double recovery" brought about by the 2005 Income Tax Policy Statement.<sup>33</sup> The FERC "received 24 comments and 19 reply comments" representing the interests of customers, pipelines, and electric utilities.<sup>34</sup> In response, the FERC issued the Revised Policy Statement, concluding that there is an impermissible double recovery when an MLP is allowed both an income tax allowance and an ROE calculated using DCF methodology.<sup>35</sup> Therefore, in its Revised Policy Statement, the FERC held that it would no longer permit an MLP to recover an income tax allowance in its cost of service, and accordingly instructed MLPs to eliminate the income tax allowance in their Form No. 6, page 700, reporting.<sup>36</sup>

SFPP, as well as other commenters in Docket No. PL17-1 requested rehearing of the Commission's Revised Policy Statement and filed Petitions for Review before the D.C. Circuit.<sup>37</sup> On July 18, 2018, the Commission issued its order on rehearing, upholding the Revised Policy Statement and providing clarification on the treatment of accumulated deferred income taxes when an MLP pipeline is not permitted to include an income tax allowance in its cost of service.<sup>38</sup>

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30. *Id.* at P 6.

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

32. *Id.* at 137.

33. 162 F.E.R.C. ¶ 61,227 at P 7; *Inquiry Regarding the Commission's Policy for Recovery of Income Tax Costs*, 157 F.E.R.C. ¶ 61,210 (2016).

34. 162 F.E.R.C. ¶ 61,227 at P 7.

35. *Id.* at P 8.

36. *Id.*

37. *Inquiry Regarding the Commission's Policy for Recovery of Income Tax Costs*, 164 F.E.R.C. ¶ 61,030 at P 3 (2018). Note that SFPP also sought rehearing of the implementation of the Revised Policy Statement in Opinion Nos. 511-C and 522-B, and those requests for rehearing are now pending before the Commission.

38. *See generally id.*

*C. Jurisdictional Issues*1. *Andeavor Field Services, LLC v. Mid-America Pipeline Company, LLC & Enterprise Products Operating LLC*

On June 21, 2018, the FERC issued an order dismissing the complaint filed by Andeavor Field Services, LLC (Andeavor) against Mid-America Pipeline Company, LLC (Mid-America) and Enterprise Products Operating LLC (Enterprise).<sup>39</sup>

In April 2011, Mid-America held an open season in connection with expanding capacity on its Rocky Mountain Pipeline system.<sup>40</sup> “QEP Field Services Company, now Andeavor, participated in that open season and entered into a Transportation Services Agreement (TSA) with Mid-America” for firm service on the expansion capacity.<sup>41</sup> Pursuant to the TSA, Andeavor agreed to ship-or-pay for a certain volume of product.<sup>42</sup> Section 2.2.1 of the TSA defines Commitment Volume as “The minimum daily volume of NGL that Shipper shall be obligated to tender to Carrier for transportation, or pay for, pursuant to this Agreement on any Day (the “Commitment Volume”), in excess of Shipper’s Base Volume, . . . .”<sup>43</sup> Base Volume is defined as

. . . the amount of NGL volumes equal to: (a) in the case of any Shipper that has executed an Exchange Agreement the “Base Volume” that is set forth in such Exchange Agreement; or (b) in the case of any other Shipper the greater of (i) the average daily volume of NGL volumes tendered to Carrier at the Origin Point(s) for the twelve (12) Month period preceding the date of this Agreement, or (ii) the average daily volume of NGL volumes tendered to Carrier at the Origin Point for the twelve (12) Month period immediately preceding the actual start-up date of Shipper’s [insert name] processing facility.<sup>44</sup>

In calculating Andeavor’s liability under the TSA, Mid-America required Andeavor to ship a certain volume on the pre-expansion capacity before it could receive credit for the shipment of its Commitment Volumes on the expansion capacity.<sup>45</sup> This calculation resulted in deficiency–payment demands from Mid-America to Andeavor.<sup>46</sup> As a result of those demands not being met, Mid-America seized Andeavor’s line fill.<sup>47</sup>

Andeavor argued that Mid-America’s interpretation of the TSA and resulting line fill seizure improperly imposes (i) a ship-or-pay obligation on uncommitted shippers and (ii) unjust and unreasonable terms and conditions on the shipment of uncommitted volumes on the existing capacity.<sup>48</sup>

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39. *Andeavor Field Services, LLC v. Mid-America Pipeline Co.*, 163 F.E.R.C. ¶ 61,209 (June 21, 2018).

40. *Id.* at P 4.

41. *Id.*

42. *Id.* at P 7.

43. *Id.* at P 7 n. 11.

44. 163 F.E.R.C. ¶ 61,209 at P 7 n. 11.

45. *Id.* at P 11.

46. *Id.* at P 8.

47. *Id.*

48. *Id.* at P 1.

Mid-America contended “that the complaint seeks resolution of a contractual dispute that is best suited for the state court in which it is already being adjudicated and that it does not implicate the Commission’s primary jurisdiction.”<sup>49</sup>

The Commission, applying the test in *Arkansas Louisiana Gas Company v. Hall*, found that it does not possess special expertise beyond that of the state court nor does the Commission need uniformity of interpretation on this issue.<sup>50</sup> Furthermore, “the dispute does not implicate the Commission’s regulatory responsibilities under the [Interstate Commerce Act] since we find . . . the exercise of the tariff’s non-payment remedies to be a secondary result arising from the contract dispute in the initial instance.”<sup>51</sup> Accordingly, the complaint was dismissed.<sup>52</sup>

## 2. Guttman Energy, Inc., et al. v. Buckeye Pipe Line Co., L.P.

This FERC Order affirmed the ruling contained in an Initial Decision issued by an Administrative Law Judge (ALJ) finding that shipments by Guttman Energy, Inc. (Guttman) on the Laurel Pipeline Co. (Laurel) originating at Chelsea Junction, Pennsylvania for delivery to locations within Pennsylvania qualified as interstate transportation subject to FERC jurisdiction.<sup>53</sup>

In affirming the Initial Decision, the FERC wrote that evaluating “[w]hether a movement is interstate or intrastate for purposes of Interstate Commerce Act jurisdiction ‘depends on the essential character of the movement’ and is determined based on a fact-specific analysis.”<sup>54</sup> The FERC further noted, the primary inquiry in any jurisdictional analysis is whether

. . . at the time the shipment commences its journey and thereafter, there is a fixed and persisting intent of the part of the shipper, or the one for whose benefit the shipment is made, to move oil to an out-of-state or foreign destination and that intention is carried out, the transportation may be considered interstate commerce notwithstanding that the journey takes place in stages with an intermediate stopover.<sup>55</sup>

Analysis of whether there was a “sufficient break in the continuity of interstate transportation such that a portion of the movement on the Laurel/Buckeye system may be considered intrastate” requires producing sufficient facts that proving that ‘shippers moving product through these lines do not have a fixed intent to move product interstate.’<sup>56</sup> Such analysis must occur based on an analysis “drawn ‘from all the facts and circumstances surrounding the transportation.’”<sup>57</sup>

In this case, the petroleum products in question were shipped from Delaware City, Delaware via a separate pipeline before being placed on Laurel pipeline for

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49. 163 F.E.R.C. ¶ 61,209 at P 14.

50. *Arkansas La. Gas Co. v. Hall*, 7 F.E.R.C. ¶ 61,175, at p. 61,322, (1979); *Arkansas La. Gas Co. v. Hall*, 8 F.E.R.C. ¶ 61,031 (1979), *reh’g denied*; 163 F.E.R.C. ¶ 61,209 at PP 28-29.

51. 163 F.E.R.C. ¶ 61,209 at P 29.

52. *Id.* at P 3.

53. *Guttman Energy, Inc. v. Buckeye Pipe Line Co.*, 155 F.E.R.C. ¶ 63,008 (2016).

54. *Guttman Energy, Inc. v. Buckeye Pipe Line Co.*, 161 F.E.R.C. ¶ 61,180 at P 49 (2017).

55. *Id.* at P 52.

56. *Id.* at P 59.

57. *Id.* at P 66.

further movement from Chelsea Junction, Pennsylvania to points within Pennsylvania.<sup>58</sup> PBF Holding Company LLC (PBF) argued that since the petroleum product shipment from Delaware stopped prior to being transferred to the Laurel pipeline, that Guttman did not know the ultimate destinations of the shipments, and that Guttman retained power to divert the shipments, the transportation in this case should properly be classified as intrastate.<sup>59</sup> The FERC rejected PBF's argument, finding the facts did not support that a break in transportation occurred sufficient to override Guttman's persisting intent to ship products from Delaware City to points in Pennsylvania.<sup>60</sup>

In rejecting PBF's arguments, the FERC pointed to numerous facts that supported Guttman's overall persisting intent to ship petroleum products in interstate commerce, including (1) the lack of non-operational storage at Chelsea Junction and (2) the absence of merchant or leased storage between the two pipelines.<sup>61</sup> Further, the FERC rejected PBF's argument that a shipper's lack of knowledge of a particular shipment's final destination should be controlling, and found that the lack of knowledge of specific destinations is not determinative of a jurisdictional analysis.<sup>62</sup> The FERC also wrote that the ALJ "did not err by not giving any weight to Guttman's ability to divert shipments after the initial movement has commenced" because other facts made Guttman's fixed and persisting intent to ship petroleum products in interstate commerce sufficiently clear.<sup>63</sup> Overall, the FERC found that the ALJ was correct to find that, based on all the facts and circumstances produced at hearing, Guttman's intent was to transport petroleum products in interstate commerce and, therefore, that the movement on Laurel pipeline was jurisdictional.<sup>64</sup>

#### *D. Tariff and Ratemaking Issues*

##### *1. Seaway Crude Pipeline Company LLC*

On December 9, 2014, Seaway Crude Pipeline Company LLC (Seaway) applied for market-based rate authority.<sup>65</sup> The Seaway pipeline provides north-to-south transportation of crude oil from its origin in Cushing, Oklahoma to destinations on the U.S. Gulf Coast.<sup>66</sup> Multiple parties protested the application to the Federal Energy Regulatory Commission (Commission).<sup>67</sup>

On December 1, 2016, the presiding ALJ issued an Initial Decision that found that Seaway lacked market power in its origin and destination markets and granted

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58. *Id.* at P 58.

59. 161 F.E.R.C. ¶ 61,180 at PP 29-46.

60. *Id.* at PP 58-66.

61. *Id.* at PP 61, 63.

62. *Id.* at PP 65-67.

63. *Id.* at 72.

64. 161 F.E.R.C. ¶ 61,180 at P 74.

65. *Seaway Crude Pipeline Co.*, 152 F.E.R.C. ¶ 61,204 at P 1 (2015).

66. *Id.* at P 2.

67. *Id.* at P 1.



Seaway's application for market-based rate authority.<sup>68</sup> Two parties filed exceptions to the Initial Decision.<sup>69</sup>

On May 17, 2018, the Commission issued Opinion No. 563, an Order on Initial Decision affirming the Initial Decision.<sup>70</sup> The Commission held that Seaway lacked market power in its origin and destination markets and granted Seaway's application for market-based rates.<sup>71</sup> In analyzing the application, the Commission explained that an applicant pipeline's cost-based rates are not relevant in determining whether it has market power.<sup>72</sup> As a general policy matter, "a just and reasonable market-based rate may diverge, at times substantially, from the individual regulated rate of a market participant."<sup>73</sup>

The Commission analyzed competition in the origin and destination markets.<sup>74</sup> It affirmed the ALJ's finding that the appropriate product market was the transportation of all crude oil, including both light and heavy crude oil.<sup>75</sup> In the origin market, the Commission held that Seaway lacked market power.<sup>76</sup> Specifically, it found that the origin market is defined geographically as the State of Oklahoma, rejecting arguments that it should be the Cushing Hub.<sup>77</sup> The Commission reasoned that the primary focus of its geographic market definition is the origin of crude oil actually shipped on the applicant's pipeline.<sup>78</sup> In addition, the Commission explained that trucking, as a means to avoid an anti-competitive price increase in the origin market, could serve to expand the geographic market.<sup>79</sup> Regarding competitive alternatives, the Commission has considered all currently used alternatives as good alternatives, which in this case included certain pipelines and refineries, but excluded rail and barge movements because there was not sufficient proof that either was actually used during the applicable period.<sup>80</sup> The Commission calculated the Herfindahl-Hirschman index in the origin market to be 1,800, which was well below the 2,500 threshold that the Commission generally relies on in its market power analysis.<sup>81</sup> In its analysis, the Commission considered Seaway as a standalone entity even though it is jointly owned and has a 50/50 joint venture ownership structure.<sup>82</sup> It also treated capacity leased by Seaway to one of its two owners as part of Seaway's capacity.<sup>83</sup> Thus, the Commission found that the origin market is not so highly concentrated that it is susceptible to the exercise of market

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68. *Seaway Crude Pipeline Co.*, 157 F.E.R.C. ¶ 63,024 at P 1 (2016).

69. *Seaway Crude Pipeline Co.*, 163 F.E.R.C. ¶ 61,127 at P 7 (2018).

70. *See generally id.*

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

72. *Id.* at P 13.

73. *Id.*

74. 163 F.E.R.C. ¶ 61,127 at P 90.

75. 152 FERC ¶ 61,204 at P 5; 163 FERC ¶ 61,127 at P 2.

76. 163 FERC ¶ 61,127 at P 96.

77. *Id.* at P 27.

78. *Id.* at P 25.

79. *Id.* at PP 28-29.

80. *Id.* at PP 42-60.

81. 163 FERC ¶ 61,127 at PP 79-80.

82. *Id.* at PP 72-73.

83. *Id.* at PP 73-75.

power.<sup>84</sup> Moreover, the Commission found that the presence of excess capacity in the origin market was further indication that Seaway lacked market power.<sup>85</sup> The Commission similarly found that Seaway had no market power in its destination markets.<sup>86</sup> No party sought rehearing of this order.

## 2. *Buckeye Pipe Line Company, L.P.*

In this Order, the FERC accepted Buckeye Pipe Line Company, L.P.'s (Buckeye) Tariff Nos. 442.13.0, 443.17.0, 444.12.0, and 446.21.0 subject to refund, consolidated the four tariff dockets, and set Buckeye's tariffs for hearing and settlement judge procedures.<sup>87</sup> These tariffs were filed "to comply with Commission's directives in Opinion No. 558, which revoked Buckeye's market-based rate authority for its Pittsburgh and Harrisburg, Pennsylvania destination markets and directed Buckeye to file revised rates for destination points in those markets."<sup>88</sup>

In accepting Buckeye's new tariffs subject to refund, the FERC found that Buckeye's new tariff rates may not be just and reasonable because protests alleged reasonable grounds for the FERC to believe that the proposed rates may not be representative of the costs that Buckeye can reasonably expect to incur during the terms that the rates will be in effect.<sup>89</sup> Furthermore, the FERC set for hearing Buckeye's proposal to base its rates on October 2011 rates indexed-forward for the years 2012 to 2017 because such a proposal is not consistent with FERC policy.<sup>90</sup> The FERC consolidated and set all the tariff dockets for hearing to allow Buckeye the opportunity to prove that the filed rates are just and reasonable.<sup>91</sup>

In the underlying order, Opinion No. 558, the FERC upheld an (ALJ) Initial Decision's finding that Buckeye possessed sufficient market power in its Harrisburg, Pennsylvania destination market to warrant revocation of Buckeye's market-based rate authority in that market, but reversed the ALJ's decision finding that Buckeye did not possess sufficient market power in its Pittsburgh destination market to justify revocation of Buckeye's market-based rate authority in that market.<sup>92</sup> As a result, the Commission revoked Buckeye's market-based rate authority for both its Pittsburgh and Harrisburg, Pennsylvania destination markets.<sup>93</sup>

In reaching this conclusion, the FERC made several supporting findings. It found that complaints challenging a pipeline's market-based rates do not require complainants to meet a heightened evidentiary standing of showing substantially changed circumstances from the period between the initial award of market-based rates and the complaint period.<sup>94</sup> It held instead that complainants must merely

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84. *Id.* at PP 80-81.

85. *Id.* at P 89.

86. 163 F.E.R.C. ¶ 61,127 at P 96.

87. *Buckeye Pipe Line Company, L.P.*, 163 F.E.R.C. ¶ 61,066 (2018).

88. *Id.* at P 2.

89. *Id.* at P 17.

90. *Id.* at P 18.

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

92. *Guttman Energy, Inc. v. Buckeye Pipeline Co.*, 161 F.E.R.C. ¶ 61,180 (2017); *Guttman Energy, Inc. v. Buckeye Pipe Line Co.*, 155 F.E.R.C. ¶ 63,008 (2016); 161 F.E.R.C. ¶ 61,180 at P 303.

93. 161 F.E.R.C. ¶ 61,180 at P 303.

94. *Id.* at P 87.

show that there are reasonable grounds for asserting that there have been substantial changes to competitive circumstances that may have rendered a pipeline's market-based rates unjust and unreasonable.<sup>95</sup> In terms of the market-power analysis for evaluating the appropriateness of market-based rates, the FERC (1) "affirm[ed] the use of Buckeye's current market-based rate as an appropriate proxy for the competitive rate in the SSNIP [(small but significant non-transitory increase in price)] test" and (2) found that, "[a]bsent a need to perform detailed cost analysis, there is no requirement to specifically identify a marginal supplier."<sup>96</sup>

Additionally, the FERC found that the Initial Decision properly defined the relevant product market, but reversed the ALJ's determination that the exclusion of intrastate transportation is a geographic market issue and not a product market issue.<sup>97</sup> It upheld the ALJ's decision concerning the appropriate origin market and destination markets, as well as the ALJ's determination regarding competitive alternatives in the origin market, Pittsburgh destination market, and Harrisburg destination market.<sup>98</sup> Further, the FERC upheld the ALJ's decision regarding the appropriate methodology to be used for evaluating market power.<sup>99</sup> The FERC upheld the "ALJ's decision regarding pro-competitive factors in the origin market, but reversed the ALJ's decision regarding certain pro-competitive factors in the Pittsburgh destination market," finding that a competing pipeline and proposed Buckeye expansion were not pro-competitive factors because these alternatives were reflected in the Herfindahl-Hirschman Index calculations that were performed to assess market power.<sup>100</sup> This determination factored into the FERC's decision to reverse the ALJ and find that Buckeye maintained sufficient market power in its Pittsburgh destination market to justify revoking its market-based rate authority to that destination.<sup>101</sup>

### 3. *SFPP, L.P.*, 162 F.E.R.C. ¶ 61,229

Pursuant to Section 342(a) of the FERC's regulations, SFPP, L.P. (SFPP) filed on July 31, 2009, a cost-of-service rate increase for movements of refined petroleum products on its East Line from Texas to destinations in New Mexico and Arizona.<sup>102</sup> A number of shippers protested the filing contending that SFPP's proposed rates were unjust and unreasonable under the Interstate Commerce Act (ICA).<sup>103</sup> Litigation in this proceeding concerning SFPP's East Line rates continues to the present day, and has resulted in Opinion Nos. 522, 522-A, and 522-B.<sup>104</sup>

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95. *Id.*

96. *Id.* at PP 108, 113.

97. 161 F.E.R.C. ¶ 61,180 at P 174.

98. *Id.* at PP 186, 202, 214, 221, 241.

99. *Id.* at PP 256, 279.

100. *Id.* at PP 295, 297.

101. *Id.* at P 47.

102. Initial Decision, FERC Docket No. IS09-437-000 (July 31, 2009).

103. Order Accepting and Suspending Tariffs, Subject to Refund and Conditions, and Establishing a Hearing, FERC Docket No. IS09-437 (Aug. 31, 2009).

104. *SFPP, L.P.*, Opinion No. 522, Opinion and Order on Initial Decision, 140 F.E.R.C. ¶ 61,220, Docket Nos. IS09-437-000 and IS10-572-000 (2012); *SFPP, L.P.*, Opinion No. 522-A, Order on Rehearing and Compliance Filing, 150 F.E.R.C. ¶ 61,097, Docket Nos. IS09-437 *et al.* (2015) [hereinafter Opinion No. 522-A]; *SFPP*,

Opinion No. 522-B primarily addressed whether SFPP could include an Income Tax Allowance (ITA) in its East Line cost-of-service rates, and the index rate changes to be applied to SFPP's 2010 cost-of-service rates that were previously determined by the Commission in this proceeding—issues that were raised on rehearing and regarding the compliance filing SFPP made pursuant to Opinion No. 522-A.<sup>105</sup>

With regard to the ITA issue, the Commission directed SFPP to remove an ITA from its East Line cost of service consistent with the Commission's determination in Opinion No. 511-C and the Revised ITA Policy Statement.<sup>106</sup> Concerning the indexing issue, Opinion No. 522-A had permitted SFPP to calculate its rates going forward from 2010 using the full index rate increase promulgated annually by the Commission pursuant to Section 342.3(d) of the Commission's regulations.<sup>107</sup> This determination was challenged, and on rehearing in Opinion No. 522-B the Commission reversed itself by directing SFPP to calculate its going-forward rates based on the *actual* index filings SFPP had made during the pendency of rate litigation in this proceeding.<sup>108</sup> In doing so, the Commission explained that indexing adjustments are based on industry-wide inflationary cost increases; therefore, no part of the SFPP-specific rate litigation in this proceeding should alter SFPP's previous decisions regarding whether to reflect indexing increases in its rates.<sup>109</sup> The Commission also determined that permitting SFPP to change its indexing determinations retroactively would inculcate SFPP from the risk inherent in its ratemaking strategies, complicate the Commission's streamlined indexing methodology, contravene certain procedures for changing rates pursuant to the Commission's indexing regulations, and create uncertainty for shippers.<sup>110</sup>

#### 4. HollyFrontier Refining & Marketing LLC, et al. v. SFPP, L.P.

On March 15, 2018, the FERC issued an order denying the complaining shippers' requests for rehearing of the Commission's December 8, 2016 order that dismissed the complaints challenging SFPP, L.P.'s (SFPP) 2012 and 2013 index-based rate increases.<sup>111</sup> SFPP had previously filed to increase its rates applicable to movements on certain lines by the FERC's 2012 and 2013 index adjustments.<sup>112</sup> Various shippers filed complaints against SFPP's proposed 2012 and 2013 index increases on June 27, 2014, claiming that such increases were not just and reasonable.<sup>113</sup> After initially holding the complaints in abeyance, the FERC dismissed

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*L.P.*, Opinion No. 522-B, Order on Rehearing and Compliance Filing, 162 F.E.R.C. ¶ 61,229, Docket Nos. IS09-437 *et al.* (2018) [hereinafter Opinion No. 522-B].

105. 162 F.E.R.C. ¶ 61,229 at P 2.

106. *Id.* at PP 5-8.

107. 150 F.E.R.C. ¶ 61,097 at PP 69-70.

108. 162 F.E.R.C. ¶ 61,229 at P 15.

109. *Id.* at P 16.

110. *Id.* at PP 15-20.

111. *HollyFrontier Refining & Mktg. LLC v. SFPP, L.P.*, 157 F.E.R.C. ¶ 61,186 (2016); *HollyFrontier Refining & Marketing LLC v. SFPP, L.P.*, 162 F.E.R.C. ¶ 61,232 at P 2 (2018).

112. 162 F.E.R.C. ¶ 61,232 at P 3.

113. *Id.*

them on December 8, 2016 in the December 8 Order.<sup>114</sup> The FERC held that the complainants failed to meet the “substantially exacerbate” test, which requires that a complaint challenging a pipeline’s index rate changes must show reasonable grounds that (1) the pipeline is substantially over-recovering its costs, and (2) the index increase substantially increases that over-recovery.<sup>115</sup> The FERC found that SFPP’s Page 700s on file at the time of the complaints show that the difference between SFPP’s costs and revenues declined from 2011 to 2013, which is inconsistent with the claim that the index increase substantially increased any pre-existing over-recovery.<sup>116</sup>

In its order denying rehearing, the FERC reiterated its findings and reasoning in the December 8 Order and rejected the shippers’ argument that the Commission altered the “substantially exacerbate” test in the December 8 Order.<sup>117</sup> The complaining shippers argued that the Commission should have only evaluated the complaints based on data for the two years prior to each index increase.<sup>118</sup> In the March 15, 2018 Order, the FERC acknowledged that the December 8 Order interprets the Commission’s 18 C.F.R. § 343.2(c) rate complaint regulations in a new context, but it did not follow that the interpretation was arbitrary.<sup>119</sup> The Commission reasoned that it had additional Page 700 data to shed light on the shippers’ complaints and found that it would be inefficient and inequitable to ignore the available evidence.<sup>120</sup> The Commission rejected the shippers’ concerns that the December 8 Order would give pipelines incentives to “drag out” or “game” index complaint litigation, noting that “[s]hippers, not pipelines, control the timing of the initiation of their complaints.”<sup>121</sup> The FERC held that “[w]hen shippers delay long enough in filing a complaint pursuant to the substantially exacerbate test, such that additional Page 700 data is available, the Commission will consider the data that became available during the delay.”<sup>122</sup>

##### 5. *SFPP, L.P.*, 162 F.E.R.C. ¶ 61,230

On March 15, 2018, the FERC issued an Order on Rehearing in which it granted rehearing in part, denied rehearing in part, and reversed the ALJ’s summary judgment that rejected SFPP, L.P.’s (SFPP) 2011 West Line index increase.<sup>123</sup> The ALJ granted summary judgment on the grounds that “SFPP’s 2010 West Line revenues exceeded SFPP’s 2010 West Line costs by 1.62 percent.”<sup>124</sup> On rehearing, the Commission found that the current record did not support complete rejection of SFPP’s West Line indexed rate increase and that further hearing

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114. *Id.* at P 6.

115. *Id.* at P 7.

116. 162 F.E.R.C. ¶ 61,232 at P 12.

117. *Id.* at P 9.

118. *Id.* at P 8.

119. *Id.* at P 13.

120. *Id.* at P 14.

121. 162 F.E.R.C. ¶ 61,232 at P 17.

122. *Id.* at P 18.

123. 162 FERC ¶ 61,230 at P 1.

124. *Id.* at P 4.

procedures were needed.<sup>125</sup> In addition, the FERC clarified whether SFPP's total company data on Page 700, as opposed to West Line-specific data, should be used to evaluate SFPP's West Line indexed rate change.<sup>126</sup> The FERC clarified that SFPP's Page 700 data "serves as a preliminary screening tool," but that the hearing proceeding should evaluate the West Line rate change based upon West Line-specific costs.<sup>127</sup> The Commission also found that the underlying order improperly rejected SFPP's West Line index increase based upon data that includes revenues and costs associated with SFPP's litigation surcharge.<sup>128</sup> The Commission held that "surcharged revenues and costs are generally not relevant" for evaluating whether indexed rates substantially exceed the change in costs to be recovered or whether the indexed rate is over or under-recovering the associated costs.<sup>129</sup>

The FERC acknowledged that the standard for evaluating a protest against an indexed rate increase "at hearing is a matter of first impression" and provided additional guidance for further hearing proceedings.<sup>130</sup> First, the FERC noted that although the "percentage comparison test is a preliminary screen, [it is] not necessarily the sole dispositive mechanism for accepting or rejecting at hearing an indexed rate change."<sup>131</sup> The FERC clarified that the parties may advance alternate theories to the 10 % screening threshold, so long as they "(1) fully explain why the percentage comparison test and 10-percent threshold do not justify accepting or rejecting SFPP's 2011 West Line index increase, and (2) fully justify any alternatives."<sup>132</sup> Second, the Commission also corrected as overly broad its statement in the underlying order that "comparing costs to revenues in a single year is irrelevant" to the evaluation of an annual indexed increase and noted that "there are circumstances in which a comparison between revenues and costs can be relevant" to evaluating an index increase.<sup>133</sup> Third, the FERC explained that additional "litigation at hearing must reflect indexing's policy objectives: (1) reduce reliance on an individual pipeline's costs for purposes of setting rates, (2) simplify and streamline rate regulation, and (3) reward efficient pipelines."<sup>134</sup> Lastly, the FERC affirmed the underlying order "that SFPP may not submit into the record cost and revenue data for the 2011 calendar year [on the grounds that] continual additions into the record would be inconsistent with simplified ratemaking methodology and streamlined ratemaking procedures."<sup>135</sup>

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125. *Id.* at P 9.

126. *Id.* at P 11.

127. *Id.*

128. 162 F.E.R.C. ¶ 61,230 at P 15 (2018).

129. *Id.*

130. *Id.* at P 18.

131. *Id.* at P 19.

132. *Id.*

133. 162 F.E.R.C. ¶ 61,230 at P 20.

134. *Id.* at P 21.

135. *Id.* at P 22.

6. *SFPP, L.P.*, 162 F.E.R.C. ¶ 61,228

On June 30, 2008, SFPP, L.P. (SFPP) filed FERC Tariff Nos. 171 and 172 pursuant to Section 342.4(a) of the FERC's regulations, proposing a cost-of-service based rate increase for all petroleum product movements on SFPP's West Line between California and Arizona.<sup>136</sup> A number of shippers moved to intervene and protest the tariff filing, contending that, for various reasons, the rates calculated by SFPP were not just and reasonable under the Interstate Commerce Act ICA.<sup>137</sup> Litigation in this proceeding continues to the present day, and has resulted in Opinion Nos. 511, 511-A, 511-B, and 511-C addressing SFPP's West Line rates.<sup>138</sup> Opinion No. 511-B was vacated in part and remanded by the opinion of the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) in *United Airlines v. FERC*.<sup>139</sup> In particular, the D.C. Circuit remanded the Commission's holdings concerning (1) the decision to grant SFPP an income tax allowance (ITA) and a rate of return on equity (ROE) determined by the discounted cash flow (DCF) methodology using a proxy group of master limited partnerships and (2) the appropriate ROE used to set SFPP's West Line rates.<sup>140</sup> On March 15, 2018, the Commission issued Opinion No. 511-C, addressing both the D.C. Circuit's remand in *United Airlines* and the compliance filing made by SFPP pursuant to Opinion No. 511-B.<sup>141</sup>

Regarding the ITA issue, at the time SFPP filed its West Line rate case it "was a wholly owned subsidiary of a master limited partnership (MLP)."<sup>142</sup> As such, in Opinion No. 511 and 511-A, the Commission ordered SFPP to include an ITA in its cost-of-service calculation pursuant to the Commission's then-effective policy on the treatment of income taxes.<sup>143</sup> Shippers petitioned the D.C. Circuit for review of this policy, and in *United Airlines* the D.C. Circuit remanded the Commission's determination in Opinion No. 511-B regarding SFPP's ITA because "[the] FERC ha[d] not provided sufficient justification for its conclusion that there is no double recovery of taxes for partnership pipelines receiving a tax allowance in addition to the discounted cash flow return on equity."<sup>144</sup> On remand in Opinion No. 511-C, the Commission ultimately held that, "in order to avoid a double recovery of investor-level tax costs, SFPP should not receive an income tax allowance."<sup>145</sup>

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136. 18 C.F.R. § 342.4(a) (2018); 162 F.E.R.C. ¶ 61,228 at P 4 (2018).

137. Motion to Intervene and Protest of BP West Coast Products LLC and ExxonMobil Oil Corporation at 2-3, *SFPP, L.P.*, FERC Docket Nos. IS08-390-008, IS08-390-009 (July 15, 2008).

138. Opinion No. 511, *SFPP, L.P.*, 134 F.E.R.C. ¶ 61,121 (2011); Opinion No. 511-A, *SFPP, L.P.*, 137 F.E.R.C. ¶ 61,220 (2011); Opinion No. 511-B, *SFPP, L.P.*, 150 F.E.R.C. ¶ 61,096 (2015); Opinion No. 511-C, *SFPP L.P.*, 162 F.E.R.C. ¶ 61,228 (2018).

139. *United Airlines, Inc. v. FERC*, 827 F.3d 122, 137 (2016).

140. *Id.*

141. 162 F.E.R.C. ¶ 61,228 at P 1.

142. *Id.* at 9.

143. 162 F.E.R.C. ¶ 61,121 at P 240; 137 F.E.R.C. ¶ 61,220 at PP 266-67; Inquiry Regarding Income Tax Allowances, 111 F.E.R.C. ¶ 61,139 at P 43 (2005).

144. *United Airlines*, 827 F.3d at 136.

145. 162 F.E.R.C. ¶ 61,121 at P 10.

The D.C. Circuit also remanded the Commission's departure in Opinion No. 511-B from its general policy of using the most recent data in the record, and data from coincident periods, when determining nominal ROE and the applicable inflation factor used to calculate real ROE.<sup>146</sup> On remand, the Commission maintained this departure and adopted a real ROE for the six-month period ending September 2008 and an average inflation factor from January 2007 (the start of the base period) through April 2009 (the most recent data submitted prior to the hearing).<sup>147</sup> The Commission reasoned that, "given the abnormal inflation volatility in the 2007-2009 periods at issue, and the difficulty of predicting future inflation levels in those uncertain conditions", using September 2008 data for the nominal ROE and adopting an average inflation factor for the entire period was appropriate, and would offset the outlying high and low inflationary periods to stabilize the determination of real ROE.<sup>148</sup>

Finally, "the Commission direct[ed] SFPP to recalculate its refunds and going forward rates to remove index increases that (a) were not previously filed by SFPP or (b) were previously rejected by the Commission."<sup>149</sup> Specifically, the Commission found that SFPP should "calculate refunds and going forward rates based upon the timing and the level of the index increases filed by SFPP and accepted by the Commission consistent with Section 342.3 of the Commission's regulations."<sup>150</sup>

#### 7. *ConocoPhillips Transportation Alaska, Inc.*

On February 28, 2018, the FERC approved a comprehensive settlement package resolving long-running litigation concerning rates for service on the Trans-Alaska Pipeline System (TAPS).<sup>151</sup> The FERC approved the two components of the package subject to its jurisdiction: (a) the Settlement Agreement Regarding 2009-2015 Interstate Rates and (b) the Settlement Agreement Establishing the Variable Tariff Methodology.<sup>152</sup> Another component of the package, a settlement resolving Alaska state rates, was approved by the Regulatory Commission of Alaska.<sup>153</sup>

The Settlement Agreement Regarding 2009-2015 Interstate Rates addressed the application of FERC Opinion No. 544 to the TAPS Carriers' 2011-2015 rates and resolved the appeals of Opinion No. 544.<sup>154</sup> Opinion No. 544, which was

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146. *United Airlines*, 827 F.3d at 131.

147. 162 F.E.R.C. ¶ 61,228 at P 46.

148. *Id.* at PP 46-50.

149. *Id.* at 57.

150. *Id.* at P 58 (citing *SFPP, L.P.*, Opinion No. 522-B, Order on Rehearing and Compliance Filing, 162 FERC ¶ 61,229, Docket Nos. IS09-437 *et al.* (2018)).

151. *ConocoPhillips Transportation Alaska, Inc.*, 162 F.E.R.C. ¶ 61,180 (2018).

152. *Id.* at P 1.

153. Notice of Approval of Interstate Settlement Agreement by Regulatory Commission of Alaska at 3, FERC Docket No. IS09-384 (Feb. 15, 2018).

154. *ConocoPhillips Transportation Alaska, Inc.*, 162 F.E.R.C. ¶ 61,180 at P 3 (2018). The TAPS Carriers consisted of BP Pipelines (Alaska) Inc., ConocoPhillips Transportation Alaska, Inc., ExxonMobil Pipeline Co., Koch Alaska Pipeline Company, LLC, and Unocal Pipeline Company. *Id.* at P 1 n. 1.



litigated in the context of the TAPS Carriers' 2009 and 2010 interstate rates, disallowed as imprudent significant costs from the TAPS Carriers' rates related to their Strategic Reconfiguration project, and denied recovery of certain out-of-period ad valorem tax costs.<sup>155</sup> In the settlement, the parties set consensus rates for the period 2011-2015.<sup>156</sup> Also, the TAPS Carriers agreed to withdraw their appeals of Opinion No. 544, and pay refunds based on the consensus rates.<sup>157</sup>

The Settlement Agreement Establishing Variable Tariff Methodology sets forth a variable tariff methodology for computing TAPS rates from January 1, 2016 going forward.<sup>158</sup> It has an initial 5-year term that is renewable for subsequent terms.<sup>159</sup> The settlement establishes a data exchange program whereby the TAPS Carriers will provide data underlying their calculation of the upcoming annual TAPS rate to the State of Alaska and the shipper interests, Anadarko Petroleum Corporation and Tesoro Alaska Company LLC.<sup>160</sup> The shippers are entitled to ask questions and request further information from the TAPS Carriers. Rates are set on a prospective basis, subject to true up.<sup>161</sup> The settlement preserves the right of the State of Alaska and the shippers to protest rate inputs, but they are not able to protest the overall methodology for calculating the rates.<sup>162</sup>

#### *E. Petitions for Declaratory Order*

##### *1. Blue Racer NGL Pipelines, LLC*

On March 15, 2018, the FERC denied a petition for declaratory order (PDO) filed by Blue Racer NGL Pipelines, LLC (Blue Racer) in which Blue Racer sought approval of the rate structure and terms of service applicable to a reconfiguration of its existing G-150 propane line designed to add batched butane transportation service to an existing interconnection with TE Products Pipeline Company (TEPPCO) in Follansbee, West Virginia, and to add a new destination for batched propane and butane deliveries at Mariner East 2, a new 350-mile pipeline providing batched propane and butane transportation service between Scio, Ohio and the Marcus Hook terminal on the Delaware River.<sup>163</sup>

In its open season, Blue Racer “offered to move at least 5,000 bpd of either propane or butane, or both combined, to Mariner East 2 or TEPPCO on a committed basis, for a 10-year term”, and ultimately contracted with one committed shipper.<sup>164</sup> Blue Racer sought approval to provide the committed shipper “up to 90 percent of the total available capacity on the restructured G-150”, totaling 27,000

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155. Opinion No. 544, *BP Pipelines (Alaska) Inc.*, 153 F.E.R.C. ¶ 61,233 at PP 12, 128 (2015).

156. The parties consisted of the TAPS Carriers, the State of Alaska, Anadarko Petroleum Corporation, Tesoro Alaska Company, LLC, Flint Hills Resources Alaska, LLC, and Petro Star Inc.

157. Offer of Settlement Regarding Trans Alaska Pipeline System (“TAPS”) Rates, FERC Docket No. IS09-348 (Dec. 15, 2017) [hereinafter *TAPS Settlement Agreement*].

158. *Id.*

159. 162 F.E.R.C. ¶ 61,180 at P 1.

160. See generally *TAPS Settlement Agreement*, *supra* note 157.

161. *Id.*

162. *Id.*

163. *Blue Racer NGL Pipelines, LLC*, 162 F.E.R.C. ¶ 61,220 at P 3 (2018).

164. *Id.* at 8.

out of 30,000 total bpd capacity on the line.<sup>165</sup> The remaining 3,000 barrel- per-day (bpd) would be available for uncommitted shippers.<sup>166</sup>

Chesapeake Energy Marketing, LLC (Chesapeake), a marketer with contractual arrangements in place with an existing propane shipper on the G-150 line, opposed the petition.<sup>167</sup> Chesapeake alleged that the requested authorizations would degrade propane service on the line because the overall capacity of the line would not change, the historic volumes exceeded the 3,000-bpd capacity proposed to remain available for uncommitted shippers, and the proposed rate structure would allow the committed shipper to avoid pro-rationing.<sup>168</sup> Blue Racer disagreed, noting that Chesapeake was not an existing shipper, and that the G-150 reconfiguration involved a new service and an expansion that would facilitate greater use of the G-150 line, so it did not run afoul of the Commission's precedent in *Colonial*.<sup>169</sup>

The FERC denied Blue Racer's petition.<sup>170</sup>

[T]he Commission has never allowed committed rates and priority service terms to be applied to existing utilized capacity where current shippers receiving service on the pipeline could be forced to either make a long-term uneconomic commitment . . . or face the possibility that their current service may be degraded to accommodate the committed service."<sup>171</sup>

Citing *Colonial Pipeline*, the Commission found that Blue Racer's proposal raised undue discrimination concerns because it could "create two classes of shippers, committed and uncommitted, out of one class of shippers who are currently receiving the same service on existing capacity."<sup>172</sup>

## 2. Belle Fourche Pipeline Company & Bridger Pipeline LLC

On February 2, 2018, the FERC issued a declaratory order approving Belle Fourche Pipeline Company's and Bridger Pipeline LLC's (collectively, the Carriers) petition for declaratory order seeking assurance of the overall tariff and rate structure set forth in the Transportation Services Agreement (TSA) governing the transportation of crude petroleum on the Carriers' respective pipeline systems in the Bakken region.<sup>173</sup> Any shipper that entered into a TSA during the open season was eligible for discounted transportation rates as compared to the rates available to similarly-situated walk-up shippers.<sup>174</sup> Because the Carriers had unutilized capacity available on their respective systems at the time the open season commenced, the TSA contemplated movements on existing capacity, but made clear that shippers would not be afforded any preferential capacity rights for movements

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165. *Id.*

166. *Id.*

167. *Id.*

168. 162 F.E.R.C. ¶ 61,220 at PP 14-17.

169. *Id.* at P 5.

170. *Id.* at P 1.

171. *Id.* at P 27.

172. *Id.* at P 29; *Colonial Pipeline Co.*, 146 F.E.R.C. ¶ 61,206 at P 37 (2014); 162 F.E.R.C. ¶ 61,220 at P 29.

173. *Belle Fourche Pipeline Company, Bridger Pipeline LLC*, 162 F.E.R.C. ¶ 61,091 at P 1 (2018).

174. *Id.* at P 2.

that occurred on existing capacity.<sup>175</sup> However, to the extent the Carriers elected to expand the capacity of their systems in the future, shippers that entered into a TSA during the open season had the opportunity to secure preferential capacity rights on that expansion capacity as it became available.<sup>176</sup>

The FERC upheld the proposed terms and conditions of the TSA, finding that the TSA and the Carriers' proposed pro-rationing policy governing the allocation of existing and expanding capacity to shippers was just and reasonable, and not unduly discriminatory or preferential.<sup>177</sup> The Commission found that the Carriers' proposed structure did not undermine the Commission's rulings in *Colonial Pipeline* because, unlike in that case, the Carriers were not attempting to provide any preferential capacity rights on capacity that already exists on the Carriers' respective pipeline systems.<sup>178</sup> The FERC also found that it was acceptable for the Carriers to provide TSA shippers with the opportunity to secure expansion capacity in the future, and to obtain preferential capacity rights on that expansion capacity, should the Carriers decide to develop new or additional expansion capacity.<sup>179</sup>

### 3. Permian Express Terminal LLC & Permian Express Partners LLC

On February 15, 2018, the FERC issued a declaratory order approving the requests of Permian Express Terminal LLC and Permian Express Partners LLC (Petitioners) concerning rate structure, terms of service, and pro-rationing methodology for the Permian Express 3 Project.<sup>180</sup> The Petitioners requested that the FERC treat the committed rates as settlement rates and approve a rate structure that provides for different rates for committed and uncommitted shippers.<sup>181</sup> The Petitioners also asked that the FERC declare that rates in the transportation service agreement signed by shippers who participated in the open season, as well as the index rate adjustment mechanism in the TSA, would not be subject to revision other than by agreement of the TSA parties.<sup>182</sup>

Furthermore, the Petitioners made requests for rulings regarding their pro-rationing policy.<sup>183</sup> They asked that they be permitted to implement a proration policy allowing up to 90 % of available capacity to be reserved for committed shippers and other shippers with Regular Shipper status.<sup>184</sup> The pro-rationing policy would be based on the volume history of the shippers.<sup>185</sup> The Petitioners asked that the volume history of committed shippers be "deemed to be the greater of the monthly average of [committed shippers'] actual shipments over the base period

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175. *Id.* at PP 4-5.

176. *Id.* at P 4.

177. *Id.* at P 19.

178. 146 F.E.R.C. ¶ 61,206 at P 37; 162 F.E.R.C. ¶ 61,091 at P 19.

179. 162 F.E.R.C. ¶ 61,091 at P 20.

180. *Permian Express Terminal LLC and Permian Express Partners LLC*, 162 F.E.R.C. ¶ 61,112 at P 1 (2018).

181. *Id.*

182. *Id.* at P 3.

183. *Id.* at P 4.

184. *Id.* at P 13.

185. 162 F.E.R.C. ¶ 61,112 at P 4.

or their minimum volume commitments.”<sup>186</sup> The Petitioners also sought authorization to implement a lottery system to allocate capacity available to shippers with New Shipper status.<sup>187</sup> Under the pro-rationing policy, shippers initially would “accrue shipping history on a defined amount of available capacity, with no history accruing on the balance of the capacity for a defined period during which uncommitted and committed shippers would have equal access to that capacity, to allow for committed shippers’ election to ramp-up their volume commitments.”<sup>188</sup> Finally, they requested that qualifying committed shippers be provided the right to extend the initial terms of their TSAs.<sup>189</sup>

The FERC approved each of the requests with little elaboration. The FERC found that the pro-rationing policy “provides a process whereby New Shippers can become Regular Shippers by shipping crude petroleum on the Project during at least nine months of the base period consistent with Commission precedent.”<sup>190</sup> The Commission also found reasonable the policy allowing shippers to initially accrue history on a defined amount of available capacity, because it preserves the election of committed shippers to ramp-up their volume commitments, and allows uncommitted shippers access to incremental capacity in addition to 10 % of base capacity for a temporary period.<sup>191</sup>

#### 4. *Marathon Pipe Line LLC*

On January 31, 2018, the FERC issued a Declaratory Order approving Marathon Pipeline LLC’s (MPL) petition regarding its two-phase project.<sup>192</sup> In phase one (the Redesign Project), MPL sought to combine its Woodpat and Roxpat Pipelines into a single pipeline system under a single tariff (System), and in phase two MPL sought to increase the capacity of the System.<sup>193</sup> Among the proposed terms and conditions of service for which MPL was seeking approval, MPL sought approval to combine the Woodpat and Roxpat pipelines, and associated shipper histories, as part of the Redesign Project.<sup>194</sup> MPL asserted that combining the Woodpat and Roxpat pipeline would result in numerous benefits to MPL’s shippers including: (1) providing existing Roxpat shippers with access to a larger number of connecting pipelines in both the origin and destination markets; (2) ensuring shippers on both pipelines would continue to be entitled to the same amount of capacity on the System as they were entitled to on the individual pipelines; (3) providing existing Roxpat shippers a lower rate for the same shipments; and (4) simplifying the nomination and scheduling process for MPL’s shippers.<sup>195</sup>

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186. *Id.* at P 13.

187. *Id.* at P 10.

188. *Id.* at P 13.

189. *Id.*

190. 162 F.E.R.C. ¶ 61,112 at P 17.

191. *Id.* at P 19.

192. *Marathon Pipeline LLC*, 162 F.E.R.C. ¶ 61,078 at PP 1-2 (2018).

193. *Id.* at P 1.

194. *Id.* at PP 13, 20.

195. *Id.* at P 4.

The FERC approved MPL's proposal to combine the Woodpat and Roxpat Pipelines into a single integrated system.<sup>196</sup> The FERC found that MPL had demonstrated that current shippers on both systems would not be harmed by the Redesign Project and may benefit from combining the two pipelines into one System.<sup>197</sup>

##### 5. *Magellan Midstream Partners, L.P.*

On November 22, 2017, the FERC issued an order denying a petition for declaratory order filed by Magellan Midstream Partners, L.P. (Magellan) concerning the establishment of a marketing affiliate, determining that Magellan's combined proposal would violate the Interstate Commerce Act (ICA).<sup>198</sup> Among Magellan's proposals was to establish a marketing affiliate that would buy and sell crude oil at origins and destinations on Magellan's subsidiaries' and affiliates' pipeline systems, and ship those volumes on such pipelines at applicable filed tariff rates even if the difference in the price at which the marketing affiliate would buy and sell the crude would be less than the published tariff rate on the affiliate's pipeline.<sup>199</sup> Magellan explained that integrated company economics would make such transactions economically beneficial even if a third party could lose money on a similar shipment.<sup>200</sup> Magellan also sought rulings that the marketing affiliate could participate in future open seasons conducted by Magellan's pipeline affiliates for new or expanded capacity, and then partially assign rights acquired in the open season or enter into similar agreements with third parties to ship third-party crude oil at a rate different from the filed tariff rate, provided the marketing affiliate paid the filed tariff rate.<sup>201</sup>

The FERC held that several of Magellan's requests were either a request for reconfirmation of well-established FERC precedent, or involved issues beyond the scope of the FERC's jurisdiction, but that taken together "would violate various provisions of the . . . ICA's prohibition on rebates."<sup>202</sup> While there is no prohibition over establishment of a marketing affiliate, an illegal rebate would be triggered if the marketing affiliate shipped "in situations where the price differential is insufficient to cover the filed tariff rate and the pipeline subsidizes those loses."<sup>203</sup> The FERC also held that the proposal implicitly contemplated offering different rates, terms, conditions, and services to its affiliates in violation of ICA section 1(5), and could preclude the FERC "from being able to review the reasonableness of the actual rates for the transportation being offered by the affiliate pipeline."<sup>204</sup> The proposal would also violate the ICA section 3(1)'s anti-discrimination provisions by offering customized terms, conditions, and rates "to affiliates

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196. *Id.* at P 20.

197. 162 F.E.R.C. ¶ 61,078 at P 20.

198. *Magellan Midstream Partners, L.P.*, 161 F.E.R.C. ¶ 61,219 at PP 1-2 (2017).

199. *Id.* at P 4.

200. *Id.*

201. *Id.* at P 6.

202. *Id.* at P 11.

203. 161 F.E.R.C. ¶ 61,219 at P 19.

204. *Id.* at P 20.

at what is essentially the variable cost of the movement,” while non-affiliated shippers pay the filed tariff rate.<sup>205</sup> Because the proposal would “set rates actually paid by the affiliate at the variable cost of the transportation service, which presumably would not be published by the pipeline,” the FERC raised concerns that the proposal “would circumvent the publication requirements of the ICA” in violation of ICA sections 6(1) and 6(3).<sup>206</sup> Additionally, the FERC raised concerns that the marketing affiliate would be “essentially offering capacity below cost, which would violate section 6(7) of the ICA.”<sup>207</sup> Magellan, along with several others, filed requests for rehearing of the order, which are pending before the FERC.<sup>208</sup>

#### 6. *CCPS Transportation, LLC*

On June 21, 2018, the FERC issued a Declaratory Order granting CCPS Transportation, LLC’s (CCPS) unopposed petition regarding its proposal for re-contracting certain existing capacity on the Spearhead Pipeline that provides crude oil transportation from Chicago, Illinois to Cushing, Oklahoma.<sup>209</sup> In its petition filed on March 16, 2018, CCPS described its proposal to re-contract a 30,000 barrel-per-day (BPD) tranche of Spearhead Pipeline’s capacity that is currently dedicated to serving committed priority shippers whose contracts will expire in 2019.<sup>210</sup> The pipeline also has a tranche of capacity dedicated to serving committed non-priority shippers and a separate tranche of capacity reserved for uncommitted shippers.<sup>211</sup>

In its petition, CCPS proposed to conduct a widely publicized and transparent open season process for up to 30,000 BPD in which all current and potential shippers would have an opportunity to enter into a Transportation Service Agreement (TSA) for a seven-year term. The TSA provided for either committed priority service at a premium rate or committed non-priority service at a discounted rate.<sup>212</sup> The committed priority shippers would pay a rate, on a ship-or-pay basis that is at least one cent higher than the corresponding uncommitted rate for service and, therefore, would not be subject to pro-rationing under normal operating conditions.<sup>213</sup> A committed non-priority shipper would pay a rate, on a ship-or-pay basis, which is lower than the corresponding rate for uncommitted service and, therefore,<sup>214</sup> would be subject to the applicable pro-rationing procedures but would be deemed to have a history for pro-rationing purposes equal to the greater of its actual shipments during the base period or its committed volume subject to a ship-

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205. *Id.* at P 21.

206. *Id.* at P 22.

207. *Id.* at P 18.

208. *See, e.g.*, Request for Clarification or, in the Alternative, Request for Rehearing, FERC Docket No. OR17-2-000 (Dec. 22, 2017).

209. *CCPS Transportation, LLC*, 163 FERC ¶ 61,206 at PP 12-16 (2018).

210. Petition for Declaratory Order of CCPS Transp., LLC at 1-3, FERC Docket No. OR18-18-000 (Mar. 16, 2018) [hereinafter *CCPS Petition*].

211. *Id.* at 2-3.

212. *Id.* at 2, 7.

213. *Id.* at 7-8.

214. *Id.* at 8.

or-pay commitment.<sup>215</sup> CCPS argued that re-contracting this existing capacity would not diminish the rights or service of any current uncommitted or committed shippers and would not result in any undue discrimination against the same.<sup>216</sup> CCPS also argued that its proposal to re-contract existing capacity was consistent with FERC precedent approving other—albeit limited—means of re-contracting existing pipeline capacity, namely, rights for shippers to contract for capacity beyond the initial open season, contractual rollover rights, automatic renewal or evergreen provisions, and right of first offer provisions.<sup>217</sup> CCPS also sought clarity that the rates under the Transportation Service Agreements for the re-contracted capacity could be filed as the equivalent of settlement rates under 18 C.F.R. § 342.4(c).<sup>218</sup>

The FERC granted all of the rulings requested by CCPS, finding that the re-contracting proposal was consistent with the agency's precedent under the Interstate Commerce Act.<sup>219</sup> With respect to rate structures, the FERC expressly approved CCPS's proposal to offer committed priority service subject to a premium ship-or-pay rate.<sup>220</sup> The FERC also expressly approved CCPS's request to provide committed non-priority service at a discount ship-or-pay rate, and to deem a committed non-priority shipper to have a history for prorating purposes that is equal to the greater of the shipper's actual shipments during the base period or its ship-or-pay volume commitment.<sup>221</sup> Finally, the FERC granted CCPS's request to file the resulting committed shipper rates as settlement rates.<sup>222</sup>

#### F. Non-Rate Issues

##### 1. *BP Pipelines (Alaska) Inc., et al.*

Oil produced on the North Slope originates in several fields, each of which contains crude oil of differing characteristics.<sup>223</sup> There are multiple shippers injecting petroleum originating in differing fields into Trans Alaska Pipeline System (TAPS), therefore, the pipeline commingles the various shippers' petroleum into a single common stream (the ANS Common Stream).<sup>224</sup> On August 30, 2016, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) remanded to the FERC its decision in *BP Pipelines (Alaska) Inc., et al.*, ruling Petro Star, Inc. (Petro Star) had raised legitimate objections to the Quality Bank methodology used by the Commission to value Residual Fuel Oil (Resid) injected into the TAPS common stream.<sup>225</sup>

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215. *CCPS Petition*, *supra* note 210, at 8.

216. *Id.* at 13.

217. *Id.* at 12-18.

218. *Id.* at 3.

219. 163 F.E.R.C. ¶ 61,206 at PP 12-13.

220. *Id.* at P 14.

221. *Id.*

222. *Id.* at P 15.

223. Opinion No. 481, *Trans Alaska Pipeline Sys.*, 113 F.E.R.C. ¶ 61,062 at P 3 (2005).

224. *OXY USA, Inc. v. FERC*, 64 F.3d 679, 684 (D.C. Cir. 1995).

225. *BP Pipelines (Alaska) Inc.*, 149 F.E.R.C. ¶ 61,149 (2014).

On February 20, 2018, on remand, the Commission affirmed the justness and reasonableness of the Quality Bank methodology used to value Resid.<sup>226</sup> The Commission reviewed the arguments identified by the D.C. Circuit and provided further explanation as to why Petro Star had both failed to demonstrate that the existing Quality Bank methodology for valuing Resid was unjust and unreasonable and why the arguments presented by Petro Star did not support removing the capital recovery allowance from the valuation of Resid.<sup>227</sup>

The Commission initially rejected Petro Star's argument that the published market prices for the six marketable cuts used in the Quality Bank methodology were short-run, spot-market prices that did not reflect long-run considerations. The Commission found such argument to be "contrary to the realities of the market and economic principles."<sup>228</sup> The Commission also rebuffed Petro Star's argument that the combined or composite value of the nine individual Quality Bank cuts should always exceed the market price of a barrel of ANS Common Stream crude, finding that "real-world refineries need to subject the intermediate products used in the Quality Bank methodology, such as Resid, to further processing is exactly what real-world refineries do."<sup>229</sup> Likewise, the Commission dismissed Petro Star's argument that refiners had abandoned the expectation that their capital costs invested in cokers would be included and recovered in the Quality Bank's valuation of Resid.<sup>230</sup> Finally, the Commission explained that "[t]he record show[ed] that market prices used by West Coast refiners include[d] the recovery of capital, fixed and variable costs [and] [t]he use of linear modeling and Platts net-back data in daily decision making does not indicate that capital cost recovery is not considered (or necessary) for West Coast coke refiners."<sup>231</sup> For all these reasons, the Commission decided the "Quality Bank methodology for valuing Resid remain[ed] just and reasonable."<sup>232</sup>

## 2. *Colonial Pipeline Company*

In this Order Following Technical Conference, the FERC upheld Colonial Pipeline Company's (Colonial) proposed tariff modifications made to facilitate in-line blending of biodiesel on the Greensboro Line Segments by a non-affiliate.<sup>233</sup> The Commission found that the blending was not a jurisdictional transportation service and that the modified tariff was neither unjust nor unreasonable because the product received was commercially acceptable.<sup>234</sup>

In June 2017, Colonial proposed to modify its tariff in various ways "to account for the injection of up to five percent biodiesel into ultra-low sulfur diesel

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226. *BP Pipelines (Alaska) Inc.*, 162 F.E.R.C. ¶ 61,147 (2018).

227. *Id.* at P 26.

228. *Id.* at PP 28-31.

229. *Id.* at PP 36-37.

230. *Id.* at P 40.

231. 162 F.E.R.C. ¶ 61,147 at P 51.

232. *Id.* at P 52.

233. *Colonial Pipeline Co.*, 162 F.E.R.C. ¶ 61,158 (2018).

234. *Id.* at P 55.



(USLD) on the Greensboro Line Segments.”<sup>235</sup> The blending would happen at Colonial’s Greensboro tank farm by Texon Distributing L.P. d/b/a Texon L.P. (Texon), a non-affiliate of Colonial.<sup>236</sup> Murphy Oil USA, Inc. (Murphy) protested the tariff modification and the FERC ordered a technical conference as “issues raised by the filing required additional exploration and scrutiny.”<sup>237</sup>

Murphy alleged that because the blending occurs in-line and because of Colonial’s alleged involvement, the blending was in fact a jurisdictional transportation service and that “Texon, acting as a shipper, will nominate 100 percent biodiesel, known as Grade 49, by means of direct injection into Colonial’s jurisdictional facilities at the Greensboro Junction.”<sup>238</sup> Murphy contended “that shippers that desire to create biodiesel in blends of up to five percent may do so only via a customer relationship with Texon” resulting in violation of the Interstate Commerce Act’s rules against discrimination and unpublished tariffs.<sup>239</sup> Colonial and Murphy debated the burdens associated with the increased testing Murphy might incur.<sup>240</sup> Colonial defended the proposed practice, arguing it “lowers a shipper’s hurdles to creating RINs [Renewable Identification Numbers]” a component of complying with the EPA’s Renewable Fuel Standards Program.<sup>241</sup> Colonial claimed that Murphy’s real motive, as a blender, was to prevent competition from Texon and that the Commission should not “exert jurisdiction simply because the petitioning party’s business interests would benefit.”<sup>242</sup> Colonial argued that the in-line blending was not jurisdictional because it was “neither incidental nor necessary” for the pipeline to perform its “jurisdictional transportation service.”<sup>243</sup> Further, Colonial defended the new terms as “fair to all shippers, and fall well within the zone of reasonableness and the discretion afforded Colonial to define the service it chooses to offer.”<sup>244</sup>

The Commission found the blending operation were not jurisdictional as they were “not integral or necessary to the transportation function provided by Colonial because Colonial is capable of transporting ULSD on its Greensboro Line Segments with or without biodiesel.”<sup>245</sup> The FERC found Murphy’s assertions were based on its “preference that Colonial not provide the option of blending on its system” which would “more effectively support Murphy’s particular business model.”<sup>246</sup> The Commission found it reasonable that shippers received blended ULSD even if they tendered clear ULSD because “oil pipelines do not track mol-

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235. *Id.* at P 2.

236. *Id.* at P 3.

237. *Id.* at PP 4-5.

238. 162 F.E.R.C. ¶ 61,158 at P 22.

239. *Id.* at P 28.

240. *Id.* at PP 28, 43.

241. *Id.* at P 7.

242. *Id.* at P 40.

243. 162 F.E.R.C. ¶ 61,158 at P 30 (citing *Kerr-McGee Refining Corp. and Texaco Refining and Marketing v. Williams Pipe Line Co.*, 72 F.E.R.C. ¶ 61,274, at p. 62,199 (1995)).

244. 162 F.E.R.C. ¶ 61,158 at P 12.

245. *Id.* at P 50.

246. *Id.* at P 53.

ecules” and shippers are “only entitled to receive product that is within the pipeline’s specifications that are commercially acceptable.”<sup>247</sup> Therefore Colonial “supported its tariff change by showing that new Grade 62 ULSD with up to five percent biodiesel is fit for purpose based on commercially accepted standards, and that the Texon blending service is not integral to Colonial’s transportation function. Nothing further is required.”<sup>248</sup>

### 3. Leveret Pipeline Company LLC & Mid-America Pipeline Company

On January 18, 2018, the FERC issued an order denying rehearing and accepting two tariff filings, one from Leveret Pipeline Company (Leveret) and one from Mid-America Pipeline Company LLC (Mid-America).<sup>249</sup> In June 2017, Leveret filed to adopt three movements from Mid-America originating in South Eddy, New Mexico and Mid-American filed a tariff to cancel the same movements adopted by Leveret in their tariff filing.<sup>250</sup> Leveret later filed a proposed tariff to cancel transportation with origins from South Eddy, New Mexico and destinations to Skellytown, Texas because Leveret could not provide that transportation service without utilizing other pipelines.<sup>251</sup> The Commission accepted Leveret and Mid-America’s tariff filings via delegated authority on July 12, 2017.<sup>252</sup> On August 4, 2017, INEOS USA LLC (INEOS) filed a request for rehearing of the Commission’s acceptance of Leveret’s and Mid-America’s tariff filings arguing that the Commission erred in failing to set the tariff revisions for hearing and failing to suspend the tariff revisions for the maximum period allowed by the statute.<sup>253</sup> The Commission dismissed INEOS’ request for rehearing on the cancellation of the tariff by Mid-America and the subsequent adoption of tariff by Leveret and then cancellation of service from South Eddy to Skellytown by Leveret.<sup>254</sup> In denying the request for rehearing and accepting the tariff filings, the Commission reaffirmed that “it is well settled that a complete cancellation of service at a point, points or a segment on a pipeline is an abandonment not within the jurisdiction of the Commission, and the Commission does not have authority to suspend cancellation tariffs.”<sup>255</sup> The Commission further reiterated that it has no jurisdiction over abandonments by oil pipelines and, as such, cannot suspend tariffs cancelling service for oil or liquids pipelines.<sup>256</sup> As a result, the Commission accepted the tariff filings by Leveret and Mid-America to be effecting on the dates requested in the original filings and denied INEOS’ request for rehearing.<sup>257</sup>

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247. *Id.* at P 52.

248. *Id.* at P 55.

249. *Leveret Pipeline Co.*, 162 F.E.R.C. ¶ 61,038 (2018).

250. *Id.*

251. *Id.*

252. *Id.* at P 4.

253. *Id.* at P 11.

254. 162 F.E.R.C. ¶ 61,038 at P 14.

255. *Id.* at P 14 (citing *ARCO Pipe Line Company*, 55 F.E.R.C. ¶ 61,420 (1991)).

256. *Id.* at P 15.

257. *Id.*

## II. PRESIDENTIAL PERMITS AND PIPELINE SAFETY

### A. *Presidential Permits*

In October 2017, the Department of State issued a Presidential Permit authorizing Enbridge Energy, L.P. (Enbridge) to operate and maintain its Line 67 pipeline facilities at the U.S.-Canada border.<sup>258</sup> The Department of State issued the October 2017 permit in response to Enbridge's November 20, 2012 application to amend its August 20, 2009 Presidential Permit for the Line 67 pipeline.<sup>259</sup> In its application, Enbridge specifically sought authorization for the pipeline to transport up to a full design capacity of approximately 890,000 barrel-per-day (bpd), compared to the originally authorized 500,000 bpd.<sup>260</sup> The Presidential Permit authorizes Enbridge's Line 67 to carry up to approximately 899,000 bpd of heavy crude oil and other hydrocarbons from the Western Canadian Sedimentary Basin, across the U.S.-Canada border near Neche, North Dakota, to an Enbridge terminal in Superior, Wisconsin.<sup>261</sup>

In a September 27, 2017 Record of Decision and National Interest Determination, the Acting Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs determined, under delegated Presidential authority, that Enbridge's proposed project would serve the national interest.<sup>262</sup> The Department of State issued the Presidential Permit on October 13, 2017.<sup>263</sup>

### B. *Criminal Enforcement and Pipeline Safety*

#### 1. *ExxonMobil Pipeline Co. v. U.S. Dep't of Transp.*

On August 14, 2017, the United States Court of Appeals for the Fifth Circuit (5<sup>th</sup> Circuit) vacated several enforcement findings of the United States Department of Transportation, Pipeline and Hazardous Materials Safety Administration (PHMSA) regarding ExxonMobil Pipeline Company's (ExxonMobil) Pegasus

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258. JUDITH A. GARBER, ACTING ASSISTANT SEC'Y OF STATE FOR OCEANS & INT'L ENVTL. & SCI. AFFAIRS, PRESIDENTIAL PERMIT AUTHORIZING ENBRIDGE ENERGY, LIMITED PARTNERSHIP TO OPERATE AND MAINTAIN EXISTING PIPELINE FACILITIES AT THE INTERNATIONAL BOUNDARY BETWEEN THE UNITED STATES AND CANADA 1 (Oct. 13, 2017), <https://www.state.gov/documents/organization/275070.pdf> [hereinafter *Enbridge Permit*]; see also Notice of Issuance of a Presidential Permit to Enbridge Energy, Limited Partnership, 82 Fed. Reg. 53,553 (Nov. 16, 2017) (notifying the public of the Dep't of State issuance).

259. ENBRIDGE PERMIT 2017, *supra* note 258, at 2; DAVID H. COBURN & JOSHUA RUNYAN, ATT'YS FOR ENBRIDGE ENERGY, LTD. P'SHIP, APPLICATION OF ENBRIDGE ENERGY, LIMITED PARTNERSHIP FOR AN AMENDMENT TO THE AUGUST 3, 2009 PRESIDENTIAL PERMIT FOR LINE 67 TO INCREASE THE OPERATIONAL CAPACITY OF PIPELINE FACILITIES AT THE INTERNATIONAL BOUNDARY BETWEEN CANADA AND THE UNITED STATES 1 (NOV. 20, 2012), <https://www.state.gov/documents/organization/202645.pdf> [hereinafter *Enbridge Application*]; see also Notice of Issuance of a Presidential Permit for the Proposed Enbridge Energy Alberta Clipper Pipeline Project, 74 Fed. Reg. 43,212 (Aug. 26, 2009) (notifying the public of the Department of State Issuance). Enbridge amended its November 20, 2012 application on June 16, 2014. *Enbridge Permit*, *supra* note 258, at 2.

260. *Enbridge Application*, *supra* note 259, at 1.

261. *Enbridge Permit*, *supra* note 258, at 1.

262. JUDITH A. GARBER, ACTING ASSISTANT SEC'Y OF STATE FOR OCEANS & INT'L ENVTL. & SCI. AFFAIRS, DEPARTMENT OF STATE RECORD OF DECISION AND NATIONAL INTEREST DETERMINATION: ENBRIDGE ENERGY, LIMITED PARTNERSHIP, APPLICATION FOR PRESIDENTIAL PERMIT, LINE 67, 22 (Sept. 27, 2017), <https://www.state.gov/documents/organization/275069.pdf>.

263. *Enbridge Permit*, *supra* note 258, at 1.

Pipeline's rupture that spilled several thousand barrels of crude oil near Mayflower, Arkansas.<sup>264</sup> PHMSA determined that the cause of the release was a manufacturing defect in the seam of the Pegasus Pipeline's low-frequency electric resistance welded steel (LF-ERW) pipe.<sup>265</sup> PHMSA issued an order concluding that ExxonMobil violated the agency's integrity management regulations and assessed a \$2.6 million civil penalty.<sup>266</sup>

Initially, the 5<sup>th</sup> Circuit determined that PHMSA's pipeline integrity regulations should not be afforded *Auer* deference "because the regulations are unambiguous."<sup>267</sup> Next, the 5<sup>th</sup> Circuit found that ExxonMobil appropriately "considered" all relevant "risk factors that reflect[ed] the risk conditions on the pipeline segment."<sup>268</sup> According to the Court, "[t]he record demonstrate[d] that ExxonMobil satisfied its obligation to 'consider' various risk factors when it conducted a lengthy, repeated, and in-deputy analysis of those risk factors by utilizing the available industry-commissioned guidance."<sup>269</sup> The Court also "conclude[d] that ExxonMobil properly considered the susceptibility of its LF-ERW pipe to seam failure when establishing a continual integrity assessment schedule based on all risk factors on the Pegasus Pipeline."<sup>270</sup> The Court, therefore, determined that ExxonMobil's actions were reasonable and that the agency's decisions pertaining to certain findings "were arbitrary and capricious."<sup>271</sup> The Court also ruled that PHMSA's interpretation of its pipeline integrity regulations were not entitled to deference because "ExxonMobil lacked fair notice" of how PHMSA interpreted the regulation.<sup>272</sup> The Court, therefore, vacated the majority of PHMSA's enforcement decision and associated civil penalties.<sup>273</sup> The Court remanded for reconsideration the civil penalty related to one regulatory violation because it determined the "violation was not a causal factor in the release."<sup>274</sup>

### C. PHMSA Regulatory Initiatives

#### 1. Department of Transportation Regulatory Reform

Since President Trump's inauguration in January 2017 and the issuance of executive orders (Executive Orders) requiring that federal agencies review regulatory initiatives and priorities, the Pipeline and Hazardous Materials Safety Administration (PHMSA) has continued to assess pending regulations.<sup>275</sup> This assessment has stalled the issuance of pending final rules that are expected to amend

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264. ExxonMobil Pipeline Co. v. United States Dep't of Transp., 867 F.3d 564 (5th Cir. 2017).

265. *Id.* at 5.

266. 49 C.F.R. pts. 190-199 (2017); *ExxonMobil Pipeline Co.*, 867 F.3d at 568.

267. *Auer v. Robbins*, 519 U.S. 452 (1997); *ExxonMobil Pipeline Co.*, 867 F.3d at 573.

268. *ExxonMobil Pipeline Co.*, 867 F.3d at 572.

269. *Id.* at 574.

270. *Id.* at 578.

271. *Id.* at 574.

272. *Id.* at 580.

273. *ExxonMobil Pipeline Co.*, 867 F.3d at 583-84.

274. *Id.* at 584.

275. Executive Order 13777, Enforcing the Regulatory Reform Agenda, 82 Fed. Reg. 12,285 (Mar. 1, 2017); Executive Order 13783, Promoting Energy Independence and Economic Growth, 82 Fed. Reg. 16,093

safety regulations applicable to gas transmission and gathering pipelines and hazardous liquid pipelines significantly.<sup>276</sup>

The United States Department of Transportation (DOT) has twice sought public input to inform the reassessment of regulatory priorities.<sup>277</sup> In response to Executive Orders, DOT identified a Regulatory Reform Officer and Task Force to oversee regulatory reform initiatives and to review agency actions, including existing regulations, orders, guidance documents, and policies that may burden the development or use of domestically produced energy resources, particularly oil, natural gas, coal, and nuclear.<sup>278</sup> In June 2017, DOT issued a notice requesting public input on “unnecessary obstacles to transportation infrastructure projects.”<sup>279</sup> In October 2017, DOT requested public input on existing regulations and other agency actions that are good candidates for repeal, replacement or modification.<sup>280</sup>

In October 2017, DOT released a report recommending actions to alleviate or eliminate burdens on the development or use of domestic energy sources.<sup>281</sup> Recommended regulatory initiatives include finalization of PHMSA’s new plastic pipe regulations to accommodate innovations in plastic pipe design and materials, evaluating whether more flexible siting requirements are appropriate for small-scale LNG facilities under Part 193, reviewing existing regulations for petroleum gas operators with 100 or fewer customers, and reviewing the definition of class locations for gas pipelines, examining policies for granting class location special permits and considering alternatives to pipe replacements when class locations change.<sup>282</sup>

The Spring 2018 Unified Agenda of Regulatory and Deregulatory Actions (Unified Agenda) reflects two new regulatory reform initiatives for both the gas and hazardous liquid pipeline regulations.<sup>283</sup> Specifically, PHMSA is developing two separate notices of proposed rulemakings that would amend existing regula-

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(Mar. 31, 2017); Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs, 82 Fed. Reg. 9,339 (Feb. 3, 2017); *see also* Memorandum from Dominic J. Mancini, Acting Administrator, Office of Information and Regulatory Affairs to Regulatory Policy Officers at Executive Departments and Agencies and Managing and Executive Directors of Certain Agencies and Commissions (Apr. 5, 2017) (clarifying that non-enforceable guidance can be used to offset new regulations and stating that an agency can offset costs by counting regulations revoked by other agencies within the same Department).

276. Hunton & Williams LLP, *Regulatory Freeze Issued by New Administration*, PIPELINE LAW (Jan. 23, 2017), <https://www.pipelinelaw.com/2017/01/23/regulatory-freeze-issued-new-administration/#>.

277. Transportation Infrastructure: Notice of Review of Policy, Guidance, and Regulation, 82 Fed. Reg. 26,734 (June 8, 2017); Notification of Regulatory Review, 82 Fed. Reg. 45,750 (Oct. 2, 2017).

278. U.S. DEPT. OF TRANSP., REPORT OF THE REGULATORY REFORM TASK FORCE (May 25, 2017).

279. 82 Fed. Reg. 26,734, at 26,734.

280. 82 Fed. Reg. 45,750, at 45,750.

281. U.S. DEPT. OF TRANSP., FINAL REPORT FOR EXECUTIVE ORDER 13783: AGENCY RECOMMENDATIONS TO ALLEVIATE OR ELIMINATE ACTIONS THAT BURDEN DOMESTIC ENERGY PRODUCTION I (Oct. 25, 2017).

282. *Id.* at 5-7.

283. DOT/PHMSA, Pipeline Safety: Gas Pipeline Regulatory Reform (Spring 2018), <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201804&RIN=2137-AF36>; DOT/PHMSA, Pipeline Safety: Liquid Pipeline Regulatory Reform (Spring 2018), <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201804&RIN=2137-AF37>.

tions to “ease regulatory burdens on the construction and operation” of gas transmission, gas gathering, and hazardous liquid pipeline systems.<sup>284</sup> The anticipated measures would include those identified through internal agency review, existing petitions for rulemaking, and public comments received on DOT’s notices addressing regulatory reform and impediments to transportation infrastructure projects.<sup>285</sup> According to the Unified Agenda, publication of proposed rules is expected during the first quarter of 2019.<sup>286</sup>

PHMSA also is developing an advance notice of proposed rulemaking that would address “the definition of an unusually sensitive area (USA) to explicitly include the Great Lakes, coastal beaches, and marine coastal waters as USA ecological resources for the purposes of determining whether a pipeline is in a high consequence area under” the hazardous liquid pipeline integrity management regulations.<sup>287</sup> This rulemaking is required by section 19 of the Protecting our Infrastructure of Pipelines and Enhancing Safety Act of 2016.<sup>288</sup> According to the Unified Agenda, this advance notice of proposed rulemaking may be issued in late 2018.<sup>289</sup>

## 2. PHMSA Partially Stays Enforcement of New Safety Standards for Underground Natural Gas Storage.

On June 20, 2017, the PHMSA issued a Notice advising of a partial stay of enforcement of an interim final rule (IFR) adopting safety regulations for underground natural gas storage facilities.<sup>290</sup> The IFR requires that storage operators implement the mandatory and non-mandatory provisions of API Recommended Practices (RP) 1170 (Design and Operations of Solution-mined Salt Caverns used for Natural Gas Storage) and RP 1171 (Functional Integrity of Natural Gas Storage in Depleted Hydrocarbon Reservoirs and Aquifer Reservoirs).<sup>291</sup>

In January 2017, several trade associations filed a petition for reconsideration of the IFR.<sup>292</sup> The Notice announced that PHMSA intends to address the petition in a final rule.<sup>293</sup> Until the final rule is issued and for one year after its publication, PHMSA will not initiate enforcement for failure to comply with non-mandatory provisions in the RPs.<sup>294</sup> PHMSA stated, however, that it will enforce other IFR

284. *Id.*

285. 82 Fed. Reg. 45,750, at 2-3; U.S. DEP’T OF TRANS., RULEMAKING REQUIREMENTS 7 (March 2012).

286. *Federal Pipeline Safety Rulemaking Update – August 2018*, THE WINDOT REPORT, <http://thewindotreport.com> (Aug. 2018).

287. DOT/PHMSA, Pipeline Safety: Coastal Ecological Unusually Sensitive Areas (Spring 2018), <https://reginfo.gov/public/do/eAgendaViewRule?pubId=201804&RIN=2137-AF31>.

288. Protecting our Infrastructure of Pipelines and Enhancing Safety Act of 2016, Pub. L. No. 114-183, sec. 19, § 60109(b)(2), 130 Stat. 514.

289. *Federal Pipeline Safety Rulemaking Update – August 2018*, THE WINDOT REPORT, <http://thewindotreport.com> (Aug. 2018).

290. Pipeline Safety: Safety of Underground Natural Gas Storage Facilities; Petition for Reconsideration, 82 Fed. Reg. 28,224 (June 20, 2017); Pipeline Safety: Safety of Underground Natural Gas Storage Facilities, Interim Final Rule, 81 Fed. Reg. 91,860 (Dec. 19, 2016).

291. 81 Fed. Reg. 91,860.

292. 82 Fed. Reg. 28,224.

293. *Id.*

294. *Id.*

compliance deadlines, including the requirement that operators develop policies and procedures implementing mandatory provisions in the RPs by January 18, 2018.<sup>295</sup> In addition, PHMSA stated that it has the authority to issue an emergency order or corrective action order if an underground gas storage facility is found to be an imminent hazard or if facility operations would be hazardous to life, property or the environment.<sup>296</sup>

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295. 81 Fed. Reg. 91,860, at 91,873.

296. 82 Fed. Reg. 28,224, at 28,225.

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