REPORT OF THE GAS, OIL, AND LIQUIDS STEERING COMMITTEE

This report summarizes policy developments and legal decisions that occurred at the Federal Energy Regulatory Commission (FERC), the Pipeline and Hazardous Materials Safety Administration (PHMSA), and the United States Courts of Appeals in the area of Oil and Liquids regulation between January 1, 2021 and December 31, 2021.[1]

1. The Gas, Oil & Liquids Steering Committee thanks Shannon Coleman, George Fatula, J.R. Hand, Joseph Hicks, Carly Kinder, Susan Kittey, Susan Olenchuk, Monique Watson, and Elizabeth Zembruski for their contributions to this report.

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

A. Jurisdictional issues

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

This case concerns a petition for review filed by various airlines challenging a FERC order that found jet fuel transported by a pipeline owned by Central Florida Pipeline LLC (CFPL) was intrastate in nature and thus the FERC lacked jurisdiction to regulate the rates CFPL charges for the transportation of jet fuel. As the Court noted, the fundamental issue in this case was whether CFPL's pipeline, which transports jet fuel from terminal facilities located in Tampa, Florida to facilities located in Orlando, Florida, served as "one link in a continuous interstate movement" from out-of-state locations through to Orlando, Florida, or whether the "storage and other activities at Tampa, Florida broke the continuity of the interstate movement."[2] The Court ultimately denied the airlines' petition.[3]

The Court noted that the airline petitioners advanced four challenges to the FERC order "in a rather scattershot fashion."[4] First, the airline petitioners argued that the FERC misapplied the factors established in *Northville Dock Pipe Line Corp.*,[5] to determine whether a stop within a state breaks the continuity of interstate transportation. "The petitioners contended that the Tampa terminal [at which CFPL's pipeline originates] was not a distribution point or local marketing facilities."[6] Specifically, "the [a]irlines emphasized that there were only four spot sales from the Tampa [t]erminal over the five-year period" that was analyzed, which

2. Aircraft Serv. Int'l Inc. v. FERC, 985 F.3d 1013, 1016 (D.C. Cir. 2021).

3. *Id*. at 1020.

4. *Id*. at 1018.

5. *Id.* The three *Northville* factors are: "(1) [a]t the time of shipment, there is no specific order being filed for a specific quantity of a given product to be moved through to a specific destination beyond terminal storage, (2) [t]he terminal storage is a distribution point or local marketing facility from which specific amounts of the product are sole or allocated, and (3) [t]ransportation in the furtherance of this distribution within the single state is specifically arranged only after a sale or allocation from storage." *Id.* at 1017 (citing *Northville Dock Pipe Line Corp.*, 14 FERC ¶ 61,111, at p. 61,207 (1981)).

6. Aircraft Serv. Int'l Inc., 985 F.3d at 1018.

was insufficient evidence to demonstrate that the Tampa terminal was a point of distribution.[7] The Court rejected this challenge, noting that the fact that there were limited spot sales at the Tampa terminal was "not what [the] FERC relied upon to find that the [distribution] factor [of *Northville* was] satisfied."[8] Rather, the FERC found that "the airlines treat[ed] the jet fuel in [tankage at] Tampa as a fungible pool and trade[d] it among themselves.[9] It was also determined that any airline could run a negative balance on their account—referred to as a negative inventory—by shipping more fuel from Tampa to Orlando than what the airline owned in tankage at Tampa.[10] It was on those facts that the FERC found the Tampa terminal to be a point of distribution, which the Court found to be a reasonable determination.[11]

Second, the airline petitioners argued that the *Northville* factors are inadequate to determine the jurisdictional status of jet fuel movements transported by CFPL.[12] To support this argument, the airlines referenced another order issued by the FERC—*Guttman Energy Inc.*[13]—where the FERC employed 12 factors in addition to the *Northville* factors in its jurisdictional analysis.[14] The Court also rejected this argument. The Court noted that, while *Guttman* did not involve a movement from an intermediate terminal facility and thus concerned a factually distinct transportation service than the one provided by CFPL, the FERC nevertheless found that at least nine of the 12 additional factors described in *Guttman* supported a finding that there was a break in the continuity of the interstate movement at the Tampa terminal.[15]

Third, the airline petitioners argued that the FERC "misinterpreted the teachings of old Supreme Court" decisions that supported a finding that a stop in transit at a terminal facility "did not break the continuity of an interstate movement."[16] The Court disagreed, noting that the stop in transit discussed in all the Supreme Court cases referenced by the airlines involved pauses in transportation that were "incidental to and supportive of continued movements."[17] Lastly, the airline petitioners argued that their business model, jointly coordinating fungible fuel storage and shipments to Orlando, is the only way the jet fuel supply to the Orlando airport can be done efficiently and that the airlines clearly have an "overarching intent"

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7. *Id*.
8. Id.
9. *Id*.
10. *Aircraft Serv. Int'l Inc.*, 985 F.3d at 1018.
11. *Id*.
12. *Id*. at 1019.
13. *Guttman Energy, Inc.*, 161 FERC ¶ 61,180 at PP 49-52, 68-69 (2017).
14. *Aircraft Serv. Int'l Inc.*, 985 F.3d at 1019.
15. *Id*. (citing 161 FERC ¶ 61,180 at PP 17-20, 56-62).
16. *Id.* (citing Texas & New Orleans R.R. Co. v. Sabine Tram Co., 227 U.S. 111 (1913); Carson Petrol. Co. v. Vial, 279 U.S. 95 (1929); United States v. Erie R.R. Co., 280 U.S. 98 (1929)).
17. *Aircraft Serv. Int'l Inc.*, 985 F.3d at 1019.

to deliver fuel from out-of-state locations, through the CFPL pipeline, to Orlando.[18] The Court likewise rejected this argument.[19] As to the airlines' indicated "overarching intent," the Court found that such intent is always present in cases in which the FERC and the Supreme Court have determined "whether an intermediate stop breaks the continuity of interstate transportation."[20] Recognizing that the Supreme Court and the FERC have used the "original and persisting intent" of the shipper to determine the essential character of the commerce, the Court found that such words can be overread.[21] Specifically, the Court stated that

> careful examination of all the relevant cases indicates that the phrase does not refer to the shipper's subjective motive as to the good's ultimate destination. The test refers to whether, using *objective* manifestations of the shipper's intent, an interstate movement has ended, and the goods have continued in intrastate transit.[22]

2. Enerplus Resources (USA) Corp. vs. Targa Badlands LLC, et al., 174 FERC ¶ 61,241 (2021) (Docket No. OR20-13)

On March 16, 2021, the FERC issued the above captioned order dismissing the complaint filed on September 28, 2020 by Enerplus Resources (USA) Corporation (Enerplus) against Targa Badlands LLC and two of its affiliates (collectively, Targa), finding that the complaint "fail[ed] to present a coherent claim under the [Interstate Commerce Act (ICA)]".[23]

In the complaint, Enerplus stated that it sells crude oil produced from dedicated acreage in North Dakota to Targa at various receipt points on Targa's North Dakota crude oil pipeline and then re-purchases the crude oil at various delivery points.[24] Enerplus argued that the fees contained in the purchase and sale agreement were unduly discriminatory in violation of the ICA, and asked FERC to direct Targa to confidentially disclose the terms and conditions pursuant to which it purchases other parties' crude oil that are transported on the pipeline.[25] However, Enerplus acknowledged in the complaint that Targa operates the pipeline under a temporary waiver of the tariff filing and financial reporting requirements of the ICA, which requires that the pipeline or its affiliates own 100% of the throughput on the line and there is no demonstrated or likely third party interest in shipping on the line.[26] Enerplus did not challenge, and requested that FERC continue to honor, the waiver.[27]

In its answer to the complaint, Targa argued that "the purchase and sale of crude oil are non-jurisdictional activities," since the FERC's jurisdiction under the

18. *See id.* at 1020.
19. *Id.*
20. *Id.*
21. *Aircraft Serv. Int'l Inc.*, 985 F.3d at 1020.
22. *Id*. (emphasis in original).
23. *Enerplus Resources (USA) Corp.*, 174 FERC ¶ 61,241 at P 1 (2021).
24. *Id.* at P 3.
25. *Id.* at PP 3-4.
26. *Id.* at P 2 (citing 49 U.S.C. app. §§ 6, 20 (1988)).
27. 174 FERC ¶ 61,241 at P 5.

ICA extends only to the terms and conditions of pipeline transportation service, and noted that Enerplus did not challenge and in fact supported the continuation of the FERC waiver issued to Targa on the condition that it did not provide service for third party owned volumes on the pipeline.[28] Targa also argued that the complaint failed to demonstrate that the rates and terms of Targa's agreements with other producers would be unduly discriminatory even if the ICA applied.[29]

FERC dismissed the complaint, finding that "Targa's obligations under the ICA extend only to pipeline transportation service," and "i[f] Enerplus has not requested or received transportation service on the pipeline, then Enerplus lacks any claim against Targa under the ICA."[30] FERC went on to find that although Enerplus "asserts that the Purchase and Sale Agreement is for ICA-jurisdictional transportation service[,]" Enerplus also "affirmatively requests that the FERC continue to honor Targa's waiver, which would be subject to revocation if Enerplus . . . had sought or received ICA jurisdictional transportation service on the pipeline."[31] The FERC therefore held that Enerplus had failed to make a coherent claim for relief and dismissed the complaint.[32] Enerplus made a timely request for rehearing of the order, which was opposed by Targa and remains pending before the FERC.[33]

B. Petitions for Declaratory Order

1. *Cactus II Pipeline LLC*, 175 FERC ¶ 61,161 (2021).

On May 25, 2021, the FERC approved a petition for declaratory order filed by Cactus II Pipeline LLC (Cactus II) related to its existing pipeline system that "transports crude oil from locations in the Permian Basin to South Texas, along the U.S. Gulf Coast."[34] Previously, on June 3, 2019, the FERC issued a declaratory order largely accepting Cactus II's requested rulings related to the terms of service offered during the initial two open seasons held in December 2017 and January 2018 that supported the development of the Cactus II pipeline.[35] During Cactus II's first open season, one anchor committed shipper (Original Anchor Shipper) executed a transportation services agreement (TSA) "for an aggregate barrel commitment of 547,500,000 barrels"—*i.e.*, approximately 300,000 barrels per day (BPD) and "an initial term of approximately five years."[36]

28. *See id.* at PP 8-9.
29. *Id*. at P 8.
30. *Id.* at P 9.
31. 174 FERC ¶ 61,241 at P 9.
32. *Id.*
33. Order Granting Rehearing for Further Consideration under the Interstate Commerce Act, Enerplus Resources (USA) Corp, FERC Docket No. OR20-13-000 (May 20, 2021).
34. *Cactus II Pipeline LLC*, 175 FERC ¶ 61,161 at PP 1-2 (2021).
35. *Cactus II Pipeline LLC*, 167 FERC ¶ 61,205 at PP 1, 3 (2019).
36. 175 FERC ¶ 61,161 at P 3.

Due to unforeseen and significant changes in the conditions of the markets served by the Cactus II pipeline, and to accommodate the Original Anchor Shipper, Cactus II sought to make certain limited modifications to the terms of service offered during its first open season.[37] The modifications proposed by Cactus II, as summarized by the FERC in *Cactus II*, related to extending the time the Original Anchor Shipper would have to fulfill its commitment obligations.[38] However, to ensure that all interested shippers had the opportunity to take advantage of the proposed modified terms of service being afforded to the Original Anchor Shipper, Cactus II held another open season (referred to as the New Open Season) for the 300,000 BPD subscribed by the Original Anchor Shipper.[39] The Original Anchor Shipper was required to participate in the New Open Season and commit to the full 300,000 BPD, which commitment would "only be reduced if Cactus II received commitments from one or more additional shippers during the New Open Season."[40] The volumes shipped by the Original Anchor Shipper under its initial open season TSA would "count toward the fulfillment of its aggregate barrel commitment under its New Open Season TSA."[41] However, under the New Open Season TSA, the Original Anchor Shipper had approximately 1.5 years longer to fulfill its commitment obligation as compared to the initial open season TSA.[42] In the event that any committed shipper other than the Original Anchor Shipper participated in the new open season, Cactus II noted that it would modify its proration policy to reset the Original Anchor Shipper's shipper history, so that the new committed shipper would not be disadvantaged.[43]

The FERC approved Cactus II's petition for declaratory order, finding its proposal to re-contract the capacity during the New Open Season under certain modified terms to be consistent with FERC precedent.[44] The FERC noted that because the same capacity was being offered during the New Open Season that was subscribed during the first open season, the capacity available to uncommitted shippers would not be affected.[45] The FERC further noted that allowing the Original Anchor Shipper's volumes shipped under the initial open season TSA to count toward its fulfillment of its aggregate volume commitment was reasonable and consistent with FERC precedent.[46] The FERC also approved Cactus II's proposal to amend its proration policy if another committed shipper executed a TSA during the New Open Season because it would allow "all committed shippers [to] be placed on equal footing with respect to shipper history."[47]

37. *Id.* at P 4.
38. *Id.*
39. *Id.* at PP 5-6.
40. Petition for Declaratory Order, Cactus II Pipeline LLC, FERC Docket No. OR21-6-000, at 4, 8 (March 25, 2021).
41. *Id.* at 31.
42. *Id.* at 28.
43. *Id.* at 17.
44. 175 FERC ¶ 61,161 at PP 15-16.
45. *Id.* at P 16.
46. *Id.* at P 18.
47. *Id.* at P 20.

C. *Rulemaking Actions/Public Inquiry Dockets*

1. *Five-Year Review of the Oil Pipeline Index*, Notice of Inquiry, 171 FERC ¶ 61,239 (2020) (RM20-14)

"In Order No. 561, the [FERC] established an indexing methodology that allows oil pipelines to change rates based upon an annual index as opposed to making cost-of-service filings."[48] In that order, the FERC also committed to review the index level every five years to ensure that the index level chosen by the FERC adequately reflects changes to industry costs.[49] Pursuant to that commitment, on June 18, 2020, the FERC issued its Notice of Inquiry seeking comments on its proposed index level for 2021-2026.[50] In the RM20-14 NOI, the FERC proposed to use PPI-FG + 0.09 percent as the index level for the five-year period commencing on July 1, 2021.[51] The RM20-14 NOI explained that the FERC had arrived at this level by employing the Kahn Methodology established in Order No. 561, and had trimmed the data considered in that methodology to include the middle 50 percent of cost changes only.[52]

On August 17, 2020, interested parties submitted comments on FERC's proposal.[53] On September 11, 2020, interested parties submitted reply comments, and on December 17, 2020, FERC issued its order setting the index level at PPI-FG + 0.78 percent.[54] The FERC's decision was based on retaining the use of data from the middle eighty percent of all oil pipeline, adoption of a proposal to adjust the data set to remove the effects of the FERC 's 2018 tax policy change for Master Limited Partnership-owned pipelines, and the incorporate of updated Form No. 6, Page 700 data.[55] Several parties sought rehearing of FERC's order.[56] On February 18, 2021, FERC granted the requests for rehearing for further consideration and is currently considering the various rehearing requests made by the parties.[57] Although the docket was included on the agenda for the April 15, 2021 and July 15, 2021 FERC open meetings, the item was pulled from the agenda before the Commissioners' vote.[58] As of December 31, 2021, the matter remained pending at FERC.[59]

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48. Notice of Inquiry, *Five-Year Review of the Oil Pipeline Index*, 171 FERC ¶ 61,239 at P 3 (2020) [hereinafter RM20-14 NOI] (citing Order No. 561, *Revisions to Oil Pipeline Regulations Pursuant to the Energy Policy Act of 1992*, [Regs. Preambles 1991-1996] FERC Stats. & Regs. ¶ 30,985 (1993), 58 Fed. Reg. 58,753 (1993) [hereinafter Order No. 561].

49. *Id*. (citing Order No. 561, *supra* note 48, at 30,947).

50. *Id.* at P 1.

51. *Id.*

52. RM20-14 NOI, *supra* note 48, at PP 1, 4.

53. *Id.* at P 12.

54. *Five-Year Review of the Oil Pipeline Index*, 173 FERC ¶ 61,245 at P 2 (2020).

55. *Id.* at PP 2, 5.

56. Order Granting Rehearing for Further Consideration under the Interstate Commerce Act, Docket No. RM20-14-001 (Feb 18, 2021).

57. *Id.*

58. *Id.*

59. *Id.*

D. Tariff and Ratemaking Issues

1. *SCM Crude, LLC*, 174 FERC ¶ 61,088, *reh'g denied*, 175 FERC ¶ 61,187 (2021).

On January 11, 2021, SCM Crude, LLC's (SCM Crude) sought to update its tariff to modify its "crude oil specifications to conform with the quality specifications of delivery points on the SCM Crude gathering system."[60] SCM Crude explained that it had received notice from a downstream connecting facility that a delivery of crude oil did not meet that facility's quality specification.[61] SCM Crude explained that its proposed tariff revisions was consistent with Item 3(B) of its tariff that gives SCM Crude "the right to change or modify the Quality Specifications provided in Item 3(A) in order to conform Gatherer's Quality Specifications to those of downstream connecting facilities."[62] The FERC accepted SCM Crude's proposed tariff modifications, finding that they there was "sufficient justification to allow SCM Crude to exercise its right under the tariff to bring its quality standards in line with the downstream delivery points."[63]

Timely rehearing was filed arguing that SCM Crude's tariff filing did not "provide sufficient explanation and support for the proposed changes"[64] and that the new specifications "appear to impose requirements based on stringent specifications for exporting crude oil, which would benefit downstream market participants at the expense of SCM Crude's shippers."[65]

The FERC denied rehearing making several findings, including that SCM Crude had a made a "sufficient showing" that the changes were operationally necessary.[66] It also found that the requesters had "not indicated that the new requirements go beyond what Item 3(A) on its face entitles SCM Crude to do. . . ."[67] The FERC also rejected the argument that SCM Crude's Tariff Item 3(B) could "only apply after SCM Crude has proven through an investigation that the downstream quality specifications are reasonable."[68] To this end, the FERC held that the rehearing request was challenging the justness and reasonableness of Item 3(B), which was "beyond the scope" of the proceeding.[69] In doing so, the FERC held that it "will not permit protests to challenge '[s]ections of the existing tariffs that are not proposed to be changed or updated' by the tariff filing that initiated a proceeding."[70] The FERC also rejected an argument that the order "should not serve

60. *SCM Crude, LLC*, 174 FERC ¶ 61,088 at P 1 (2021).

61. *Id.* at P 3.

62. *SCM Crude, L.L.C.*, 175 FERC ¶ 61,187 at PP 2, 6 (2021).

63. *Id.* at P 4.

64. *Id.* at P 4.

65. *SCM Crude, L.L.C., supra* note 62.

66. *Id.* at P 7.

67. *Id.*

68. *Id.* at P 8.

69. *Id.* at P 9.

70. *Id.* (citing *BP Pipelines (Alaska) Inc.*, 170 FERC ¶ 61,153 at P 13 (2020) (*reh'g denied*, *BP Pipelines (Alaska) Inc.,* 173 FERC ¶ 61,249 at P 16 (2020)).

as precedent for future tariff changes" because the rehearing request "pointed to no reason this precedent should be treated differently from any other."[71]

2. Equinor Marketing & Trading (US) Inc. v. Mustang Pipe Line LLC in Docket No. OR21-5-000

On June 17, 2021, the FERC set for hearing a complaint filed by Equinor Marketing & Trading (US) Inc. (Equinor) against Mustang Pipe Line LLC (Mustang) which alleged that Mustang unlawfully allocated capacity on its pipeline in violation of the proration policy incorporated by reference in its rules and regulations tariff as well as several sections of the Interstate Commerce Act (ICA).[72]

The FERC established a hearing to explore the issues raised in Equinor's complaint, including but not limited to whether Mustang failed to properly implement its proration policies, unduly preferred shippers when issuing notification of available excess capacity following allocation in violation of ICA Section 3(1), or failed to provide transportation service to Equinor on reasonable request as required by ICA Section 1(4), and, if so, what remedies are appropriate.[73] The FERC held the hearing in abeyance to provide time for settlement judge procedures.[74] Those settlement judge procedures were terminated after settlement discussions reached an impasse.[75] On December 14, 2021, the presiding administrative law judge set the procedural schedule and the hearing is scheduled to commence on August 22, 2022.[76]

E. Market Based Rates

1. Epsilon Trading, LLC, et al. v. Colonial Pipeline Co., 177 FERC ¶ 63,017 (2021) (Docket No. OR18-7)

On December 1, 2021, the FERC issued a partial Initial Decision (ID) on the Complaints filed by shippers against Colonial Pipeline Company (Colonial) challenging Colonial's cost-of-service (COS) rates, market-based rates (MBR), and product loss allowance (PLA).[77] This partial ID addressed the issues set for hearing regarding Colonial's MBR authority and PLA.[78] The Presiding Judge stated that the ID regarding Colonial's COS rates would come "later," but did not specify

71. *SCM Crude, L.L.C., supra* note 62 at P 11.

72. *Equinor Marketing & Trading (US) Inc.*, 175 FERC ¶ 61,217 at P 14 (2021).

73. Id. at P 15.

74. Id. at P 16.

75. *Equinor Marketing & Trading (US) Inc.*, 175 FERC ¶ 61,217 (1985) (Order of Chief Judge Terminating Settlement Judge Procedures, Designating Presiding Administrative Law Judge, and Establishing Track II Procedural Time Standards).

76. *Equinor Marketing & Trading (US) Inc.*, 175 FERC ¶ 61,217 (1985) (Order Setting Procedural Schedule).

77. *Epsilon Trading, L.L.C.*, 177 FERC ¶ 63,017 (2021).

78. *Id.*

a particular date when the rest of the ID would be released.[79] However, on December 2, 2021, the Chief Judge issued an order setting April 29, 2022 as the deadline to issue the remainder of the initial decision.[80]

On MBR issues, the Presiding Judge concluded Colonial lacks market power for the Gulf Coast market, but that Colonial's MBR authority should be revoked regarding the Tuscaloosa-Moundville origin market.[81] On the issue of burden of proof in the MBR case, the Presiding Judge stated that Complainants do not bear a heightened burden to demonstrate changed circumstances since the MBR authority was originally granted.[82] Rather, the Complainants hearing burden is to demonstrate that Colonial has the ability to exercise market power.[83] The Presiding Judge found that the relevant product market was the transportation of all refined petroleum products by pipeline.[84] The Presiding Judge found there were two geographic markets: (1) a 90-county Gulf Coast origin market; and (2) a 16-county Tuscaloosa-Moundville origin market.[85] The Presiding Judge further found that the competitive price proxy used should first be Colonial's MBR rate, and then, if Colonial is found to lack market power using its current MBR, another analysis using the competitive price proxy developed by Complainants' witness in order to avoid the trap of the "cellophane fallacy."[86]

On the issues of competitive alternatives, the ID affirmed the FERC precedent that at-or near- capacity alternatives are "good alternatives."[87] The ID further found that there were eight oil pipelines that served as good competitive alternatives in the 90-County Gulf Coast origin market and none in the 16-county Tuscaloosa-Moundville geographic origin market.[88] The ID found that domestic waterborne shipments (*i.e.,* waterborne shipments within the origin market to reach another point to exit said origin or shipments to another domestic location such as Florida or New York) and trucking to local consumption were good alternatives in both geographic markets.[89] The ID found that international waterborne shipments were not a good competitive alternative to Colonial.[90] The ID also found rail was not a competitive alternative.[91] For the primary market power measures, the ID found the Gulf Coast market had a Herfindahl-Hirschman index (HHI) of

79. *Id.* at P 4.
80. *Epsilon Trading, LLC*, 177 FERC ¶ 63,017 at P 9-10, 12, 190 (2021).
81. *Id.* at P 10.
82. *Id.* at PP 151-55.
83. *Id.* at P 154.
84. *Epsilon Trading, L.L.C., supra* note 77 at P 170 (2021).
85. *Id.* at 209.
86. *Id.* at PP 241-245.
87. *Id.* at 278.
88. *Epsilon Trading, L.L.C., supra* note 77 at PP 289-90 (2021).
89. *Id.* at PP 313, 363.
90. *Id.* at P 313.
91. *Id.* at P 371.

1,617, and Colonial had a 36.1% market share there.[92] In the Tuscaloosa-Moundville market, the ID concluded that the HHI to be 2,498 and Colonial's market share to be 49.9%.[93]

The ID also analyzed numerous secondary market factors and "pro-competitive factors" raised by Colonial.[94] For the most part the Presiding Judge found those factors were not supported on the record but did find that new or expanded oil pipelines, exchanges, and storage would be procompetitive factors in the Gulf Coast.[95] The ID did not consider other factors of dominance, such as the secondary market for line space, finding that the analysis in the Gulf Coast to constitute a "close call."[96] The ID affirmed that evidence of cost over-recoveries could be relevant to a market power analysis, although she did not apply that evidence here because she did not find it to be a close enough call.[97]

For the Tuscaloosa-Moundville market, where the ID recommended FERC revoke Colonial's MBR authority, the ID recommended setting the rates going forward based on information and methodologies determined after the conclusion of the COS portion of the proceeding.[98] However, the Presiding Judge found that reparations are prohibited and separately recommended FERC *not* order reparations even if it finds them to be permissible.[99]

On the issue of PLA, ID recommended that Colonial be ordered to file its PLA in its tariff although the mechanism for calculating it can be made available elsewhere.[100] Going forward, the ID recommended the Complainants' methodology of using a fixed allowance percentage deduction, which was opposed by all the other participants in the case.[101] The Presiding Judge also recommended reparations calculated as the difference between the amount paid and the amount calculated under an 0.19% allowance deduction.[102]

2. *MPLX Ozark Pipe Line LLC*, 172 FERC ¶ 63,034 (2020)

On December 26, 2018, MPLX Ozark Pipe Line LLC (MPLX Ozark) filed an application for authorization to charge market-based rates for the interstate transportation of crude oil on its pipeline system from Cushing, Oklahoma, to Wood River, Illinois.[103] Phillips 66 Company and Husky Marketing & Supply

92. *Epsilon Trading, L.L.C., supra* note 77 at P 409 (2021).
93. *Id.* at P 410.
94. *Id.* at 411.
95. *Id.* at PP 433, 438.
96. *Epsilon Trading, L.L.C., supra* note 77 at P 454 (2021).
97. *Id.* at P 472.
98. *Id.* at P 495.
99. *Id.*
100. *Epsilon Trading, L.L.C., supra* note 77 at P 646 (2021).
101. *Id.* at P 639.
102. *Id.* at 646.
103. Application of MPLX Ozark Pipe Line LLC for Authorization to Charge Market-Based Rates, FERC Docket No. OR19-14-000 (filed Dec. 21, 2018).

Company jointly protested MPLX Ozark's application.[104] The FERC, in its June 25, 2019, order addressing the protest, granted MPLX Ozark market-based rate authority in its proposed origin market of the State of Oklahoma, finding that MPLX Ozark had met its burden to show that the origin margin is workably competitive.[105] The Commission set for hearing the issue of whether MPLX Ozark had the ability to exercise market power in an appropriately determined geographic destination market.[106]

A virtual hearing commenced on May 6, 2020, and concluded on May 28, 2020, and the presiding Administrative Law Judge issued an initial decision on September 25, 2020.[107] The Initial Decision found that: (1) MPLX Ozark's product market should be defined as the transportation of all grades of crude oil, (2) the geographic area of Wood River/Roxana, Illinois was the appropriate geographic destination market, (3) the Herfindahl-Hirschman Index for the defined destination market is in the range of 2,859 to 2,676, and (4) MPLX Ozark's market share of the defined destination market is in the range of 34.5 to 30.1 percent.[108] The Initial Decision determined that these numbers presented a "relatively close call" that required analysis of qualitative secondary market measures, such as optionality and affiliate connections.[109] As a result of that secondary analysis, the Initial Decision concluded that MPLX Ozark had failed to demonstrate it is unable to exercise market power over crude oil transportation to the defined geographic destination market, and denied MPLX Ozark market-based ratemaking authority for the destination market.[110] The participants completed briefing on the Initial Decision on November 16, 2020.[111] To date, the FERC has not ruled on the Initial Decision.

F. Tax Issues

1. *SFPP v. FERC* (Case No. 19-1067)

On July 31, 2020, the D.C. Circuit issued an opinion addressing petitions for review of two FERC orders involving application of the FERC's revised policy statement regarding recovery of income tax costs to SFPP, L.P. (SFPP).[112] On appeal, SFPP challenged the FERC's refusal to grant SFPP an income tax allowance based on reasoning that allowing SFPP to recover in its cost-of-service rates both an income tax allowance and a rate of return on equity based on the discounted cash flow methodology would compensate SFPP for its income tax costs

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104. Motion to Intervene and Protest of Husky Marketing & Supply Company and Phillips 66 Company, FERC Docket No. OR19-14-000 (filed Feb. 25, 2019).

105. *MPLX Ozark Pipe Line L.L.C.*, 167 FERC ¶ 61,264 at P 1 (2019).

106. *Id*.

107. *MPLX Ozark Pipe Line LLC*, 172 FERC ¶ 63,034 (2020) (Initial Decision).

108. *Id*. at P 4.

109. *Id*. at P 276.

110. *Id*. at PP 291-93.

111. 172 FERC ¶ 63,034, at PP 291-93.

112. SFPP, L.P. v. FERC, 967 F.3d 788 (D.C. Cir. 2020). *See also Inquiry Regarding the Commission's Policy for Recovery of Income Tax Costs*, 162 FERC ¶ 61,227 (2018).

twice (a claimed "double recovery").[113] The Court upheld the FERC's treatment of income tax allowances, stating that it permissibly solved the problem of a double recovery by removing the income tax allowance from master limited partnership pipelines such as SFPP.[114]

SFPP also appealed the FERC's denial of its request to reopen the record in the underlying rate proceeding so that SFPP could provide additional information regarding the potential double recovery of income tax costs.[115] The Court found that the FERC had reasonably exercised its discretion to deny SFPP's motion to reopen the record, and that SFPP was not treated differently from similarly situated pipelines in this regard.[116] SFPP further appealed the FERC's decision to require SFPP to use its originally filed index rates when calculating its revised rates pursuant to the FERC's final rulings regarding SFPP's cost of service.[117] The Court also rejected this argument, holding that the FERC's decision was consistent with its policy and did not violate the rule against retroactive ratemaking.[118]

Additionally, in a cross appeal, certain of SFPP's shippers challenged the FERC's decision to allow SFPP to eliminate its accumulated deferred income tax balance (ADIT) from its rates when making its cost-of-service compliance filing as a result of the FERC's decision to deny SFPP an income tax allowance.[119] The shippers argued that the FERC should have found that any ADIT balance should be credited back to shippers through amortizing the amount and incorporating the amortized reduction into SFPP's prospective rates.[120] The Court rejected the shippers' cross appeal, holding that requiring pipelines to refund their ADIT balances to ratepayers "would constitute impermissible retroactive ratemaking," and that the FERC's order denying the shippers' request for an ADIT refund was not arbitrary or capricious.[121]

SFPP and the shippers sought rehearing and/or rehearing *en banc* of the Court's opinion in *SFPP v. FERC*.[122] The Court denied all parties' requests for rehearing on November 19, 2020, and the Court issued a mandate returning the matter to FERC on December 1, 2020.[123] On April 19, 2021, SFPP filed a *writ of certiorari* seeking review of the *SFPP v. FERC* opinion by the Supreme Court of the United States.[124] SFPP voluntarily dismissed the petition before the Supreme Court took any action.[125]

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113. *Id*. at 792-93, 796-97.
114. SFPP, L.P. v. FERC, 967 F.3d at 796-97.
115. *Id*. at 797-98.
116. *Id*.
117. *Id*. at 798-99.
118. SFPP, L.P. v. FERC, 967 F.3d at 798-99.
119. *Id*. at 799-803
120. *Id*. at 800-01.
121. *Id.* at 801-03.
122. SFPP, L.P. v. FERC, Nos. 19-1067, 2020 U.S. App. LEXIS 36579 (D.C. Cir. Nov. 19, 2020).
123. *Id.*
124. Pet. for Writ of Cert, at 1-3, *SFPP, L.P. v. FERC,* No. 20-1484 (U.S. filed Apr. 19, 2021).
125. Mot. for Voluntary Dismissal, *SFPP, L.P. v. FERC,* No. 20-1484 (U.S. filed May 3, 2021).

II. PHMSA AND PIPELINE SAFETY

A. PIPES Act 2020 Reauthorizes Federal Pipeline Safety Programs Through FY 2023.

On December 27, 2020, President Trump signed the Protecting our Infrastructure of Pipelines and Enhancing Safety Act of 2020 (PIPES Act 2020) reauthorizing funding for federal pipeline safety programs through fiscal year 2023 and amending the Pipeline Safety Laws.[126] Several provisions of the Pipes Act of 2020 affect oil and hazardous liquid pipelines.

1. Unusually Sensitive Areas.

The PIPES Act of 2020 requires that the Department of Transportation's Pipeline and Hazardous Materials Safety Administration (PHMSA)[127] amend Part 195 of the federal pipeline safety regulations[128] to require that "certain coastal waters" (including the Great Lakes and their connecting waters) and "coastal beaches" be classified as unusually sensitive areas (USA) for the purpose of determining whether a hazardous liquid pipeline is located in, or could affect, a "high consequence area" (HCA).[129] Section 195.450 defines an HCA to include commercially navigable waterways, highly populated areas and USAs, *i.e.,* areas where a release from a pipeline could have significant consequences.[130] A hazardous liquid pipeline's proximity to an HCA can affect the pipeline operator's regulatory compliance obligations.[131] The effect of the amended definition of a USA is to ensure that coastal beaches and certain coastal waters are deemed to be HCAs and to expand the regulatory requirements applicable to hazardous liquid pipelines that are located in or that could affect an HCA.

2. Idled Pipelines.

The PIPES Act 2020 defines the term "idled pipeline" as a pipeline that has ceased normal operations and will not resume service for at least 180 days, has been isolated from product sources, and has been purged of combustibles and hazardous materials and maintains a blanket of inert nonflammable gas at low-pressure, unless the volume of gas is so small that no potential hazard exists.[132] PHMSA must adopt risk-based regulations for idled pipelines and verify that they have been purged of product.[133] Before an idled pipeline can resume operations,

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126. Division R of Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, 134 Stat. 1182, 2210-43 (Dec. 27, 2020).

127. Through delegation orders of the United States Department of Transportation, PHMSA is the federal agency responsible for administering the nation's pipeline safety program. 49 C.F.R. §§ 1.96(a) & 1.97(a) (2020).

128. 49 C.F.R. Part 195.

129. Pub. L. No. 116-120, § 120, 134 Stat. at 2235.

130. 49 C.F.R. § 195.450.

131. 49 C.F.R. Part 195.

132. Pub. L. No. 116-120, § 109(a), 134 Stat. at 2223.

133. Pub. L. No. 116-120, § 109(b)(1), 134 Stat. at 2224.

it must be inspected and comply with regulations, including any regulations adopted while the pipeline was idled.[134]

3. Automatic and Remote-Controlled Shut-Off Valves on Existing Pipelines.

PHMSA must arrange for the National Academy of Sciences (NAS) to study potential methodologies or standards for installing automatic or remote-controlled shut-off valves on hazardous liquid pipelines located in a commercially navigable waterways or USAs, and with respect to existing gas transmission pipelines, those located in HCAs.[135] NAS must submit a report to Congress describing the results of the study.[136]

Other provisions of the PIPES Act of 2020 affecting hazardous liquid pipelines include the following:

4. Purpose and General Authority.

When evaluating whether the benefits of a proposed or issued safety standard justifies its costs, PHMSA must consider both safety and environmental benefits.[137]

5. Enforcement.

Multiple provisions are intended to enhance transparency and fairness in PHMSA's enforcement proceedings. In addition, when establishing the amount of a civil penalty, PHMSA must consider whether the operator self-disclosed and corrected the violation before it was discovered by PHMSA.[138]

6. Regulatory Updates.

PHMSA must publicly post monthly updates of each final rule required by any statutory mandate contained in the PIPES Act 2020 or any previous statute amending the Pipeline Safety Act.[139]

7. Interstate Drug and Alcohol Oversight.

PHMSA must amend its program for auditing compliance with Part 199 drug and alcohol regulations to minimize duplicative audits of operators and contractors by PHMSA and multiple state agencies.[140]

134. Pub. L. No. 116-120, § 109(b)(2)134 Stat. at 2224.
135. Pub. L. No. 116-120, § 119(a), 134 Stat. at 2234.
136. Pub. L. No. 116-120, § 119(c), 134 Stat. at 2234.
137. Pub. L. No. 116-120, § 118, 134 Stat. at 2234.
138. Pub. L. No. 116-120, § 108, 134 Stat. at 2221.
139. Pub. L. No. 116-120, § 106, 134 Stat. at 2220.
140. Pub. L. No. 116-120, § 117, 134 Stat. at 2234.

8. Whistleblower Protections.

Whistleblower protections are expanded to include former employees and, if the Secretary of Labor does not act on a complaint within 210 days, allows employees to bring an original action in a U.S. district court with a jury trial, regardless of the amount in controversy.[141] The rights and remedies provided under this section cannot be waived and no pre-dispute arbitration agreement is valid or enforceable.[142]

B. Interim Final Rule Addressing Unusually Sensitive Areas for the Great Lakes, Coastal Beaches, and Certain Coastal Waters

On December 27, 2021, PHMSA issued an interim final rule (IFR) amending § 195.6 of the federal pipeline safety regulations to require that "certain coastal waters" (including the Great Lakes and their connecting waters) and "coastal beaches" be classified as unusually sensitive areas (USA) for the purpose of determining whether a hazardous liquid pipeline is located in, or could affect, a "high consequence area" (HCA).[143] The IFR implements congressional mandates of the Protecting Our Infrastructure of Pipelines and Enhancing Safety Act of 2016 (PIPES Act of 2016),[144] and PIPES Act 2020.[145]

Generally, an HCA is an area where a release from a pipeline accident could have significant consequences. Section 195.450 of PHMSA's regulations defines an HCA to include commercially navigable waterways, highly populated areas and USAs.[146] Section 195.6, in turn, defines a USA is "a drinking water or ecological resource area that is unusually sensitive to environmental damage from a hazardous liquid pipeline release."[147] The proximity of a hazardous liquid pipeline to an HCA affects the regulatory compliance requirements applicable to that pipeline. For example, a hazardous liquid pipeline that is located in or that could affect an HCA is subject to heightened regulatory requirements contained in PHMSA's integrity management regulations.[148]

The PIPES Act of 2016 provided that USAs must include the Great Lakes, coastal beaches and marine coastal waters, and directed PHMSA to amend the definition of a USA to include these areas.[149] Section 120(a) of the PIPES Act of 2020 defined these terms and directed PHMSA to incorporate them into the regulations.[150] First, the PIPES Act of 2020 replaced the term "marine coastal waters"

141. Pub. L. No. 116-120, § 117, 134 Stat. at 2233.

142. Pub. L. No. 116-120, § 116, 134 Stat. at 2233.

143. Interim Final Rule, Pipeline Safety: Unusually Sensitive Areas for the Great Lakes, Coastal Beaches, and Certain Coastal Waters, 86 Fed. Reg. 73,173 (Dec. 27, 2021).

144. Pub. L. No. 114-183, § 19, 130 Stat 514, 527 (June 14, 2016).

145. Consolidated Appropriations Act, Pub. L. No. 116-260, 134 Stat. 2235.

146. 49 C.F.R. § 195.450 (2001).

147. *Id.* § 195.6.

148. *Id.* § 195.452.

149. Protecting our Infrastructure of Pipelines and Enhancing Safety Act of 2021, Pub. L. No. 114-183, 130 Stat. 527.

150. Consolidated Appropriations Act, Pub. L. No. 116-260, 134 Stat. 2235, § 120(a), (c).

with the term "certain coastal waters" and defines it to mean the "territorial sea of the United States; the Great Lakes and their connecting waters; and the marine and estuarine waters of the United States up to the head of tidal influence."[151] The PIPES Act of 2020 also defines the term "coastal beach" as "any land between the high-and low-water marks of certain coastal waters."[152]

The IFR implements the requirements of the PIPES Act of 2020 and amends § 195.6 to incorporate into the definition of a USA the terms "certain coastal waters" and "coastal beach" and their statutory definitions.[153] These areas are now HCAs. The effect of the amended USA definition will be to increase the amount of hazardous liquid pipelines subject to PHMSA's integrity management regulations which impose heightened safety requirements for pipelines located in or could affect an HCA.[154]

The amended definition of a USA also could increase the amount of underwater pipeline infrastructure that is located in or could affect an HCA and therefore, subject to certain inspection and assessment requirements.[155] In addition, rural onshore hazardous liquid gathering pipelines that currently are not regulated because they are not located within ¼ mile of a USA could become subject to regulation as a result of the amended USA definition.[156] Similarly, the amended definition of a USA may cause some category 3 low-stress pipelines to be within ½ mile of a USA and become subject to integrity management requirements.[157]

C. Transportation Security Administration Issues Security Directive to Pipelines Deemed to be Critical Facilities

On May 26, 2021, the Transportation Security Administration (TSA) released Security Directive Pipeline-2021-01 directing owners and operators of hazardous liquid pipelines, natural gas pipelines, and liquefied natural gas (LNG) facilities identified as "critical" by TSA to take certain actions related to pipeline cybersecurity.[158] TSA issued the Security Directive following the cybersecurity ransomware attack on Colonial Pipeline Company, which caused pipeline operations to stop for several days.[159] The Security Directive became effective May 28, 2021.[160]

The Security Directive is considered the first step in establishing a more prescriptive regulatory scheme and combines the resources of both TSA and the Cybersecurity and Infrastructure Security Agency (CISA) within the Department of

151. *Id.*, 134 Stat. 2235, § 120(a), (b).
152. *Id.*, 134 Stat. 2235, § 120(a).
153. 86 Fed. Reg. at 73,186.
154. 49 C.F.R. § 195.452.
155. Consolidate Appropriations Act, Pub. L. No. 116-260, 134 Stat. 2235, § 120(d) (2021) (codified at 49 U.S.C. § 60109(g).
156. 49 C.F.R. § 195.11.
157. 49 C.F.R. § 195.12.
158. *Security Directive Pipeline*, 86 Fed. Reg. 38,209 (2021).
159. *Id.*
160. *Id.*

Homeland Security. Owners and operators of facilities deemed to be critical were required to take the following actions:

1. Identify a corporate-level Cybersecurity Coordinator and alternative Cybersecurity Coordinator to serve as the primary contact for cyber-related intelligence information and cybersecurity-related activities and communications with TSA and CISA, coordinate internal cyber and related security practices and procedures, work with appropriate law enforcement and emergency response agencies, and be accessible to TSA and CISA 24 hours a day, 7 days a week.[161]
2. Report cybersecurity incidents to CISA.[162] Cybersecurity incidents include unauthorized access of information technology (IT) or operational technology (OT) systems; discovery of malicious software on IT or OT systems; activity resulting in a denial of service to any IT or OT system; physical attack against the owner/operator's network infrastructure, such as deliberate damage to communication lines; and any other cybersecurity incident that results in operational disruption to IT or OT systems or other aspects of the pipeline system or facility, or otherwise could cause operational disruption.[163]
3. Report the information described in (2) above to CISA within 12 hours.[164] The report must contain the information specified in the Security Directive.[165] If all required information is not available within 12 hours, the owner/operator must submit an initial report and supplemental reports.[166]
4. Perform a Vulnerability Assessment based on Section 7 of TSA's 2021 Pipeline Security Guidelines.[167] Owner/operators must assess whether current practices and activities to address cyber risks to IT and OT systems align with the Guidelines; identify gaps; identify remediation measures to fill the gaps and a timeline for implementing the measures; and provide a report to TSA and CISA.[168]
5. Confirm receipt of the Security Directive and disseminate information and measures contained in the Security Directive to corporate senior management, security management representatives, and personnel with compliance responsibilities.[169]

D. Emergency Request from Airlines

1. *Airlines for America, et al.* – Docket Nos. OR21-10-000/AD21-16-000

On July 26, 2021, various airlines filed a request for the FERC to exercise its emergency powers pursuant to Section 1(15) of the Interstate Commerce Act to require SFPP, L.P. (SFPP) to temporarily provide priority treatment to jet fuel shipments on SFPP's North Line to Reno, Nevada.[170] The airlines argued that, given the reduced shipments of jet fuel during the COVID-19 pandemic, many airlines loss shipment history on SFPP's system, including on its North Line.[171]

161. 86 Fed. Reg. 52,953 (2021).
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.*
166. Pipeline Safety Update - Issue No. 165 at 2 (June 8, 2021).
167. *Id.*
168. *Id*. 2-3.
169. *Id*. at 3.
170. *Order Denying Request for Emergency Relief and Establishing Conference*, 176 FERC ¶ 61,065, at P 1 (2021).
171. *Id*. at 3.

As a result, some airlines and cargo carriers would be without access to jet fuel as of July 23, 2021, and that most airlines at the Reno-Tahoe International Airport would experience staggered jet fuel unavailability until at least August 7, 2021.[172] To avoid any interruption in jet fuel supply that would disrupt air travel, the airlines argued that the FERC should require SFPP to prioritize jet fuel shipments on its North Line and provide an additional 20,000 barrels per day of jet fuel capacity.[173]

Multiple parties submitted comments on the airlines request, including SFPP, the Association of Oil Pipelines (AOPL) and members of the Reno-Tahoe Airport community, among others. The comments of the Reno-Tahoe Airport community generally supported the airlines request, noting that the Reno-Tahoe International Airport provides jet fuel for air ambulances, firefighters, and first response helicopters, among others, and failure to increase jet fuel shipments on SFPP would foster increased competition between airlines and firefighting units.[174] Other comments supporting the airlines request noted that the lack of fuel would severely impact the tourism and hospitality industries in the region.[175] AOPL (among others) responded that the FERC should use caution in determining whether to exercise its emergency powers, as the airlines request would effectively provide a preference to one class of shippers (jet fuel shippers) to the detriment of other shippers.[176] SFPP responded by explaining that it was willing to work with shippers to find an equitable solution, but that it was not possible to alter its shipment cycles to accommodate the airlines request.[177] SFPP further requested that if the FERC accommodated the airlines request, then the FERC should provide specific guidance on how the added jet fuel capacity should be scheduled among its shippers and suggested a pro rata allocation in line with existing jet fuel shippers' shipment history.[178] Other parties argued against the airlines request, noting that it would provide a single shipper group an undue preference in a situation that stems from the airlines' failure to pursue commercial solutions in a timely and responsible manner.[179]

While recognizing the economic impacts that could result for jet fuel supply shortages at the Reno-Tahoe International Airport, the FERC denied the airlines' request on the basis that the described facts did not warrant emergency action under Section 1(15).[180] However, the FERC established a conference in Docket No. AD21-16-000 to address both current and long-term issues related to the airlines

172. *Id*.

173. *Id*. at 1, 3.

174. *Order Denying Request for Emergency Relief and Establishing Conference*, 176 FERC ¶ 61,065 at P 6 (2021).

175. *Id*.

176. *Id*. at P 7.

177. *Id*. at P 2.

178. *Order Denying Request for Emergency Relief and Establishing Conference*, 176 FERC ¶ 61,065 at P 8 (2021).

179. *Id*. at P 9.

180. *Id*. at P 13.

access to SFPP's North Line.[181] Conferences were convened on August 12 and 23, 2021 to address the issues identified in the airlines' request.[182] No consensual resolution was reached during those conferences, as the long-term concerns raised regarding jet fuel capacity were determined to be too speculative.[183] As such, all further discussions on the issue were terminated pursuant to an order issued by the FERC's Chief Administrative Judge on August 25, 2021.[184] The Chief Judge did indicate in the order that it "seems beneficial for all entities to keep open lines of communication to identify issues or disputes before they arise, and to engage in dialogue on how to best obtain optimal commercial resolution of what they perceived to be issues in this matter."[185]

181. *Id.* at P 2.

182. *Order Denying Request for Emergency Relief and Establishing Conference*, 176 FERC ¶ 61,065 at P 4 (2021).

183. *Final Status Report, Order Declaring Impasse of Conference Procedures, and Order Terminating Conference Procedures* at P 2, Docket No. AD21-16-000 (issued Aug. 25, 2021).

184. *Id*. at P 3.

185. *Id.* at P 4.