

REPORT OF THE OIL & LIQUIDS PIPELINE REGULATION COMMITTEE

This report summarizes policy developments and legal decisions that have occurred at the Federal Energy Regulatory Commission (“FERC” or “Commission”) and the U.S. Courts of Appeals in the area of oil and liquids pipeline regulation. The time frame covered by this report is the period between July 1, 2011, and June 30, 2012.*

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I. SIGNIFICANT ADMINISTRATIVE ORDERS

A. *Rulemaking Orders*

No significant rulemaking orders regarding oil pipelines were issued during the relevant time period.

B. *Jurisdictional Issues*1. *Kenai Pipe Line Co.*, 138 F.E.R.C. ¶ 61,034 (2012).

On January 19, 2012, the Commission issued its “Order on Request for Jurisdictional Determination or Temporary Waiver” in *Kenai Pipe Line Co.*¹ In *Kenai*, a refiner, Tesoro Alaska Co. (“Tesoro Alaska”), and two affiliates sought a determination that certain pipeline spurs and tank and dock facilities owned by the Kenai Pipe Line Company (“KPL”) were not subject to Commission jurisdiction under the Interstate Commerce Act (ICA).² In the alternative, the refiner sought a “temporary waiver” of the tariff filing and reporting obligations under the statute.³ Although the pipeline facilities had been subject to a tariff since 1995, Tesoro Alaska contended that changes to operations, including the consolidation of ownership of the facilities in a single affiliated company group, rendered the facilities not subject to Commission jurisdiction because they operated as integral parts of the refinery, and because no transportation to third parties had been provided.⁴ Several shippers protested, contending that although they did not ship currently, they valued the option of Commission tariffed service.⁵ They further asserted that the facilities were used for interstate commerce and that although they were not currently transporting crude oil in the facilities, they had considered doing so in the future.⁶

The Commission found that no other entity than Tesoro had shipped crude petroleum on the facilities since 1995, that Tesoro did not provide or offer to provide interstate services, “that Tesoro has not provided interstate common carrier services on the Kenai facilities for some time,” and that there was no intention to “provid[e] interstate common carrier services in the future.”⁷ The Commission found that the facilities were solely employed to support Tesoro’s refining operations, and that they were non-jurisdictional for reasons similar to those that the Commission had cited in finding non-jurisdictional certain facilities connected to another Tesoro-owned refinery in Salt Lake City.⁸

2. *Enbridge Energy, Limited Partnership*, 139 F.E.R.C. ¶ 61,134 (2012).

On May 18, 2012, the Commission issued its “Order Accepting Tariff,” in *Enbridge Energy, Limited Partnership*, where it rejected a protest by a potential

1. *Kenai Pipe Line Co.*, 138 F.E.R.C. ¶ 61,034 (2012).

2. *Id.* at P 1.

3. *Id.*

4. *Id.* at PP 2, 7.

5. *Id.* at P 14.

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

7. *Id.* at PP 18, 20.

8. *Id.* at P 20 (citing *Tesoro Ref. & Mktg. Co.*, 135 F.E.R.C. ¶ 61,116 (2011)).

connecting pipeline.⁹ The filing carrier, Enbridge Energy, Limited Partnership (“Enbridge”), filed tariff records making changes to its nomination procedures, as well as some other minor revisions.¹⁰ High Prairie Pipeline, LLC (“High Prairie”) filed a protest challenging Enbridge’s tariff and tariff administration on the grounds that Enbridge should provide for reasonable terms for pipelines seeking interconnections.¹¹ High Prairie was a potential new carrier of crude petroleum from the Bakken producing region, and sought to interconnect with Enbridge’s mainline facilities at Clearbrook, Minnesota.¹² High Prairie contended that the Enbridge tariff required shippers to tender volumes at existing origins and that, in conjunction with other tariff provisions, the current tariff gave Enbridge “almost unlimited” discretion to deny access to shippers seeking new connections – while Enbridge planned a connection with an affiliated new pipeline.¹³ High Prairie relied on a case involving mandatory access for a pipeline in the Outer Continental Shelf, among other arguments.¹⁴ Enbridge responded extensively in an answer.¹⁵

The Commission dismissed the protest.¹⁶ Although it noted that discussions between High Prairie and Enbridge were at an early stage, the Commission went on to state that, “there is no statutory authority, or judicial or Commission precedent that gives the Commission jurisdiction to compel Enbridge Energy to interconnect,” and further held that, “[t]o the contrary, the Commission has decided exactly the opposite.”¹⁷ The Commission cited its holding in *Plantation*,¹⁸ and concluded that, “[t]he ICA does not allow the Commission to order the establishment of interconnections,”¹⁹ and found further that as a connecting carrier and non-shipper, High Prairie could not invoke the protections of “the anti-discrimination provisions of the ICA.”²⁰

On May 17, 2012, High Prairie filed a complaint regarding the interconnection issue, in Docket No. OR12-17-000.²¹

3. Temporary Waiver Orders: *ONEOK Rockies Midstream L.L.C.*, 138 F.E.R.C. ¶ 61,133 (2012); *Agave Energy Co.*, 136 F.E.R.C. ¶ 61,094 (2011); *Saddle Butte Pipeline LLC*, 136 F.E.R.C. ¶ 61,071 (2011).

During the period July 1, 2011 to June 30, 2012, the Commission issued three orders concerning requests for temporary waiver of the tariff filing and reporting requirements of sections 6 and 20 of the ICA, and parts 341 and 357 of

9. *Enbridge Energy, Limited Partnership*, 139 F.E.R.C. ¶ 61,134 (2012).

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

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

12. *Id.* at P 6.

13. *Id.* at P 5.

14. *Id.* at P 9.

15. *Id.* at PP 12-17.

16. *Id.* at P 20.

17. *Id.* at P 18.

18. *Plantation Pipe Line Co. v. Colonial Pipeline Co.*, 104 F.E.R.C. ¶ 61,271 (2003).

19. 139 F.E.R.C. ¶ 61,134 at P 19.

20. *Id.* at P 20.

21. Complaint of High Prairie Pipeline, LLC at 1-2, FERC Docket No. OR12-17-000 (May 17, 2012).

the Commission's regulations.²² The waivers were requested for pipelines owned and operated by the applicants.²³ The Commission grants such waivers when "(1) the pipelines (or their affiliates) own 100 percent of the throughput on the line; (2) there is no demonstrated third-party interest in gaining access to or shipping on the line; (3) no such interest is likely to materialize; and (4) there is no opposition to granting the waivers."²⁴ In each case, the applicant alleged that either it or its affiliates own all of the throughput to be transported on the relevant facilities, there are no interconnecting third-party pipelines, and no third party had requested or was likely to request service on the subject facilities.²⁵

The Commission granted the requested temporary waivers in all three cases, subject to the conditions the Commission generally applies to such requests.²⁶ Each applicant was required "to immediately report . . . any change in the circumstances on which the [temporary] waivers [are] based,"²⁷ "including, but not limited to (1) increased accessibility of other pipelines or refiners to [the] facilities; (2) changes in the ownership of the facilities; (3) changes in the ownership of the crude oil [or NGLs] shipped; and (4) shipment tenders or requests for service by any person."²⁸ In addition, the Commission required the applicants to "maintain all books and records . . . consistent with the Uniform System of Accounts for Oil Pipelines, . . . and make such books and records available to the Commission or its . . . agents upon request."²⁹

C. *Ratemaking Issues*

1. Cost-based rates.

a. *ConocoPhillips Co. v. SFPP, L.P.*, 137 F.E.R.C. ¶ 61,005 (2011).

On October 3, 2011, the Commission issued its "Order on Complaints and Establishing Further Procedures" in *ConocoPhillips Co. v. SFPP, L.P.*³⁰ In that proceeding, three "[c]omplainants filed complaints generally challenging all of SFPP rates using the consolidated, system-wide cost, volume, and other data reported in SFPP's 2010 FERC Form No. 6, page 700."³¹ "The Commission recognize[d] that because the FERC Form No. 6 data does not identify costs for [each] individual SFPP line, the [c]omplainants [could not] determine which of SFPP's particular rates may be unjust and unreasonable, and that this lack of line-specific data impeded certain complainants "ability to conduct the analysis necessary to evaluate whether there are substantially changed circumstances on

22. *ONEOK Rockies Midstream L.L.C.*, 138 F.E.R.C. ¶ 61,133 at P 1 (2012); *Agave Energy Co.*, 136 F.E.R.C. ¶ 61,094 at P 1 (2011); *Saddle Butte Pipeline LLC*, 136 F.E.R.C. ¶ 61,071 at P 1 (2011). See generally Interstate Commerce Act (ICA) §§ 6, 20, 49 U.S.C. app. §§ 6, 20 (1988); 18 C.F.R. §§ 341, 357 (2011).

23. 138 F.E.R.C. ¶ 61,133 at P 2; 136 F.E.R.C. ¶ 61,094 at P 2; 136 F.E.R.C. ¶ 61,071 at P 2.

24. 138 F.E.R.C. ¶ 61,133 at P 4; 136 F.E.R.C. ¶ 61,094 at P 5; 136 F.E.R.C. ¶ 61,071 at P 3.

25. 138 F.E.R.C. ¶ 61,133 at PP 2-3; 136 F.E.R.C. ¶ 61,094 at PP 3-4; 136 F.E.R.C. ¶ 61,071 at P 4.

26. 138 F.E.R.C. ¶ 61,133 at PP 7-8; 136 F.E.R.C. ¶ 61,094 at PP 7-8; 136 F.E.R.C. ¶ 61,071 at PP 5-6.

27. 138 F.E.R.C. ¶ 61,133 at P 8; 136 F.E.R.C. ¶ 61,094 at P 8; 136 F.E.R.C. ¶ 61,071 at P 6.

28. 136 F.E.R.C. ¶ 61,094 at P 8; 138 F.E.R.C. ¶ 61,133 at P 8; 136 F.E.R.C. ¶ 61,071 at P 6.

29. 138 F.E.R.C. ¶ 61,133 at P 8; 136 F.E.R.C. ¶ 61,094 at P 8; 136 F.E.R.C. ¶ 61,071 at P 6.

30. *ConocoPhillips Co. v. SFPP, L.P.*, 137 F.E.R.C. ¶ 61,005 (2011).

31. *Id.* at P 27.

[SFPP's] North and Oregon Lines.”³² The Commission concluded that, “to accept a complaint against grandfathered rates, the [c]omplainants must allege reasonable grounds to conclude there may be substantially changed circumstances to the grandfathered portion of the pipeline’s base rates.”³³ However, the pipeline and the complainants “relied on outdated data from 2003 and 2004 to support their arguments regarding substantially changed circumstances”³⁴ – “because more current data . . . [was] not publically available.”³⁵

The Commission determined “the existing record in [the] proceeding [was] insufficient to allow the Commission to determine, with respect to SFPP’s rates for its individual segments, whether the [c]omplainants have shown each of SFPP’s rates may be unjust and unreasonable so that those particular rates would require further examination at hearing.”³⁶ “Therefore, the Commission . . . establish[ed] a procedure by which SFPP [would] provide the [c]omplainants . . . annual cost-of-service data elements broken down by each of SFPP’s six lines.”³⁷ “After receiving the line-specific data” the complainants would be permitted to file amended complaints presenting a “*prima facie* showing for each of the individual rates challenged, including any initial showing of whether there are substantially changed circumstances for the grandfathered portion of the North and Oregon Line rates.”³⁸

b. Opinion No. 511-A, *SFPP, L.P.*, 137 F.E.R.C. ¶ 61,220 (2011).

On December 16, 2011, the Commission issued its “Order on Rehearing and Compliance Filing,” in Opinion No. 511-A, addressing numerous requests for rehearing of Opinion No. 511.³⁹ The Commission denied rehearing sought by shippers regarding throughput and test period definition, and upheld its rulings in Opinion No. 511⁴⁰ on these issues, finding that SFPP was required to use the Commission’s throughput figures, based on actual deliveries, annualized, from January to September 2008.⁴¹ On the issue of litigation costs, the Commission denied rehearing requests by shippers who had sought to limit SFPP to recovery of only a portion of the litigation costs.⁴² Regarding environmental costs, which were not challenged on rehearing, the Commission rejected a shipper’s challenge to the inclusion in the compliance filing of certain remediation costs approved in Opinion No. 511,⁴³ and similarly dismissed

32. *Id.* at P 28.

33. *Id.*

34. *Id.* at P 30.

35. *Id.*

36. *Id.* at P 31.

37. *Id.* at P 32 (citation omitted).

38. *Id.* at P 33.

39. Opinion No. 511-A, *SFPP, L.P.*, 137 F.E.R.C. ¶ 61,220 at P 1 (2011) [hereinafter Opinion No. 511-A].

40. Opinion No. 511, *SFPP, L.P.*, 134 F.E.R.C. ¶ 61,121 (2011).

41. Opinion No. 511-A, *supra* note 39, at PP 18-25.

42. *Id.* at PP 39-42.

43. *Id.* at PP 52-57.

certain challenges to fuel and power costs in the compliance filing, noting that no requests for rehearing had been filed as to fuel and power costs.⁴⁴

Opinion No. 511 made numerous findings regarding the allocation of overhead costs among the Kinder Morgan entities for purposes of SFPP's ratemaking,⁴⁵ and on rehearing the Commission addressed rehearing requests regarding many of those findings.⁴⁶ On rehearing, the Commission denied rehearing on nearly all overhead cost allocation issues,⁴⁷ but did reverse its finding in Opinion No. 511 that it was accurate to exclude the KM Canada entities from the Massachusetts Formula.⁴⁸

With respect to return on rate base, the Commission upheld Opinion No. 511 in nearly all respects. The Commission denied rehearing regarding allowing the purchase accounting adjustment to be included in capital structure determinations,⁴⁹ and denied rehearing sought by SFPP seeking the use of post-test period data for inflation calculation in the DCF formula.⁵⁰ The Commission granted rehearing regarding the calculation of the starting rate base.⁵¹ Regarding the decision to permit SFPP to recover an income tax allowance despite its status as a master limited partnership, the Commission upheld its decision in Opinion No. 511 not to revisit or revise its broad policy regarding an MLP's ability to recover an income tax allowance.⁵² On one issue, concerning the use of marginal tax rates for calculating ADIT, the Commission granted SFPP's request for rehearing and ruled that SFPP is not required to use the marginal tax rate for past periods.⁵³

The Commission also granted rehearing regarding SFPP's argument that "substantial divergence" is a threshold test to be applied at the time of a pipeline's filing, and that it did not apply to the ultimate determination of the just and reasonable rates following a hearing.⁵⁴

c. *Chevron Products Co. v. SFPP, L.P.*, 138 F.E.R.C. ¶ 61,115 (2012).

On February 16, 2012, the Commission issued *Chevron Products Co. v. SFPP, L.P.*, in which it dismissed three complaints on the grounds that "the [c]omplainants [were] not aggrieved by SFPP's ceiling levels and [because] the [c]omplainants [did] not challenge[] SFPP's rates or its operations or practices."⁵⁵ Section 343.2(c) of the Commission's regulations provides that "[a] complaint must challenge either rates established under sections 342.3 or 342.4 of the Commission's regulations or a carrier operation or practice,

44. *Id.* at PP 59-62.

45. *Id.* at PP 65-69.

46. *Id.* at P 70.

47. *Id.* at P 2.

48. *Id.* at PP 138-40.

49. *Id.* at PP 235-41.

50. *Id.* at PP 256-59.

51. *Id.* at PP 2, 262-65.

52. *Id.* at PP 378-79.

53. *Id.* at PP 385-91.

54. *Id.* at PP 393-96.

55. *Chevron Products Co. v. SFPP, L.P.* 138 F.E.R.C. ¶ 61,115 at P 1 (2012).

otherwise the complaint will be dismissed.”⁵⁶ According to the Commission, the “[c]omplainants challenge[d] SFPP’s ceiling levels, alleging that the ceiling levels are unlawful because they will allow unjust and unreasonable rate increases.”⁵⁷ The Commission determined that the “[c]omplainants [did] not assert that the ceiling level [was] a carrier operation or practice.”⁵⁸ The “ceiling levels, which carriers are required to calculate annually pursuant to the Commission’s indexing regulations, are neither rates nor a carrier operation or practice” according to the Commission.⁵⁹

“Moreover, the Commission also dismis[s]e[d] [the] complaints on the grounds that the issue, whether the rates that SFPP could seek to charge based on the 2011 ceiling levels would be just and reasonable, [was] premature and not ripe for review.”⁶⁰ “[B]y calculating the 2011 ceiling levels [the pipeline] [had] not changed its tariffs or any term or condition of service,” and therefore, “shippers [were] not subject to the calculated 2011 ceiling levels.”⁶¹ The Commission held that “[t]he justness and reasonableness of a possible, future index-based rate increase [was] not ripe for . . . review until SFPP actually submits a tariff filing proposing to charge such rates.”⁶²

d. *Imperial Oil v. Enbridge Pipelines (Southern Lights) LLC*, 136 F.E.R.C. ¶ 61,115 (2011).

On August 19, 2011, the Commission issued its “Order on Complaint” in *Imperial Oil v. Enbridge Pipelines (Southern Lights) LLC*.⁶³ In *Southern Lights*, the Commission dismissed a complaint filed on May 11, 2011, by two parties (Imperial Oil and ExxonMobil Oil Company (“Complainants”)), in which the Complainants “alleg[ed] that certain rates, terms and conditions of service and practices of [Southern Lights] [were] unjust and unreasonable, unduly discriminatory and preferential, and anticompetitive.”⁶⁴

Southern Lights “was designed to transport up to 180,000 barrels per day of diluent from Chicago to points in Alberta, Canada.”⁶⁵ Before implementing the Southern Lights project, Enbridge held an open season for shippers to enter into agreements to commit volumes to the pipeline under fifteen year Transportation Services Agreements (TSAs), with the incentive of service at a 50 percent discount to the filed rates for uncommitted shippers.⁶⁶ Subsequently, Enbridge requested the Commission to issue a declaratory order approving certain aspects of the proposed rate structure for the United States portion of the Southern Lights Pipeline, specifically finding that: “the Committed Shippers would . . . pay the Committed Rates to which they agreed in the TSA;” the rate design

56. *Id.* at P 17.

57. *Id.*

58. *Id.*

59. *Id.* at P 18 (citations omitted).

60. *Id.* at P 19.

61. *Id.*

62. *Id.*

63. *Imperial Oil v. Enbridge Pipelines (Southern Lights) LLC*, 136 F.E.R.C. ¶ 61,115 (2011).

64. *Id.* at P 1.

65. *Id.* at P 2 (citation omitted).

66. *Id.*

would set the Uncommitted Rate at a level two times the Committed Rate; and that the pipeline could true-up the tariff rates annually for certain credits under the TSAs (e.g., “refund of uncommitted revenues to both Committed and Uncommitted Shippers”).⁶⁷ In *Southern Lights*, “[t]he Commission approved the proposed rate structure and found that the discount received by the Committed Shippers was not unduly discriminatory or preferential because it was offered to all interested shippers.”⁶⁸ When *Southern Lights* filed its initial tariffs early in 2011, the Complainants first protested the tariffs, and after the scope of the proceeding commenced by the protests was limited to the cost basis for the uncommitted rate, the Complainants filed the complaint at issue in *Southern Lights*.⁶⁹

The complaint alleged that, unless changed, the rates and rate structure “will be unjust and unreasonable . . . , unduly discriminatory and preferential . . . , and [have] significant anticompetitive impacts;” further, the Complainants alleged that the consequences would include giving market power to the Committed Shippers, as well as creating “price distortion in the market for diluent.”⁷⁰ The Complainants also challenged “the refund mechanism, the subordination of the U.S. tariff to the Canadian tariff, and the Committed Shippers’ rights of first offer of new capacity,” and relied in part on evidence alleged not to have been in hand when the Commission approved the declaratory order for the project.⁷¹

The Commission dismissed the complaint on both procedural and substantive grounds.⁷² Regarding the refund methodology, the Commission found that its operation was not unduly discriminatory because it benefited Uncommitted Shippers and to the extent that differences existed in the Committed versus Uncommitted Shippers’ rights to refunds, they were not similarly situated.⁷³ The Commission rejected the claim that there were changed circumstances, asserting that this challenge was in effect “an impermissible collateral attack on the orders in the declaratory order proceeding.”⁷⁴ The Commission also defended its review of the TSAs in the declaratory order proceeding, and found both that the TSAs were properly assessed and that the Commission retains jurisdiction over them.⁷⁵ The Commission dismissed the Complainants’ allegations that the Committed Shippers were receiving firm service due to the operation of the TSAs and the tariffs of the Canadian and U.S. pipelines providing the service.⁷⁶ The Commission found the concern premature because there has been no prorationing and none in prospect, and found in addition that the pro rata tariff provision disproved claims of firm rights for Committed Shippers.⁷⁷ The Commission found Complainants’ assertions

67. *Id.* at P 3.

68. *Id.*

69. *Id.* at PP 5-7.

70. *Id.* at P 8.

71. *Id.*

72. *Id.* at P 11.

73. *Id.* at PP 11, 13-14.

74. *Id.* at P 12.

75. *Id.* at PP 16-19.

76. *Id.* at PP 22-23.

77. *Id.* at PP 20-24.

regarding the right of first offer on capacity premature because the right would not be exercised until 2020.⁷⁸ However, the Commission agreed with the Complainants that future filings by Southern Lights should be made subject to the outcome of the rate proceeding.⁷⁹

2. Market-Based Rates.

a. *Enterprise Products Partners, L.P.*, 139 F.E.R.C. ¶ 61,099 (2012).

On May 7, 2012, the Commission issued its “Order on Application for Market Power Determination” (“May 7 Order”), in which it denied the market-based rate application of Enterprise Products Partners L.P. and Enbridge Inc. (collectively, “Enterprise/Enbridge”) on the grounds that the application failed to provide detailed cost data.⁸⁰ Subsequently, on June 28, 2012, the Commission, on its own motion, granted rehearing and sought comments concerning “the proper interpretation” of the recent D.C. Circuit case of *Mobil Pipe Line Co. v. FERC*, 676 F.3d 1098 (D.C. Cir. 2012), which is discussed, *infra* in Section II.A of this report.⁸¹

The proceeding commenced when Enterprise/Enbridge filed an application for market-based rates for the planned reversal of flow in the Seaway Crude Pipeline Company system (“Seaway”), which was “anticipated to occur in the second quarter of 2012.”⁸² In the May 7 Order, the Commission noted the recent decision in *Mobil* and explained its understanding of the court’s holdings – in particular, that, while the court held that “the regulated tariff rate [in *Mobil*] was not a proper proxy” for the competitive price level, pricing data was nonetheless necessary for a market power determination.⁸³ The Commission expressed concern that the applicant might “have market power in both its . . . origin and destination markets,” and stated that the protests raised issues of fact concerning:

- (1) the lack of an existing tariff rate, or acceptable proxy for a competitive rate, with which a market power analysis can be conducted;
- (2) the appropriate netback analyses for ascertaining the level of competition in the markets;
- (3) the absence of existing shipper behavior with which a determination of the product market could be achieved; and
- (4) the viability of alternative options available to shippers, including potential competition, for the distribution of petroleum products.⁸⁴

Protests also alleged that there were no true alternatives to Seaway, and that the true Herfindahl-Hirschman Index (HHI) for the pipeline was much higher than shown in the application.⁸⁵

The Commission stated that in *Colonial Pipeline Co.*,⁸⁶ it focused on the netback, i.e., the price to the shipper after costs of delivery, to determine “whether a shipper had ‘good’ alternatives for [moving a] product” from one location to another, but that the applicants stated that they could not conduct

78. *Id.* at P 25.

79. *Id.* at P 27.

80. *Enterprise Prods. Partners L.P.*, 139 F.E.R.C. ¶ 61,099 at P 47 (2012) [hereinafter *May 7 Order*].

81. *Enterprise Prods. Partners L.P.*, 139 F.E.R.C. ¶ 61,255 (2012).

82. *May 7 Order*, 139 F.E.R.C. ¶ 61,099 at P 1.

83. *Id.* at P 32.

84. *Id.* at P 34.

85. *Id.* at P 36.

86. *Colonial Pipeline Co.*, 92 F.E.R.C. ¶ 61,144, at p. 61,532 (2000).

such an analysis for each alternative outlet in its origin market, nor did they provide a proxy for the prevailing price or any other means of evaluating alternatives.⁸⁷ The Commission held that it “has been clear when addressing recent market-based rate applications that in the absence of a rational or workable means to evaluate competitive choices, a netback analysis is required.”⁸⁸ The Commission also found that the applicants’ failure to provide a proxy for the competitive price also prevented analysis under the Commission’s “small but significant and non-transitory increase in price” [test] (the SSNIP test)” in which the Commission uses a 15 percent threshold price increase to evaluate market power.⁸⁹

The Commission found the applicants’ showing was “insufficient,” and therefore denied the application.⁹⁰ Although the Commission would ordinarily set the matter for hearing, the Commission stated that a hearing would not be productive because the applicant had stated that “the required information . . . does not yet exist”;⁹¹ hence, the Commission concluded that the applicants could not meet their burden of proof.⁹²

On June 28, 2012, the Commission *sua sponte* granted rehearing for the purpose of reconsidering the impact of the *Mobil* decision on the application and allowed any party to file comments within twenty days of the order and reply comments within fifteen days of the filing of initial comments.⁹³

D. Orders Relating to Rules and Regulations

1. CCPS Transportation LLC, 139 F.E.R.C. ¶ 61,125 (2012).

On May 16, 2012, the Commission issued an order in which it accepted CCPS Transportation, LLC’s (Spearhead) April 16, 2012 tariff filing, which stated that it “modifies language regarding its verification procedures . . . , modifies its prorationing policy . . . , and implements a lottery process . . . to allocate available capacity to New Shippers during periods of apportionment.”⁹⁴ In its filing, Spearhead explained that the proposed allocation of capacity was necessary to manage shipper proliferation.⁹⁵

Yaltex Oil LLC (Yaltex) filed a motion to intervene and offered comments regarding the proposed lottery process.⁹⁶ Yaltex argued that Spearhead’s lottery process could limit its ability to become a Regular Shipper.⁹⁷ Yaltex suggested that Spearhead should increase the percentage of available capacity allocated to New Shippers, reduce the number of months of actual shipments a New Shipper

87. *May 7 Order*, 139 F.E.R.C. ¶ 61,099 at PP 38-39.

88. *Id.* at P 39.

89. *Id.* at P 40 (quoting *Mobil*, 133 F.E.R.C. ¶ 61,268 at P 23).

90. *Id.* at P 33.

91. *Id.*

92. *Id.* at PP 33, 41.

93. *Enterprise Prods. Partners L.P.*, 139 F.E.R.C. ¶ 61,255 at PP 2-3, & Ordering PP A, B (2012).

94. *CCPS Transportation, LLC*, 139 F.E.R.C. ¶ 61,125 at P 1 (2012).

95. CCPS Transportation LLC Oil Pipeline Tariff Filing at 1, FERC Docket No. IS12-233-000 (Apr. 16, 2012).

96. Motion to Intervene and Comments of Yaltex Oil LLC, FERC Docket No. IS12-233-000 (May 1, 2012).

97. *Id.* at 1-2.

needs to attain Regular Shipper status, and reduce its minimum batch size.⁹⁸ In its response, Spearhead stated that Yaltex's proposed modifications to its lottery process "have not been generally endorsed by other shippers, are not in line with standard industry practice, have not been shown to be feasible from an operational standpoint, and involve changes to aspects of the Tariff that are unchanged from prior practice."⁹⁹

The FERC accepted Spearhead's tariff filing effective May 11, 2012 as just and reasonable.¹⁰⁰ The Commission found that several of Yaltex's suggested modifications involved tariff changes that were not before the Commission and "would unfairly impact other classes of shippers."¹⁰¹ The Commission also found that Spearhead "operationally demonstrates the need for the proposed 50,000 barrel minimum batch size and differentiates it from its other affiliated pipelines."¹⁰² The Commission concluded that "[t]he proposed lottery process is not discriminatory to any individual shipper and [is a consequence] of shipper proliferation and . . . over-nominations on [the] pipeline."¹⁰³

2. *BP Pipelines (Alaska) Inc.*, 138 F.E.R.C. ¶ 61,164 (2012).

On March 9, 2012, the Commission issued its "Order on Remand," in *BP Pipelines (Alaska) Inc.* ("*TAPS Remand*").¹⁰⁴ This case concerns the Trans Alaska Pipeline System (TAPS) Quality Bank, a system for making monetary adjustments among shippers to compensate for the different qualities of crude oils shipped on TAPS.¹⁰⁵ Crude oil produced from different fields on the Alaska North Slope (ANS) varies in quality and hence value, but is shipped to market in a jointly owned common carrier pipeline, TAPS, and only blended ANS oil from TAPS is actually loaded on tankers in Valdez, Alaska, and sold in the crude oil market.¹⁰⁶ Therefore, economic adjustments are necessary to return to the producer the value of the oil sold as ANS.¹⁰⁷ The Quality Bank collects assessments from shippers of lower value oil and pays the receipts to shippers of higher value oil.¹⁰⁸

The *TAPS Remand* is an outgrowth of litigation, relating to Opinion No. 500, to determine a new value for the Heavy Distillate "cut" of the Quality Bank.¹⁰⁹ The compliance filing to implement Opinion No. 500 presented the Commission with the first opportunity to apply section 4412 of the Motor Carrier Safety Reauthorization Act of 2005,¹¹⁰ which applies only to TAPS

98. *Id.* at 6.

99. Response of CCPS Transportation, LLC to Motion to Intervene and Comments of Yaltex Oil LLC at 6, FERC Docket No. IS12-233-000 (May 7, 2012).

100. *CCPS Transportation LLC*, 139 F.E.R.C. ¶ 61,125 at P 15 (2012).

101. *Id.*

102. *Id.*

103. *Id.*

104. *BP Pipelines (Alaska) Inc.*, 138 F.E.R.C. ¶ 61,164 (2012).

105. *Id.* at P 5.

106. *Flint Hills Res. Alaska, LLC v. FERC (FHR)*, 631 F.3d 543, 544 (D.C. Cir. 2011).

107. *Id.*

108. *Id.*

109. 138 F.E.R.C. ¶ 61,164.

110. Motor Carrier Safety Reauthorization Act of 2005, Pub. L. No. 109-59, 119 Stat. 1144 (2005).

Quality Bank administrative proceedings.¹¹¹ It sets time limits for FERC action, and limits retroactive application of FERC final decisions in Quality Bank matters.¹¹² In *FHR*, the court applied section 4412(b)(2) to reverse the FERC's choice of the effective date for a new value for the Heavy Distillate cut of the Quality Bank that was adopted to implement Opinion No. 500; the court found that the June 1, 2006 effective date adopted by the FERC did not comply with section 4412(b)(2),¹¹³ which states: "the Commission may not order retroactive changes in TAPS quality bank adjustments for any period that exceeds the 15-month period immediately preceding the earliest date of the first order of the Federal Energy Regulatory Commission imposing quality bank adjustments in the proceeding."¹¹⁴ The court offered the FERC two alternative effective dates that had been suggested by the parties: the date that Opinion No. 500 was issued, or the date that the Carriers made their compliance filing to implement Opinion No. 500, and instructed the Commission to determine the period of time in advance of the effective date that would be eligible for retroactive implementation of the new rate.¹¹⁵

The *TAPS Remand* was the Commission's response to the *FHR* remand.¹¹⁶ The FERC ruled that Opinion No. 500, issued on March 20, 2008, was the "first order [in the proceeding] imposing quality bank adjustment[s]" and hence set the effective date for the Heavy Distillate value change under the wording of section 4412(b)(2).¹¹⁷ The Commission also ruled that the rate adjustment should be made for the fifteen months preceding March 20, 2008, rejecting arguments of Flint Hills Resources Alaska, LLC, and Petro Star, Inc. that the Compliance Order issued on December 2, 2008 was the "first order," and arguments that retroactive adjustments for the period from March 20, 2008 to December 2, 2008 were barred by section 4412(b)(2).¹¹⁸

3. *Enbridge Pipelines (North Dakota) LLC*, 138 F.E.R.C. ¶ 61,087 (2012).

On February 2, 2012, the Commission issued an order in which it rejected an Enbridge Pipelines (North Dakota) tariff filing whose stated purpose was "to enhance and clarify its quality specifications."¹¹⁹ In its tariff filing, the pipeline had explained that new volumetric penalties would be levied against shippers in instances where crude oil that fails to meet the quality specifications is discovered after the crude oil has entered its system.¹²⁰

A shipper, Plains Marketing, L.P. ("Plains"), protested the tariff and contended, *inter alia*, that the proposed tariff's new penalties were unnecessary and excessive, and further alleged that the pipeline "has not shown the harm that

111. 138 F.E.R.C. ¶ 61,164, at P 14.

112. *FHR*, 631 F.3d at 545.

113. *Id.* at 546.

114. *Id.* at 545 (quoting Motor Carrier Safety Reauthorization Act of 2005 § 4412(b)(2)).

115. *Id.* at 548-49.

116. 138 F.E.R.C. ¶ 61,164, at P 1.

117. *Id.* at Ordering PP A, B.

118. *Id.* at PP 65-68.

119. *Enbridge Pipelines (North Dakota) LLC*, 138 F.E.R.C. ¶ 61,087 at PP 1, 3 (2012).

120. Enbridge Oil Pipeline Tariff Filing at 1, FERC Docket No. IS12-104-000 (Jan. 4, 2012).

off-specification shipments would cause on its system.”¹²¹ Further, Plains argued that the tariff: (1) “lacks a dispute resolution procedure”; (2) the “tariff language is unclear and contradictory”; and (3) the process “to determin[e] the class of shippers that are eligible for refunds is not just and reasonable.”¹²²

Enbridge responded that: (1) the tariff’s penalties were established following consultation with shippers; (2) they stressed the need for penalties, which deter shippers from shipping off-specification crude oil, and the penalties are clear and fair; (3) there is no need for additional dispute resolution processes; and (4) Plains had not demonstrated why current dispute resolution processes are insufficient.¹²³

The Commission rejected Enbridge’s proposed tariff, finding that Enbridge failed to demonstrate that its “proposed tariff changes are just and reasonable and not unduly discriminatory.”¹²⁴ The Commission further found that “Enbridge [failed to] present[] evidence to support the need for and the levels of the proposed penalties.”¹²⁵ Specifically, the Commission found that Enbridge had not presented, “evidence of a history of previous violations, showing the number of off-speculation violations, the volumes involved, the resulting damage to the pipeline or to other shippers, the actual costs to the pipeline of such events, or any other pertinent facts.”¹²⁶

4. *Mid-America Pipeline Co.*, 138 F.E.R.C. ¶ 61,052 (2012).

On January 26, 2012, the Commission issued its “Order Accepting Tariff Subject to Modification and Conditions,” in *Mid-America Pipeline Co.* (“*MAPL Order*”), regarding Mid-America Pipeline Company, LLC’s (“MAPL’s”) proposed tariff provisions imposing obligations on shippers to provide detailed information in support of the jurisdictional status of their shipments.¹²⁷ MAPL’s filing was protested by a shipper, Coffeyville Resources Refining and Marketing, LLC (“Coffeyville”).¹²⁸

As the Commission characterized the filing, MAPL’s proposed language provided that shippers must provide: “(1) the ultimate destination, (2) the specific routing of movements, and (3) the name of all consignees on each barrel shipped through the Coffeyville Outbound Line.”¹²⁹ MAPL contended that its tariff filing was justifiable as a necessary step to ensure that it applied the correct tariff (interstate vs. intrastate) on shipments being tendered.¹³⁰

In the *MAPL Order*, the Commission accepted the tariff filing, subject to the modifications set out in its order.¹³¹ The Commission held that “[a] sworn affidavit attesting to the nature of the barrels moved by Coffeyville achieves the

121. 138 F.E.R.C. ¶ 61,087, at PP 9-10.

122. *Id.* at PP 11-13.

123. *Id.* at PP 14-17.

124. *Id.* at P 21.

125. *Id.* at P 20.

126. *Id.*

127. *Mid-American Pipeline Co.*, 138 F.E.R.C. ¶ 61,052 at P 1 (2012).

128. *Id.* at PP 7-11.

129. *Id.* at P 5.

130. *Id.* at PP 5-6.

131. *Id.* at P 17.

goal of identifying interstate and intrastate barrels.”¹³² The Commission specifically held that the ultimate destination and routing is irrelevant,” and although it observed that this approach would not impose the “burdensome details” of the original proposal and would eliminate the need for the shipper to provide data that it considered to be competitively sensitive, the Commission also stated that the shipper “has an obligation to provide accurate information regarding the nature of their shipments in order to ensure that the correct rate is charged under the ICA.”¹³³ The Commission appended to the order both the originally proposed tariff provision and a black-lined version of the same provision amended in accordance with the requirements of the order.¹³⁴

E. Orders on Petitions for a Declaratory Order for New Pipeline Capacity

1. Mid-America Pipeline Co., 136 F.E.R.C. ¶ 61,087 (2011).

On August 5, 2011, the Commission issued its “Order on Petition for Declaratory Order” in *Mid-America Pipeline Co.* (“*MAPL Declaratory Order*”), which granted MAPL’s request for approval for specific contract rates and priority capacity rights for expansion shippers on a planned expansion to its system.¹³⁵ In its petition for a declaratory order, MAPL had requested FERC approval of proposed rate and service terms for shippers contractually committing to use expanded capacity of 85,000 barrels/day (bpd) in its Rocky Mountain System, at a cost of \$735 million, including 275 miles of 16-inch pipeline looping and pump modifications.¹³⁶ MAPL had stated that the increased capacity was needed to meet increased NGL production from rising natural gas production in the Piceance and Uintah Basins, and further that it needed to have contract commitments from its shippers to support the project.¹³⁷ MAPL sought approval by August 1, 2011, to allow an in-service date of the third quarter of 2014.¹³⁸ Under MAPL’s proposal, committed shippers would sign Transportation Service Agreements (TSAs) “for an initial term ending August 31, 2021, [but] with the option of one additional five-year term.”¹³⁹ Committed shippers who have a take-or-pay obligation for committed volumes, would pay a premium rate higher than the currently-effective local MAPL tariff rate – committed rates for two destinations were (in cents/barrel) 495.60 cents and 567.00 cents versus uncommitted rates of 392.12 cents and 499.85 cents, respectively, subject to escalation.¹⁴⁰ Committed shippers would have “priority access” and would not be subject to prorationing “under normal operating conditions,” except in cases of force majeure or shipper breach.¹⁴¹ Expansion volumes would be 85,000 bpd (in addition to 72,000 of existing Expansion Capacity from an earlier expansion); the capacity available to uncommitted

132. *Id.* at P 18.

133. *Id.*

134. *Id.* at apps. A, B.

135. *Mid-America Pipeline Co.*, 136 F.E.R.C. ¶ 61,087 at PP 1-3 (2011).

136. *Id.* at P 6.

137. *Id.* at PP 5, 7.

138. *Id.* at PP 1, 13.

139. *Id.* at P 10.

140. *Id.* at PP 10-11.

141. *Id.* at P 8.

shippers would be 203,000 bpd.¹⁴² The Commission summarized the petition's requests as follows:

- a. That the terms of the TSA executed by the committed shippers (including the agreed-upon tariff, rate, and priority service structure) will be upheld and applied during the agreed term of the TSA as between Mid-America and the shippers that made volume commitments during the open season.
- b. That Mid-America may provide the new capacity created by the Expansion as priority committed space for shippers that have committed to move volumes on a ship-or-pay basis at a premium rate pursuant to the terms of the TSA.¹⁴³

The Commission approved the requested proposal as being “consistent with applicable policy and precedent, including orders addressing previous expansions of Mid-America’s system.”¹⁴⁴ The Commission found that the pipeline had shown that its Rocky Mountain System was constrained, and that to alleviate the strain and increase volumes of NGLs moved to market, the pipeline needed a “capital-intensive expansion project” more than \$700 million, and further that “without the support of committed shippers to share in the financial risk of the Expansion” the additional capacity might not be timely built.¹⁴⁵ The Commission further found that to achieve this project, MAPL needed its “shippers to commit to a ship-or-pay contract at premium rates for an initial term ending August 31, 2021, [and that in] exchange for the commitment, the TSA would provide that committed volumes will not be subject to prorationing.”¹⁴⁶ The Commission then held that:

Mid-America appropriately distinguishes committed and uncommitted shippers and provides for rates consistent with the obligation of each class of shipper, while providing a significant amount of capacity for uncommitted shippers. In addition, the open season gave all potential shippers the opportunity to become committed shippers. Accordingly,¹⁴⁷ the Commission grants Mid-America’s unopposed petition for a declaratory order.

2. *Sunoco Pipeline L.P.*, 137 F.E.R.C. ¶ 61,107 (2011).

On November 4, 2011, the Commission issued its “Order on Petition for Declaratory Order,” in *Sunoco Pipeline, L.P.* (“*Sunoco Mariner Order*”).¹⁴⁸ Sunoco Pipeline, L.P. (“Sunoco”) had filed a petition for a declaratory order for its “Mariner West Project,” for which Sunoco proposes to build approximately thirty-seven miles of new pipeline, with a capacity of approximately 50,000 bpd, from Houston, PA to Midland, PA, and to use approximately 350 miles of refined petroleum pipeline, from Midland to the U.S./Canadian border near Sarnia, Ontario, converted to carry ethane from gas processing plants supplied by Marcellus shale production.¹⁴⁹ In the petition, Sunoco specifically sought approval for: (1) priority service for shippers making commitments to the proposed Mariner West ethane pipeline; and (2) the overall tariff and rate

142. *Id.* at P 7.

143. *Id.* at P 9.

144. *Id.* at P 18.

145. *Id.*

146. *Id.*

147. *Id.* at P 19.

148. *Sunoco Pipeline L.P.*, 137 F.E.R.C. ¶ 61,107 (2011).

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

structure for the Mariner West Project, no later than November 30, 2011.¹⁵⁰ Under the project, Committed Shippers would sign TSAs through an open season, would have priority rights to 90 percent of the capacity, and Committed Shippers would pay at least \$0.01/barrel more for transportation (a premium) than uncommitted shippers.¹⁵¹ Although Sunoco did not file the TSA or the draft tariff, it stated generally that they were designed to conform to Commission precedent.¹⁵² There were no protests.¹⁵³

The Order issued the requested declaratory order without modification, noting that the project would “provide additional capacity for increased production of ethane from the Marcellus Shale area, thereby avoiding likely constraints on the production of natural gas from that area,” and would “enhance domestic energy production and allow the expansion of ethane markets.”¹⁵⁴ The Commission also stated “that the Project entails a significant capital investment, which requires the support of committed shippers to share the financial risk of the Project.”¹⁵⁵ The Commission held without extensive discussion that the two key aspects of the Sunoco proposal were consistent with its precedent:

As has been the case in other proposals approved by the Commission and cited by Sunoco, its proposal provides an appropriate amount of capacity for uncommitted shippers, while affording protection to the committed shippers who provide consistent long-term financial support for the Project. These committed shippers will pay premium rates for the assurance that their much greater volumes will not be prorated under normal operating conditions. Sunoco offered the terms of its proposal in an open season that gave all potential shippers the opportunity to become committed shippers.¹⁵⁶

3. *Magellan Pipeline Co.*, 138 F.E.R.C. ¶ 61,177 (2012).

On March 15, 2012, the Commission issued its “Order on Petition for Declaratory Order,” in *Magellan Pipeline Co.*¹⁵⁷ In its petition, Magellan Pipeline Company, L.P. (“Magellan”) described the project as part of a two-part “Longhorn Project.” In Phase I, the Longhorn pipeline currently providing petroleum products transportation from Houston to El Paso would be partially reversed (from Crane, Texas) and converted to crude service from the west to Houston markets.¹⁵⁸ In the second phase, the “Magellan Refined Products Expansion Project,” Magellan proposed to expand its current refined products system from Houston to El Paso from 24,000 bpd up to 110,000 bpd from Houston to Odessa and 64,000 bpd from Odessa to El Paso, at a cost of more than \$100 million.¹⁵⁹

150. *Id.* at PP 7-12.

151. *Id.* at PP 6-7.

152. *Id.* at PP 9-10.

153. *Id.* at P 13.

154. *Id.* at P 14.

155. *Id.*

156. *Id.* at P 15.

157. *Magellan Pipeline Co.*, 138 F.E.R.C. ¶ 61,177 (2012).

158. *Id.* at P 2.

159. *Id.* at P 3.

To determine shipper commitments, Magellan held an open season, which offered “T&D Agreements” “that included three proposed rate, volume commitment, and priority committed capacity levels.”¹⁶⁰

Level 1 required a volume commitment of 1.8 million barrels per year for approximately six years, with daily average reserved capacity of 5,000 bpd and a rate of \$ 3.5334 per barrel. Level 2 required a commitment of 3.6 million barrels per year for approximately nine years, with daily average reserved capacity of 10,000 bpd and a rate of \$3.1134 per barrel. Level 3 required a commitment of 7.8 million barrels per year for approximately eleven years, with daily average reserved capacity of 21,500 bpd, and a rate of \$2.6934 per barrel. The initial rate for uncommitted shippers was \$2.6934 per barrel and [was proposed to be] equal to Magellan’s market based rate for petroleum product deliveries from Houston to El Paso. Magellan’s proposal also allow[ed] shippers to reserve up to 150 percent of their Daily Average Reserved Capacity in any given month at the corresponding tariff rate.¹⁶¹

Under the proposal, Committed Shippers would not be subject to prorationing, and approximately 50 percent of the pipeline would be subject to this priority service.¹⁶² The pipeline explained that shippers under Levels 1 and 2 were paying a premium relative to uncommitted shippers, but that Level 3 shippers (or shipper; only one shipper signed a contract) would pay a rate equal to the uncommitted shippers, but “not materially different from the \$0.01 per barrel premium rate for committed shippers that the Commission approved in the [*Sunoco Mariner Order*],” and further that the percentage of capacity subject to the contracts would only be 50 percent (rather than 90 percent as approved in the *Sunoco Mariner Order*).¹⁶³

The Commission denied the pipeline’s petition for approval of contract rates providing firm service, citing Magellan’s proposal that the Level 3 contract shippers pay the same rate as uncommitted shippers.¹⁶⁴ The Commission concluded that “Magellan’s proposal to charge Level 3 committed rate shippers the same rate as uncommitted shippers but provide them the benefit of being excluded from prorationing is not consistent with Commission precedent,” and that the Commission had “previously found that the carrier must support a preferential prorationing element by premium rates so as to render the preference not undue.”¹⁶⁵ The Commission emphasized that the price is the key consideration, not the “non-price elements as proposed by Magellan,”¹⁶⁶ further re-emphasized its original rationale in earlier cases requiring a premium rate for priority access, and declined to accept Magellan’s proffered arguments distinguishing the earlier cases or supporting its proposal.¹⁶⁷

160. *Id.* at P 4.

161. *Id.* at P 5.

162. *Id.* at P 7.

163. *Id.* at PP 6, 10 (citing *Sunoco Pipeline L.P.*, 137 F.E.R.C. ¶ 61,107 (2011)).

164. *Id.* at P 13.

165. *Id.*

166. *Id.* at P 14.

167. *Id.* at PP 14-17.

4. *Skelly-Belview Pipeline Co.*, 138 F.E.R.C. ¶ 61,153 (2012).

On March 1, 2012, the Commission issued its “Order on Petition for Declaratory Order,” in *Skelly-Belview Pipeline Co.* (“*Skelly-Belview Order*”)¹⁶⁸ In the *Skelly-Belview Order*, the FERC granted without modification the pipeline’s request for a declaratory order finding lawful certain contract rate and contract capacity rights to be granted to contract shippers for expansion capacity.¹⁶⁹ The applicant proposed to give contract shippers priority capacity rights (not subject to prorationing) for 90 percent of certain proposed expansion capacity – the expansion would increase the petitioner’s NGL pipeline between Skellytown, Texas and the fractionating hub at Mt. Belview, Texas from 17,000 bpd to 44,000 bpd to accommodate increased NGL production.¹⁷⁰ The petitioner held two open seasons, and obtained contract support in the form of ten-year TSAs; committed shippers would pay premium rates – “the committed shippers’ contract rate was initially set at \$2.25 per barrel, which exceed[ed] the comparable general commodity rate of \$1.7034 for uncommitted shipments.”¹⁷¹ Committed shippers would not be subject to prorationing, although non-committed shippers were to benefit from the additional capacity available to non-contract shippers.¹⁷²

The Commission approved the proposal without modification, finding that it was “consistent with applicable policy and precedent [because the petitioner had] demonstrated that the supply of NGLs at Skellytown has increased significantly, straining the current capacity to reach downstream markets,” thus requiring substantial capital investment to allow the pipeline to transport growing volumes, and further that “[w]ithout the substantial financial investment of shippers [committing to transport] pursuant to the TSAs,” the expansion might not timely be created.¹⁷³ Shippers were required to make long-term “ship-or-pay obligations at premium rates,” and were in turn given the right not to be subject to prorationing.¹⁷⁴ The Commission found that while providing protection for committed shippers, the proposal contemplated “an appropriate amount of capacity for uncommitted shippers,” and further that “[c]ommitted shippers [would] pay a premium rate above the existing general commodity rates.”¹⁷⁵ “In addition, uncommitted shippers [would] have access to a post-expansion capacity exceeding the current capacity of the Skelly-Belview system.”¹⁷⁶ The Commission also noted that because of the open season, “all potential shippers [had] the opportunity to become committed shippers by entering into TSAs.”¹⁷⁷

168. *Skelly-Belview Pipeline Co.*, 138 F.E.R.C. ¶ 61,153 (2012).

169. *Id.* at P 1.

170. *Id.* at PP 1, 3.

171. *Id.* at PP 7-8.

172. *Id.* at PP 6, 9.

173. *Id.* at P 16.

174. *Id.*

175. *Id.* at P 17.

176. *Id.*

177. *Id.* at P 18.

5. *Shell Pipeline Co.*, 139 F.E.R.C. ¶ 61,228 (2012).

On June 21, 2012, the Commission issued its “Order on Petition for Declaratory Order,” in *Shell Pipeline Co.*, in which the FERC approved the petition submitted by Shell Pipeline Company, L.P. (“SPLC”).¹⁷⁸ On March 30, 2012, SPLC submitted its petition requesting a declaratory order in connection with a proposed reversal of its Houma-to-Houston crude pipeline system, which at a cost of more than \$100 million would be converted from transporting Gulf and imported crudes westward from Louisiana to Port Arthur and Houston area markets, to transporting crudes entering the Houston market eastward to Port Arthur and Louisiana refinery markets.¹⁷⁹ The system would have a capacity of between 250,000 bpd and 360,000 bpd, depending on the segment.¹⁸⁰

The petition sought approval of contract rates, firm priority rights for contract shippers and for the use of a “net present value” (NPV) approach to prorating requests for contract rights in the open season.¹⁸¹ Specifically, the proposal involved three and five year contracts made available during an open season, with tiered, descending contract rates for higher volumes (in tiers ranging from 10,000 to more than 100,000 bpd) and longer commitments, for a number of specified routes.¹⁸² The petition did not seek approval of the uncommitted rate, but did propose that the contract shippers would have priority rights for up to 90 percent of the pipeline capacity.¹⁸³ The contract shippers would pay a premium relative to the payment by the uncommitted shippers for similar volume commitments.¹⁸⁴ The Commission summarized the rate proposal as follows:

A premium payment by the lowest contract rate shipper is proposed relative to the base uncommitted rate. In other words, the contract shippers pay a premium relative to the rate applicable to Uncommitted Shippers for that volume tier. For example . . . , for Route 1, the uncommitted rate would be 74 cents/barrel; the rate applicable to the 3-year contract meeting a minimum volume commitment of 10,000 to 24,999 barrels/day would be 80 cents/barrel, and the rate applicable to the 5-year contract meeting a volume commitment of 10,000 to 24,999 barrels/day would be 75 cents/barrel. In addition, for each level of contract rate volume commitment, the tariff will offer a discounted non-contract rate for a non-contract shipper meeting an equivalent volume for a given month. For Route 1, the rate applicable for the non-contract shipper that transports 10,000 to 24,999 barrels/day in a given month would be 73 cents/barrel. For the next level of volume commitments, the rate relationships remain the same: the 3 and 5 year contract rates are set at a premium of at least one cent higher than the rate applicable to an Uncommitted Shipper tendering the same volume commitment for a given month.¹⁸⁵

Shell requested that the Commission find:

(1) That the terms of the TSA [which was attached] and the accompanying pro forma tariff rates and service terms for Committed Shippers are lawful, and that the

178. *Shell Pipeline Co.*, 139 F.E.R.C. ¶ 61,228 at P 1 (2012).

179. *Id.* at PP 1, 3-4.

180. *Id.* at P 2.

181. *Id.* at P 1.

182. *Id.* at P 6.

183. *Id.* at P 11.

184. *Id.* at P 8.

185. *Id.*

stated contract rates will be the just and reasonable rates to govern the Committed Shippers' service during the terms of the TSA . . . [;] (2) That Shell [could] provide up to 90 percent of the capacity of the Ho-Ho Reversal System for priority transportation of the contract volumes of Committed Shippers . . . [; and] (3) That Shell's proposal to allocate capacity among prospective Committed Shippers during the Open Season process, in the event that requests for contract rights exceed available capacity, may be done on the basis of a uniform, non-discriminatory NPV ranking of requests for contract rights.¹⁸⁶

The Commission approved the petition without modification.¹⁸⁷ The merits discussion is reproduced below in full:

Consistent with the precedent established by the Commission's order in *Express*, Shell has sought advance approval for the rates, and terms [and] conditions of a financially significant project in order to obtain regulatory certainty and to address issues outside the compressed timetable of normal tariff filings. Also, consistent with *Express* and its progeny, Shell has offered committed rates to all shippers in a widely publicized open season. Because all shippers had the opportunity to take advantage of competitive rates based on volume commitment and contract term, there is no issue of undue discrimination or undue preference among the resulting classes of shippers differentiated by contract term and volume commitment. Such shippers are not similarly situated by their own choices.¹⁸⁸

The Commission approved the "proposal for [granting] priority rights for Committed Shippers for up to 90 percent of the capacity [as being] consistent with Commission precedent," given that these "rights were offered during an open season, [that] there [was] an appropriate amount of capacity (10 percent) made available to Uncommitted Shippers, and [that] Committed Shippers [would pay] a premium rate [of] at least one cent higher compared to [that paid by] Uncommitted Shippers."¹⁸⁹

The Commission stated that the one element of Shell's proposal "not previously addressed [for] oil pipelines [was] the use of an NPV allocation methodology in the event of oversubscribed capacity during the open season."¹⁹⁰ The Commission noted that it had approved NPV allocation methodologies for natural gas pipelines holding open seasons and concluded that it would be "appropriate for allocating capacity in the event of oversubscription during an oil pipeline open season."¹⁹¹ The Commission found that "all potential shippers had notice of the use of the NPV methodology, including detailed examples of [its operation]" and "all shippers had the ability to determine how their contracts would be structured based on volume and term," and further that all shippers "knew in advance what the impact . . . would be" on bid evaluation.¹⁹² The Commission held that an NPV methodology "ensures full utilization of the capacity of the pipeline by those shippers that value it most and who provide the greatest financial value to the system," and further would avoid "the possibility

186. *Id.* at P 11.

187. *Id.* at PP 21-23.

188. *Id.* at P 20.

189. *Id.* at P 21.

190. *Id.* at P 22.

191. *Id.*

192. *Id.*

of certain pipeline segments being undersubscribed or underutilized, thus furthering the principle of allocative efficiency.”¹⁹³

6. *Sunoco Pipeline L.P.*, 139 F.E.R.C. ¶ 61,259 (2012).

On June 28, 2012, the Commission issued its “Order on Petition for Declaratory Order” in *Sunoco Pipeline, L.P.*, addressing a petition filed by Sunoco Pipeline L.P. (“Sunoco”) on April 20, 2012 regarding proposed rates and service conditions for its related “Longview Access Project” and “Houston Access Project” (“Projects”).¹⁹⁴ The Projects involve the use of a crude pipeline that had been idled and was proposed to be re-activated for service both north and south on separate segments, from Goodrich, Texas, north to Longview, Texas and from Goodrich, Texas, south to Houston, to meet changing demands.¹⁹⁵ Sunoco stated that the Projects would require significant capital investment, and would enhance transportation options for crude produced in West Texas.¹⁹⁶ Sunoco held separate open seasons for the two separate projects, and obtained volume commitments for priority transportation service at a premium rate of at least \$0.01 per barrel; 90 percent of the capacity would be made available to committed shippers, and 10 percent to uncommitted shippers, and the project terms were for eight years (Longview Access Project) or until 2022 (Houston Access Project).¹⁹⁷ Sunoco sought approval of its proposal to provide priority service to committed shippers agreeing to transport on a take or pay basis at a premium rate, for up to 90 percent of the capacity.¹⁹⁸ There were no protests.¹⁹⁹

The Commission found that these requests were consistent with its policy and precedent, and stated that the proposal “provid[ed] an appropriate amount of capacity for uncommitted shippers, at least ten percent, [provided] protection to the committed shippers,” and “gave all potential shippers [an] opportunity to become committed shippers” in open seasons.²⁰⁰ The Commission therefore approved Sunoco’s “proposed rate design and overall tariff structure,” although it was required to comply with Part 342 upon filing its tariffs.²⁰¹

II. SIGNIFICANT COURT DECISIONS

A. *Mobil Pipe Line Co. v. FERC*, 676 F.3d 1098 (D.C. Cir. 2012).

On April 17, 2012, the United States Court of Appeals for the District of Columbia Circuit issued its decision in *Mobil Pipe Line Co. v. FERC*.²⁰² In *Mobil*, the court considered a petition for judicial review of an order by the

193. *Id.*

194. *Sunoco Pipeline, L.P.*, 139 F.E.R.C. ¶ 61,259 at P 1 (2012).

195. *Id.* at PP 2-5.

196. *Id.* at P 6.

197. *Id.* at PP 7-9, 13-14.

198. *Id.* at P 9.

199. *Id.* at P 12.

200. *Id.* at PP 13-14.

201. *Id.* at P 15.

202. *Mobil Pipe Line Co. v. FERC*, 676 F.3d 1098 (D.C. Cir. 2012).

Commission²⁰³ in which it denied a request for market-based rates for “Pegasus,” an 858-mile, 20-inch diameter crude oil pipeline that, since April 2006, had transported approximately 66,000 barrels per day of Western Canadian crude oil from Illinois to Texas.²⁰⁴ The owner of Pegasus, Mobil Pipe Line Company (“Mobil”), had filed an application for market-based rates for Pegasus that was set for hearing.²⁰⁵ At hearing, the Commission’s Trial Staff supported granting Mobil’s application based on a number of factors,²⁰⁶ including the argument that adding an additional pipeline to a competitive situation logically would enhance competition, and that Pegasus’ small size (3 percent) relative to the market did not raise competitive concerns.²⁰⁷ In *Mobil*, the court emphasized the recommendations of the Commission’s Trial Staff favoring granting the application.²⁰⁸ The court noted that competitive alternatives included both pipelines and local refineries, and that 97 percent of Western Canadian crude was not handled by Pegasus.²⁰⁹ The court also concluded that, because this origin market was competitive before Pegasus began transporting Western Canadian crude in 2006, “[b]asic economic logic dictates that the introduction of a new alternative into a highly competitive market further increases competition; it does not suddenly render a previously competitive market uncompetitive.”²¹⁰ Regarding Pegasus’ ability to raise its rates more than 15 percent above its existing rate levels, the court found that this fact showed “only that Pegasus’s regulated rate [was] below the competitive rate.”²¹¹ The court also stated that, while “it [was] true that Pegasus [was] the primary avenue for” shippers of Western Canadian crude to access *Gulf Coast* refineries, there is “nothing unique” about Gulf Coast refineries compared to other refineries available in Canada and the United States.²¹²

The court concluded that, when an agency exercises its discretion to allow “basic economic and competition principles as the guide for agency decisionmaking, . . . the agency must adhere to those principles when deciding individual cases.”²¹³ The court noted that in Order No. 572,²¹⁴ the Commission established guidelines on how it would decide whether to grant market-based rate applications, and that inquiry “centers on whether a pipeline possesses market power.”²¹⁵ The court concluded that the Commission failed to explain how Mobil’s Pegasus pipeline, a relatively small pipeline and new entrant into

203. *Mobil Pipe Line Co.*, 133 F.E.R.C. ¶ 61,192 (2010).

204. *Mobil*, 676 F.3d at 1099, 1100.

205. *Id.* at 1101.

206. *Id.* Because no participant contested that the destination market was competitive, the court focused on the origin market, for transportation from Western Canada. *Id.* at 1101 & n.1.

207. *Id.* at 1101-02.

208. *Id.* at 1099.

209. *Id.* at 1102-03.

210. *Id.* at 1103.

211. *Id.*

212. *Id.* at 1104.

213. *Id.*

214. Order No. 572, Final Rulemaking, *Market-Based Ratemaking for Oil Pipelines*, [Regs. Preambles 1991-1996] FERC STATS. & REGS. ¶ 31,007 (1994), 59 Fed. Reg. 59,148 (1994) (to be codified at 18 C.F.R. pt. 348), *order denying reh’g*, Order No. 572-A, 69 F.E.R.C. ¶ 61,412 (1994).

215. *Mobil*, 676 F.3d at 1100.

the market for shipping Western Canadian crude oil, possessed market power.²¹⁶ Therefore, the court held “that the Commission’s denial of Mobil’s application for market-based rate authority was unreasonable on the facts and evidence.”²¹⁷ The court further stated that the record “thoroughly undermine[d] FERC’s conclusion” and therefore the court vacated the FERC’s order denying market-based rate authority for Pegasus.²¹⁸

B. MarkWest Michigan Pipeline Co. v. FERC, 646 F.3d 30 (D.C. Cir. 2011).

On July 1, 2011, the United States Court of Appeals for the District of Columbia Circuit issued its opinion in *MarkWest Michigan Pipeline Co. v. FERC* affirming the Commission’s orders issued below in *MarkWest Michigan Pipeline Co. (MarkWest I)*, and the subsequent order which denied any rehearing.²¹⁹ In *MarkWest I*, the FERC rejected a tariff increase filed by the pipeline as being inconsistent with its index regulations, and in so doing had addressed a “case of first impression involving interpretation of the Commission’s oil pipeline ratemaking regulations.”²²⁰ The court’s affirmation rested in large part on its conclusion that the settlement agreement at issue could be interpreted in more than one way, and the court did not find grounds to reject the Commission’s interpretation versus that of the pipeline petitioner.²²¹

The background to the case commenced in 2006, when the pipeline had filed an offer of settlement to resolve a proceeding in which a rate increase had been opposed by shippers. The FERC approved the offer of settlement, under which the pipeline proposed to use as its rates certain rates previously used as intrastate rates, and which limited rate increases to a level lower than that which would have been permitted under the generic oil pipeline regulations.²²² The settlement period expired on January 1, 2009.²²³ During the settlement’s term, the pipeline filed periodic increases to those rates, on July 1, 2006, July 1, 2007, and July 1, 2008; the accompanying transmittal letters noted that the increases were less than the amount that would have been permitted in the absence of the settlement.²²⁴ Then, in a March 2009 filing, the pipeline sought to increase its rates effective April 1, 2009 at the full amount the pipeline would have been permitted to file for under the index regulations in the absence of the now-expired settlement.²²⁵ Protesting shippers argued that the pipeline could not implement a rate increase effective April 1, 2009 after filing rates pursuant to the settlement on July 1, 2008 under 18 C.F.R. § 342.3(d)(5), which states: “[w]hen an initial rate, or a rate changed by a method other than indexing, takes effect during the index year, such rate will constitute the applicable ceiling level for

216. *Id.* at 1103.

217. *Id.* at 1105.

218. *Id.* at 1104-05.

219. *MarkWest Mich. Pipeline Co. v. FERC*, 646 F.3d 30, 33-34 (D.C. Cir. 2011), *aff’g MarkWest Mich. Pipeline Co.*, 126 F.E.R.C. ¶ 61,300 (2009) (“*MarkWest I*”), *reh’g denied*, 130 F.E.R.C. ¶ 61,084 (2010).

220. 126 F.E.R.C. ¶ 61,300, at PP 1, 5.

221. *MarkWest Mich.*, 646 F.3d at 36-37.

222. *MarkWest I*, 126 F.E.R.C. ¶ 61,300, at P 2.

223. *Id.*

224. *Id.*

225. *Id.* at P 1.

that index year.”²²⁶ Consequently, the shippers argued “that the July 1, 2008 rate increase to a level that is less than would otherwise be permissible under the Commission’s indexing regulations was a rate established pursuant to a settlement, [and] [a]s settlement rates establish a rate by a method other than indexing, . . . section 342.3(d)(5) precludes any additional increase before the end of the then-current index year, i.e., before July 1, 2009.”²²⁷

In contrast, the pipeline argued that the index allows increases to any point below the ceiling rate, and because it took increases at less than the ceiling rate levels under the settlement, once the settlement period ended, the pipeline was free to raise the rates to the ceiling once again.²²⁸ The pipeline further argued that, contrary to the shippers’ arguments, the rate was not set as a formal “settlement rate” in accordance with the regulations, and thus was not set under an alternative to the index methodology because a settlement rate requires an affidavit by the pipeline to that effect as well as support by all shippers using the rate – prerequisites not met in this case.²²⁹

In *MarkWest I*, the Commission agreed with the protesting shippers, and found that even though the rate resulting from the settlement was not filed under the “settlement rate” category of permitted rate changes or the “literal language” of the regulations, the broader purpose of the regulations would be defeated by the pipeline’s approach.²³⁰ First, “[t]he Commission consider[ed] the January 2006 settlement rates as initial rates for purposes of an analysis of the effects of indexing such rates, [reasoning that] [a]n initial rate normally establishes the ceiling rate for purposes of the indexing regulations.”²³¹ Then, the FERC construed the impact of the indexed rate increases permitted following the settlement’s establishment of the new ceiling rates.²³² The FERC concluded that under the specific language of the agreement relating to annual increases, the pipeline could not make a filing to increase its rates effective prior to July 1, 2009 because under the contract the pipeline was limited to an annual increase effective July 1, 2008, which limited its ability to increase the rate even after the end of the settlement period.²³³ Because the settlement rate created a new ceiling rate, and the annual filings created subsequent ceiling rates, the Commission concluded that “MarkWest permanently surrendered the right to a maximum rate increase above the agreed levels regardless of the actual format of MarkWest’s index rate filings” during the term of the settlement.²³⁴ On rehearing, the Commission reaffirmed its findings and rationale.²³⁵

In *MarkWest v. FERC*, the court first determined that it was required to accord “deference to the Commission’s interpretation of language in a settlement agreement resolving rate disputes,” and then concluded that the settlement

226. *Id.* at P 3.

227. *Id.*

228. *Id.* at P 4.

229. *Id.*

230. *Id.* at PP 5-6.

231. *Id.* at P 7.

232. *Id.*

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

234. *Id.* at P 10.

235. *MarkWest Mich. Pipeline Co.*, 130 F.E.R.C. ¶ 61,084 (2010).

agreement was ambiguous as to whether the settlement established new initial rates.²³⁶ The court then found that the Commission's interpretation of the agreement was reasonable and further that, in construing how to apply the index regulations, the Commission reasonably chose to consider the annual filings as falling under the settlement rate provision (18 C.F.R. § 342.4(c)) rather than the regulations permitting carriers to change rates at any time below the ceiling (18 C.F.R. § 342.3(a)) – particularly in light of the court's conclusion that the regulations required construction in a manner not originally contemplated.²³⁷

236. MarkWest Mich. Pipeline Co. v. FERC, 646 F.3d 30, 34-35 (D.C. Cir. 2011).

237. *Id.* at 36-37.

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