

REPORT OF THE OIL & LIQUIDS COMMITTEE

This report summarizes oil and liquids developments of particular interest to energy law practitioners that occurred from July 1, 2015 through July 1, 2016.*

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I. SIGNIFICANT FERC ADMINISTRATIVE ORDERS

A. Rulemaking

1. Five-Year Review of Oil Pricing Index

On June 30, 2015, the Federal Energy Regulatory Commission (FERC) issued a Notice of Inquiry (NOI) initiating its five-year review of its indexing methodology in order to establish the oil pipeline index level for the July 1, 2016 to June 30, 2021 time period.[1] The NOI requested comment regarding a proposed index level of between Producer Price Index for Finished Goods (PPI-FG)+2.0% and PPI-FG+2.4%,[2] as well as alternative methodologies for calculating the index level.[3]

After considering comments from interested persons, the FERC adopted an index level of PPI-FG+1.23% for the five-year period commencing July 1, 2016, in an Order Establishing Index Level issued on December 17, 2015.[4] The index level adopted by the FERC departs from the index level range proposed in the NOI, which the FERC explained is a result of: (1) the FERC's use of "FERC Form No. 6, Page 700 . . . data that [it said] directly measures changing pipeline costs as opposed to the estimates previously used to calculate the index level"; and (2) "updated [FERC] Form No. 6 filings and other corrections to the data set."[5]

B. Jurisdictional Issues

1. CHS Inc., *et al.* v. Enterprise TE Products Pipeline Company, LLC, *et*

1. Five-Year Review of the Oil Pipeline Index, F.E.R.C. STATS. & REGS. ¶ 35,053 (2015), 80 Fed. Reg. 39,010 (2015) (to be codified at 18 C.F.R. pt. 342).

2. *Id*.

3. *Id*.

4. Five-Year Review of the Oil Pipeline Index, F.E.R.C. STATS. & REGS. ¶ 35,054, 80 Fed. Reg. 81,744, 81,752 (2015) (cross-reference to 153 F.E.R.C. ¶ 61,312 (2015)).

5. *Id.* at 81,744.

al.

In November 2013, CHS Inc., Federal Express Corporation, GROWMARK, Inc., HWRT Oil Company, LLC, MFA Oil Company, Southwest Airlines Company, United Airlines, Inc. (United) and UPS Fuel Services, Inc. (UPS) (collectively, the Complainants) requested limited rehearing of the FERC's Complaint Order in this proceeding.[6] The Complainants asserted that the FERC erred in ruling that it lacked jurisdiction to prevent Enterprise TE Products Pipeline Company, LLC (Enterprise TE) from discontinuing transportation service for "distillate and jet fuel."[7] In addition, the Complainants argued that the FERC should require Enterprise TE to provide transportation of "distillate and jet fuel" as an equitable remedy for Enterprise TE's breach of an underlying settlement agreement among the parties.[8]

The FERC denied rehearing, finding that Enterprise TE "did not violate [its] common carrier obligations . . . [under] the Interstate Commerce Act (ICA)" by "discontinu[ing] transportation service for distillate and jet fuel."[9] The FERC concluded that, consistent with its holding in *Mid-America Pipeline Co., LLC*,[10] Enterprise TE's cancellation of service was "a complete abandonment of a distinct service and thus beyond the Commission's jurisdiction."[11] The FERC rejected the Complainants assertion that cancellation of the service at issue qualified as a "classification" or "practice" that would provide the FERC with jurisdiction under section 1(6) of the ICA.[12] In addition, the FERC stated that the Complainants request for service was not reasonable under section 1(4) of the ICA because Enterprise TE was not "holding itself out as offering these distinct services."[13] Finally, the discontinuation of service was not unduly discriminatory under section 3(1) of the ICA because Enterprise TE "discontinue[ed] service for all potential shippers of distillate and jet fuel."[14] Furthermore, the FERC concluded that the remedy of specific performance was inappropriate and monetary damages were the proper remedy for violation of the settlement agreement.[15]

C. *Tariff and Ratemaking Issues*

1. Enterprise TE Products Company, *et al.,* and Plains Pipeline, L.P.

The FERC issued letter orders rejecting proposed oil pipeline tariff filings for failure to comply with section 341.2(c)(1) of the FERC's regulations requiring that transmittal letters accompanying oil pipeline tariff filings must "explain any changes to the carrier's rates, rules, terms or conditions of service."[16]

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6. *CHS Inc. v. Enter. TE Products Pipeline Co.*, 145 F.E.R.C. ¶ 61,056 (2013) [hereinafter *Complaint Order*].
7. *Id.* at P 7.
8. *CHS Inc. v. Enter. TE Products Pipeline Co.*, 155 F.E.R.C. ¶ 61,178 at P 1 (2016).
9. *Id.* at P 2.
10. *Mid-America Pipeline Co.*, 131 F.E.R.C. ¶ 61,012 (2010).
11. 155 F.E.R.C. ¶ 61,178 at P 14.
12. *Id*.
13. *Id*.
14. *Id.* (citing *ConocoPhillips Co. v. Enter. TE Products Pipeline Co.*, 134 F.E.R.C. ¶ 61,174 (2011)).
15. *Id.* at P 45.
16. 18 C.F.R. § 341.2(c)(1) (2016).

In *Enterprise TE Products Co., et al.*,[17] Enterprise TE Products Pipeline Company, Dixie Pipeline Company, LLC, and Mid-America Pipeline Company, LLC (collectively, the Pipelines) filed tariffs as part of their index filings that included a proposed increase to the penalty charge applicable to each barrel of off-specification product delivered into each respective pipeline's system.[18] In their respective tariff filings, the Pipelines noted that the penalty charge was being increased by an amount equal to the FERC's 2015 index adjustment to "account for the impact of inflation over the past year."[19] The FERC rejected the Pipelines' tariff filings, finding that their transmittal letters "d[id] not provide evidence to adequately explain why an increase in the off-spec[ification] penalty [was] necessary to deter shipper conduct."[20] The FERC also determined that the pipelines failed to show that they were "experiencing any operational problems with off-spec[ification] product."[21] The FERC noted that "[f]ailure to provide adequate explanatory support in the transmittal letter may result in the rejection of a pipeline's [tariff] filing as patently deficient."[22]

In *Plains Pipeline, L.P.*,[23] Plains Pipeline, L.P. (Plains) submitted a new tariff that identified a new crude petroleum transportation movement from Vaca Station to Jal Station, in Lea County, New Mexico.[24] The tariff also included an exception to the loss allowance provision contained in Plains' general rules and regulations tariff that would apply to movements from Vaca Station to Jal Station.[25] In particular, the tariff identified a specific "deduction for incremental evaporation and shrinkage" that would apply to higher API gravity crude petroleum that was delivered into Plains' system.[26] Referencing section 341.2(c)(1) of its regulations, the FERC rejected the tariff filing because it did not provide explanatory support to justify the deduction exception set forth in the tariff, nor did it explain why the movement from Vaca Station to Jal Station may experience higher losses warranting an exception to Plains' generally-applicable deduction provision.[27]

2. American Midstream Bakken, LLC

American Midstream Bakken LLC (American Bakken) submitted a tariff instituting new pipeline transportation service between origins and destinations located in McKenzie County, North Dakota and the associated tiered committed and

17. Letter Order, *Rejection of FERC Tariffs*, Docket No. IS15-346-000 (2015) [hereinafter *Rejection of FERC Tariffs*].

18. *Id.* at 1-2.

19. *Id.* at 2.

20. *Id*.

21. *Id*.

22. *Rejection of FERC Tariffs*, *supra* note 17, at 2.

23. Letter Order, *Rejection of FERC Tariff*, No. IS15-547-000 (2016).

24. *Id.* at 1.

25. *Id*.

26. *Id*.

27. *Id.* at 2.

uncommitted rates.[28] The tariff was protested by Newfield Production Company (Newfield), the only committed shipper on the pipeline.[29]

Newfield and Costar Bakken, LLC (Costar), the predecessor of American Bakken, had entered into a transportation services agreement (TSA) in June 2014, which provided that Newfield "would receive priority gathering and transportation service on [the] pipeline" in exchange for Newfield's agreement to "dedicate[] all of its production from [certain] leases [to the pipeline] . . . for a period of ten years . . . ."[30] Following American Bakken's acquisition of the Costar pipeline system, Newfield informed American Bakken that it "no longer intended to drill wells reasonably consistent with the drilling forecast contained in the TSA" due to the steep decline in oil prices.[31] American Bakken "conducted a second open season" in May 2015, but was unable to secure any additional commitments to the pipeline apart from the commitment previously made by Newfield.[32]

Upon conclusion of the second open season, American Bakken submitted a tariff filing that included a provision indicating that, before a shipper would qualify for the lowest tiered committed rate set forth in the tariff, it must ship at least 79% of the barrels identified in the committed "shippers [sic] initial drilling forecast" set forth in its TSA.[33] Newfield protested the tariff, claiming that American Bakken's language requiring a committed shipper to ship a minimum volume before it qualifies for the lowest tiered committed rate, was inconsistent with the TSA.[34]

The FERC ruled that it had primary jurisdiction over the contract dispute.[35] Applying the test set forth in *Arkansas Louisiana Gas Company v. Hall*,[36] the FERC first determined that the "contractual provisions at [issue] deal[t] specifically with acreage commitments, and could entail extrinsic evidence of industry expectations and norms surrounding acreage commitments," an area in which the FERC possesses special expertise.[37] Second, the FERC found that "there is a need for uniformity [in the] interpretation of the language in the TSA concerning acreage commitments [since] [o]ther parties have entered into TSAs involving acreage commitments similar to [the one entered into] between American Bakken and Newfield."[38] Third, the FERC found that the proceeding would ultimately determine the rate that Newfield would be subject to for its shipments on American Bakken's system, and "[r]ate regulation [was] the primary regulatory responsibility" of the FERC.[39] On this basis, the FERC "establish[ed] a hearing for the pur-

28. *American Midstream Bakken, LLC*, 152 F.E.R.C. ¶ 61,022 at P 1 (2015) [hereinafter *American Bakken*].

29. *Id*.

30. *Id.* at P 3.

31. *Id.* at P 5.

32. *Id.* at P 7.

33. 152 F.E.R.C. ¶ 61,022, at 8.

34. *Id.* at P 10.

35. *Id.* at P 15.

36. *Arkansas La. Gas Co. v. Hall*, 7 F.E.R.C. ¶ 61,175; *reh'g denied* 8 F.E.R.C. ¶ 61,031 (1979).

37. *American Bakken*, *supra* note 28, at P 15.

38. *Id.* at P 16.

39. *Id.* at P 17.

pose of determining whether [American Bakken's tariff was] a proper memorialization of the TSA between American Bakken and Newfield."[40] Shortly thereafter, the parties privately reached a settlement under which American Midstream filed to cancel the tariff, effectively terminating the docket, and Newfield withdrew its protest.[41] The chief judge then issued an unreported order terminating the proceeding.[42]

3. Enbridge Energy, Limited Partnership

On July 8, 2015, the FERC denied High Prairie Pipeline LLC's (High Prairie) request for rehearing of its May 2012 order which accepted Enbridge Energy, Limited Partnership's (Enbridge) proposal to revise its nomination procedures and make other minor revisions to its tariff over the objections of High Prairie, a potential connecting pipeline.[43] The FERC reaffirmed that it was not necessary to address High Prairie's claims that Enbridge violated the ICA by discriminating against High Prairie because it "is not a current or prospective shipper that would be protected by the anti-discrimination provisions of the ICA."[44] The FERC also reaffirmed its finding that High Prairie lacked standing to protest Enbridge's tariff filing.[45] The FERC found that High Prairie was not a "current or prospective shipper" that would be protected by various provisions of the ICA, but "[r]ather . . . a pipeline carrier seeking an interconnection with another pipeline."[46] Nor did High Prairie "demonstrate[] the concrete adverse impact of its inability to establish an interconnection with Enbridge"[47] or have a "direct interest in the tariff at issue in this proceeding" as required by FERC's regulations.[48]

4. Chaparral Pipeline Company, LLC, *et al.*

On June 24, 2015, Chaparral Pipeline Company, LLC, Front Range Pipeline LLC, Texas Express Pipeline LLC, Seminole Pipeline Company LLC, Mid-America Pipeline Company, LLC, Enterprise TE Products Pipeline Company LLC, and Dixie Pipeline Company LLC (collectively, the Pipelines) filed tariffs to become effective on July 1, 2015, all of which included proposed rate increases in accordance with the FERC's 2015 index adjustment.[49] Each of the Pipelines had originally submitted their index tariff filings on May 28 or May 29, 2015.[50] Those index filings were subsequently withdrawn or rejected, however, as a result of the FERC's order rejecting certain of the Pipelines' proposed increases to their off-

40. *Id.* at P 18.

41. Order Accepting and Suspending Tariff, *American Midstream Bakken, LLC*, 152 F.E.R.C. ¶ 61022 (2015).

42. Order of Chief Judge Deferring Appointment of Settlement Judge, *American Midstream Bakken, LLC*, Docket No. IS15-511-000 (July 28, 2015).

43. *Enbridge Energy, Ltd. P'ship*, 152 F.E.R.C. ¶ 61,047 (2015).

44. *Id.* at P 14.

45. *Id.* at P 30.

46. *Id.* at P 28.

47. *Id.* at P 29.

48. 152 F.E.R.C. ¶ 61,047, at P 30.

49. *Chaparral Pipeline Co.*, 152 F.E.R.C. ¶ 61,068 at P 2 (2015).

50. *Id.*

specification penalty charge that were contained in the original index filings.[51] The "[P]ipelines submit[ted] that good cause exist[ed] for" allowing the re-filed tariffs to become effective on short notice because the rate increases reflected in the re-filed tariffs were identical to those originally set forth in the Pipelines' index filings submitted on May 28 or May 29, 2015.[52]

The FERC denied the Pipelines' request for special permission to file the tariffs on short notice.[53] The FERC found that the circumstances described by the Pipelines did "not constitute an unusual circumstance or an emergency situation that warrant[ed]" allowing the re-filed tariffs to go into effect on short notice.[54] The FERC advised that the Pipelines should not have included the proposed off-specification penalty increases in their original index filing because "penalty changes [were] not part of the [Pipeline's] annual index" filing but rather should be made in a separate tariff filing.[55] Because the FERC found that there was no unusual circumstance or emergency situation present, the Pipelines' short notice request was denied, and the tariffs were permitted to go into effect on July 25, 2015. The FERC also required the "[P]ipelines [to] provide refunds to their shippers in accordance with sections 340.1 and 341.14(b) of the Commission's regulations."[56]

5. SFPP, L.P.

On August 31, 2015, the FERC approved SFPP, L.P.'s (SFPP) proposal to "specify its allocation method for transmix generated on gathering lines connected to SFPP's pipeline system (Gathering Line Transmix)."[57] Specifically, SFPP added new language to its tariff that addressed the allocation of responsibility for Gathering Line Transmix among third-party suppliers (the Suppliers).[58] SFPP proposed that the "allocation . . . be based on the proportion of each Supplier's supplied volumes on a gathering line [compared] to the total supplied volumes on [the] gathering line.[59] In addition the tariff specified "where SFPP [would] physically distribute Gathering Line Transmix to [the] Suppliers" and clarified that the "sole responsibility for the disposition of . . . Gathering Line Transmix" would be with the Suppliers.[60]

HollyFrontier Refining & Marketing LLC (HollyFrontier) filed a protest on August 17, 2015, asserting that SFPP should allocate Gathering Line Transmix based on shippers' volumes rather than the Suppliers.[61] HollyFrontier argued that there is insufficient information for shippers to determine whether Gathering Line Transmix is generated by their shipments on the gathering lines and thus shippers

51. *Id*.
52. *Id.* at P 3.
53. *Id.* at P 5.
54. 152 F.E.R.C. ¶ 61,068, at P 5.
55. *Id.* at P 6.
56. *Id.* at P 8.
57. *SFPP, L.P.*, 152 F.E.R.C. ¶ 61,167 at P 1 (2015).
58. *Id.* at P 3.
59. *Id*.
60. *Id*.
61. *Id.* at 4.

are unable to determine if SFPP is properly allocating the Gathering Line Transmix.[62] The FERC stated that the proposed tariff language "adequately addresses the allocation of Gathering Line Transmix."[63] The FERC concluded that SFPP's invoices provide a clear separation between transmix on the mainline and on the gathering lines and therefore shippers "have been on notice of the distinction of transmix allocation and SFPP's practice."[64] The FERC noted that the Suppliers are in the best position to accurately allocate responsibility for gathering line transmix and therefore concluded that the "allocation methodology . . . is just and reasonable in these circumstances."[65]

6. Enterprise Products Partners L.P., *et al.*

On September 15, 2015, the FERC issued an Order on Rehearing, in which it denied requests for rehearing and motions for reconsideration by various parties.[66] The underlying order, issued on February 20, 2014, had upheld the FERC's "denial of the application by Enterprise Products Partners L.P. (Enterprise) and Enbridge Inc. (Enbridge) ([together, the] Applicants) for authority to charge market-based rates on the Seaway Crude Pipeline Company System (Seaway) from Cushing, Oklahoma to the U.S. Gulf Coast," which had been filed on December 2, 2011.[67] The underlying order also set forth the FERC's "approach to evaluating applications from oil pipelines for market-based rate authority."[68] The FERC had set forth its reasoning on rehearing, in response to the United States Court of Appeals for the District of Columbia's (Court) decision in *Mobil Pipe Line Co. v. FERC*,[69] which had reversed the FERC's decision on a different market-based rate application, finding that the applicant faced "numerous competitive alternatives and therefore could not exercise market power."[70] Nonetheless, the FERC found in the instant case that the Applicants had not demonstrated that they merited market-based rate authority.[71]

The various parties put forth several arguments in favor of rehearing. Parties argued that the FERC had correctly denied market-based rate authority, but had erred in several of its statements of economic principles, including its methods for determining the competitive price, good alternatives, the significance of excess capacity on the pipeline, and its selection of a competitive price proxy.[72] The FERC held that it had appropriately determined the competitive price proxy and what constitutes a good alternative.[73] In doing so, the FERC discussed the "cellophane fallacy," which is the principle that demand elasticity at the competitive price may be narrower than demand elasticity at a supra-competitive price, which

62. 152 F.E.R.C. ¶ 61,167, at P 7.
63. *Id.* at 10.
64. *Id*.
65. *Id*.
66. *Enterprise Prods. Partners L.P.*, 152 F.E.R.C. ¶ 61,203 (2015).
67. *Id.* at P 1.
68. *Id*.
69. Mobil Pipe Line Co. v. FERC, 676 F. 3d 1098 (D.C. Cir. 2012).
70. 152 F.E.R.C. ¶ 61,203, at P 5.
71. *Id.* at P 6.
72. *Id.* at PP 8-15.
73. *Id.* at P 17.

could restrain the behavior of an apparent monopolist.[74] The FERC held that the fallacy was inapplicable because pipelines are unable to charge a monopoly price due to cost-of-service and other regulations.[75] The FERC concluded that the underlying order correctly stated that "a competitive price [] where supply and demand intersect is accurate if the underlying market studied is defined by buyers and sellers who are constrained by market forces from extracting monopoly pricing."[76]

The FERC also rejected the idea that a pipeline's tariff rate should be the competitive price proxy, noting that the Court had held in *Mobil* that a pipeline's tariff rate could be significantly below the competitive price proxy.[77] Furthermore, the FERC found that the presence of excess demand relative to the capacity of the system indicates that the tariff rate is below the competitive rate, and that a pipeline would have to increase its rate to eliminate excess demand in order for the tariff rate to equal the competitive rate.[78] However, pipelines differ from other types of entities in that they are not so easily able to expand or restrict supply. Flexibility in expansions of capacity are difficult for obvious reasons, and as a common carrier, a pipeline "cannot simply restrict access to the pipeline to increase demand," as other types of firms might.[79] Because a pipeline's tariff rate is not necessarily the competitive rate, it follows that good alternatives need not necessarily "be as good as the applicant at the applicant's tariff rate."[80] Finding that:

> The Commission's methodology for reviewing applications from oil pipelines for a determination that they lack market power and so should be granted market-based rate authority, as set forth in the Order on Rehearing, is consistent with Order No. 572 as well as the *Mobil* decision, and is well grounded in economic principles.[81]

7. Tesoro Logistics Northwest Pipelines LLC

In October 2015, the FERC rejected Tesoro Logistics Northwest Pipelines LLC's (Tesoro) tariff filing that would have added a surcharge to its Northwest Products Pipeline System in order to offset expenses to comply with environmental regulatory requirements and ensure the safe operation of the pipeline system.[82] Following two shippers' protests, the FERC determined that the environmental expenses are "not the type of extraordinary, non-recurring costs beyond a pipeline's control" and, therefore, use of a surcharge was not appropriate.[83]

In its initial filing, Tesoro stated that it incurred approximately $11.6 million in costs to comply with a Corrective Action Order (CAO) that the U.S. Pipeline and Hazardous Materials Safety Administration issued to the pipeline's previous

74. *Id.* at P 23.
75. 152 F.E.R.C. ¶ 61,203, at P 27.
76. *Id.* at P 32.
77. *Id.* at PP 37-38.
78. *Id.* at P 39.
79. *Id.* at P 43.
80. 152 F.E.R.C. ¶ 61,203, at P 47.
81. The FERC Denied Rehearing. *Id.* at P 52.
82. *Tesoro Logistics Nw. Pipelines LLC*, 153 F.E.R.C. ¶ 61,118 at P 1 (2015).
83. *Id.* at P 22.

owner.[84] Tesoro also stated that it had incurred $20.6 million in costs for "additional inspection work, repair and protection" activities.[85] Tesoro proposed a per-barrel surcharge of $0.12 to be collected over a term of ten years to recover these $32.2 million in environmental costs, asserting that the "comprehensive environmental review and repair affects and benefits all shippers . . . equally."[86] Tesoro pointed to the FERC precedent in *Magellan*[87] that permitted a ten-year surcharge to allow a pipeline to recover costs associated with bringing its system into compliance with new standards that the U.S. Environmental Protection Agency had set for the transportation of ultra-low sulfur diesel (ULSD).[88]

The two shippers who objected to Tesoro's proposed surcharge distinguished the regulatory expenses underpinning the ULSD surcharge in *Magellan* from the scenario that Tesoro described in its tariff filing, noting that in *Magellan* the pipeline's expenses were incurred as a result of new regulations whereas Tesoro's expenses were the result of corrective actions taken to comply with longstanding, industry-wide regulations.[89] The FERC agreed with the protesting shippers, finding that the expenses Tesoro described are not extraordinary or non-recurring and consequently are not the type of expenses that the FERC previously has permitted pipelines to recover through surcharge mechanisms.[90] The FERC held that Tesoro's admission that it had to make significant investments and repairs along its entire Northwest Products Pipeline System suggests that the repairs actually represented "the type of ongoing and routine expenses that are appropriately recovered through the normal ratemaking process."[91] Noting that no new regulations caused these repairs, the FERC concluded that a pipeline system owner "cannot recover costs arising from that purchase through a surcharge, simply because it may have entered into a bad deal."[92] The FERC noted that its decision was without prejudice to Tesoro seeking to recover the environmental costs through the normal ratemaking process.

8. Buckeye Pipe Line Company, L.P.

On October 30, 2015, the Commission issued an Order Accepting Tariff in *Buckeye Pipe Line Co., L.P.*[93] Buckeye Pipe Line Company, L.P. (Buckeye) had filed a tariff establishing volume incentive rates and changing existing base rates applicable to the transportation of jet fuel to the New York City area airports.[94] The tariff was filed pursuant to a settlement agreement Buckeye had reached with American Airlines, Inc., Delta Air Lines, Inc., JetBlue Airways Corporation,

84. Oil Pipeline Tariff Filing, *Tesoro Logistics Nw. Pipelines LLC*, Docket No. IS15-644-000 at 2 (Sept. 22, 2015) [hereinafter *Tesoro Tariff Filing*].
85. *Id*.
86. *Id*.
87. *Magellan Pipeline Co., L.P.*, 115 F.E.R.C. ¶ 61,276 (2006).
88. *Tesoro Tariff Filing*, *supra* note 84, at 3 (citing 115 F.E.R.C. 61,276, at PP 1-2).
89. *Id.* at PP 3-4.
90. 153 F.E.R.C. ¶ 61,118, at P 22.
91. *Id.* at P 23.
92. *Id*.
93. *Buckeye Pipe Line Co., L.P.*, 153 F.E.R.C. ¶ 61,120 (2015).
94. *Id.* at P 1.

United Air Lines, Inc., and US Airways, Inc. (collectively, the Airlines) in a prior complaint proceeding.[95]

The tariff provided that shippers that are "consumers" and that executed an agreement with Buckeye to ship, or otherwise pay for, a minimum of 3,300,000 barrels of jet fuel per year for a specified number of years, would qualify for the volume incentive program and receive volume incentive rates that reduced existing rates by "76 percent to Newark Airport (Newark), 44 percent to John F. Kennedy International Airport (JFK), and 16 percent to LaGuardia Airport (LaGuardia)."[96] Shippers could execute such agreements during the period from October 1, 2015, to December 31, 2015.[97] The base rate changes, without the volume incentive rates, included a "40 percent reduction from current rate levels to Newark, a 20 percent reduction to JFK, and a 4.6 percent increase to LaGuardia."[98]

The tariff filing was protested by World Fuel Services, Inc., Virgin America Inc., Virgin Atlantic Airways Limited, and Alaska Airlines Inc. (collectively, the Protesters) on the basis that the volume incentive program improperly distinguished between consumers and marketers, and thus was unduly discriminatory under the ICA.[99] The Protestors alleged that because "consumers" could ship on behalf of third parties, this discriminated against smaller airlines, because such airlines could not meet the volume levels necessary for participation in the agreements, while small airlines that were affiliated or in partnership with large airlines could do so.[100] Buckeye and the Airlines each responded to the protest, stating that the protest amounted to an untimely collateral attack on an approved settlement agreement.

The FERC held that Buckeye had made the tariff filing in compliance with the terms of the approved settlement agreement.[101] Noting that "[n]ormally, this would be the end of the inquiry," the FERC nonetheless decided to address the issues raised by the Protestors on the merits.[102] The FERC agreed that the protest was "an impermissible collateral act on the settlement."[103] The Protestors should have been aware of the ongoing litigation as "sophisticated" parties, who "all had the opportunity to intervene in the various proceedings in order to protect their interests and failed to do so" and thus "waived their rights to object to the settlement."[104]

The FERC also held that there was no merit to the Protestors' claims of undue discrimination.[105] The issue regarding different treatment of consumers versus marketers had already been raised by the FERC Trial Staff in the underlying proceeding, and "[t]he Presiding Administrative Law Judges (ALJs) determined that there was no undue discrimination by the exclusion of marketers from the volume

95. *Id.* at P 2 n.2.
96. *Id.* at P 3.
97. *Id*.
98. 153 F.E.R.C. ¶ 61,120, at P 4.
99. *Id.* at PP 5-6.
100. *Id.* at P 7.
101. *Id.* at P 15-16.
102. 153 F.E.R.C. ¶ 61,120, at P 16.
103. *Id.* at P 17.
104. *Id*.
105. *Id.* at P 18.

incentive rate program because jet fuel consumers and jet fuel marketers are not similarly situated."[106] Likewise, the FERC found no undue discrimination against small airlines in the volume incentive program, saying "[t]he fact that the small airlines that are part of the Protesters may be unable or unwilling to take advantage of the program due to ongoing or future business relationships or contractual commitments does not render the volume incentive program unduly discriminatory."[107] Finally, the FERC found that there was no merit to the claims of potential degradation of service, due to the fact that Buckeye had not changed its prorationing policy, which would still be based on a twelve-month period of shipping history.[108] Thus, the FERC "rejected [the protests] on both procedural and substantive grounds," and accepted the tariff, effective November 1, 2015.[109]

9. North Dakota Pipeline Company, LLC

North Dakota Pipeline Company, LLC (North Dakota Pipeline) filed a revised tariff to establish a new delivery point at Minot, North Dakota, with both base rates and rates that the pipeline characterized as "'volume discounted rates' from all upstream receipt points."[110] The volume discounted rates would have applied to shippers who stored crude petroleum at North Dakota Pipeline's merchant tankage at Minot and who agreed to transport their barrels downstream to Clearbrook, Minnesota. North Dakota Pipeline requested waiver of section 4 of the ICA, which generally prohibits charging a greater amount for a shorter distance than for a longer distance over the same line or route in the same direction.[111] This relief was necessary, North Dakota Pipeline claimed, for it to charge the volume discounted rates for reoriginated-from-tankage service to Clearbrook from Minot.[112] Suncor Energy Marketing Inc. (Suncor), a shipper on North Dakota Pipeline, filed comments raising concerns with the proposed tariff and waiver request.[113]

On November 30, 2015, the FERC rejected North Dakota Pipeline's tariff and denied its request for waiver of section 4 of the ICA.[114] The FERC found that North Dakota Pipeline did not adequately explain the "rates for the new Minot delivery point" or justify why relief under ICA section 4 was necessary.[115] The FERC noted that North Dakota Pipeline's tariff filing included a "sworn affidavit that its proposed initial rate had been agreed to by a non-affiliated shipper who intended to use the service" pursuant to 18 C.F.R. section 342.2.[116] However, the FERC found that North Dakota Pipeline filed "initial rates for what appears to be two separate services but has not explained how these services would work."[117]

106. *Id*.
107. 153 F.E.R.C. ¶ 61,120, at P 19.
108. *Id.* at P 20.
109. *Id.* at P 21.
110. *North Dakota Pipeline Co., LLC*, 153 F.E.R.C. ¶ 61,250 at P 1 (2015).
111. *Id.* at P 15.
112. *Id.* at P 17.
113. *Id.* at P 7.
114. *Id.* at P 16.
115. 153 F.E.R.C. ¶ 61,250, at P 16.
116. *Id.* at P 17.
117. *Id*.

The FERC also found that North Dakota Pipeline "ha[d] not adequately explained why relief under section 4 of the ICA was necessary[,]" stating that the pipeline "simply assert[ed] that the rates [were] intended to maintain its competitive position with respect to movements to Clearbrook[,] but fail[ed] to explain what type of competition it face[d] or provide any detail on special circumstances that would justify the requested relief."[118] In addition, the FERC found that North Dakota Pipeline's tariff, as proposed, "raise[d] an issue as to whether the merchant storage provided by [the] [p]ipeline at Minot should be considered to be jurisdictional."[119]

10. Colonial Pipeline Company

In an order issued on May 19, 2016, the FERC rejected Colonial Pipeline Company's (Colonial) Tariff No. 98.25.0, which included proposed revisions to Colonial's rules and regulations.[120] On Colonial, shippers can transfer their shipper history, which allows a Regular Shipper to confer its status on shippers that otherwise would be categorized as New Shippers during periods of capacity constraint. In Tariff No. 98.25.0, Colonial proposed to amend the definitions of New Shipper and Regular Shipper and impact how it allocates capacity during a history transfer period, which can be twelve to fourteen months in length.[121] Under the proposed change, a Regular Shipper would retain its status following a transfer for the entire transfer period. Colonial stated that it was proposing to memorialize an existing practice on its system in its tariff.[122] Certain New Shippers protested the tariff filing, arguing that Colonial's proposed revisions would "lock[] New Shippers out of Colonial's common carrier pipeline for 14 months based on an unpublished 'policy.'"[123]

The FERC agreed with the protestors and rejected the tariff change on grounds that Colonial had failed to support it.[124] Colonial's explanation that it was memorializing an existing practice stood counter to FERC precedent because, the FERC held, the practice was not in the tariff, had no references in the tariff, and had not been subject to FERC or shipper review.[125] The FERC stated that a proper explanation would have included how the history transfer practice is applied, how its application impacts capacity allocation on Colonial's system, and how that practice and the shippers are impacted by the tariff change.[126] The FERC found that substantive issues concerning Colonial's history transfer practice would be addressed in a separate FERC complaint proceeding in Docket No. OR16-17-000.[127]

118. *Id.* at P 18.
119. *Id.* at P 19.
120. *Colonial Pipeline Co.*, 155 F.E.R.C. ¶ 61,187 at P 1 (2016).
121. *Id.* at P 2.
122. *Id.*
123. *Id.* at P 3.
124. *Id.* at P 11.
125. 155 F.E.R.C. ¶ 61,187, at P 11.
126. *Id.*
127. *Id.*

11. Colonial Pipeline Company

On May 31, 2016, the FERC accepted Colonial's Tariff No. 99.22.0 that added a footnote clarifying the treatment of "Surplus" and "Product," which are excess volumes generated by the batching process on Colonial's system that do not correlate to shippers' ticketed volumes.[128] "Surplus is the difference . . . between system-wide physical volumes and book inventory . . . ."[129] Surplus is a "byproduct of system operations and results in a gain or loss adjustment."[130] "Product (also referred to as 'swell') is generated on the system as the result of non-jurisdictional blending."[131] The footnote was added to provide for consistent treatment for transportation purposes of all Surplus and Product generated downstream of Collins, Mississippi, a capacity constraint point on the Colonial system.[132] Colonial stated in its filing that the proposed change would impact how Colonial charges for Surplus and Product and in its treatment for purposes of capacity allocation.[133]

Costco Wholesale Corporation (Costco) filed a protest arguing that the change would further restrict a New Shipper's ability to become a Regular Shipper on Colonial because the proposal would eliminate any product surplus from the earned history of a New Shipper downstream of Collins.[134] The FERC rejected Costco's arguments stating that it would address the issues and operation concerns raised by Costco concerning "Colonial's history transfer provisions and prorationing policy [in other] pending . . . dockets."[135]

12. Colonial Pipeline Company

In this proceeding, the FERC rejected tariff revisions filed by Colonial.[136] The Colonial tariff at issue classifies a shipper as either a New Shipper or Regular Shipper, based on whether the shipper accumulates a history of shipments over a twelve-month period that meets a specified threshold. These categories determine the shipper's entitlement to capacity during prorationing. New Shippers obtain capacity through a lottery system, while Regular Shippers are limited by their historical allocation.[137]

On November 3, 2015, Colonial filed Tariff No. 98.22.0, containing a number of modifications to its minimum tender requirements and capacity allocation procedures,[138] which the pipeline stated were needed to prevent shippers from "gaming" the capacity allocation program by acquiring shipper histories and tak-

128. *Colonial Pipeline Co.*, 155 F.E.R.C. ¶ 61,214 at P 1 (2016).
129. *Id.* at P 3.
130. *Id*.
131. *Id.* at P 4.
132. *Id.* at P 5.
133. 155 F.E.R.C. ¶ 61,214, at P 6.
134. *Id.* at P 10.
135. *Id.* at P 15.
136. *Colonial Pipeline Co.*, 156 F.E.R.C. ¶ 61,001 at P 27 (2016).
137. *Id.* at PP 9-11.
138. *Colonial Pipeline Co.*, 153 F.E.R.C. ¶ 61,270 at P 1 (2015).

ing advantage of the existing rounding increment, thereby circumventing the history-based allocation procedures.[139] Among these modifications was a new provision limiting the "transfer of shipper history" to situations in which a shipper sold its entire business or business line, a decrease in the "minimum tender for [m]ainline shipments," a decrease in the rounding increment used for determining allocations, and revisions to the operation of its lottery system for New Shipper.[140] Colonial pointed out that its system has been prorated since 2012, and that a secondary market for capacity has developed with prices exceeding the tariff rate.[141]

A variety of shippers, offering differing perspectives, protested the proposed modifications. In response, on December 3, 2015, the FERC suspended the tariff for the maximum period, until July 4, 2016, and convened a technical conference, which was held on March 8, 2016.[142]

After reviewing post-technical conference comments, the FERC rejected Colonial's tariff modifications in full in an order issued on July 1, 2016. The FERC found that "certain aspects of Colonial's proposal contravene sections 1(4) and 3(1) of the ICA by depriving New Shippers of their right to obtain transportation upon reasonable request and granting an undue or unreasonable preference or advantage to Colonial's existing Regular Shippers."[143]

Specifically, the FERC determined that Colonial's proposed modifications to its lottery system did not "appear to provide any meaningful opportunity for New Shippers to become Regular Shippers."[144] The FERC cited expert testimony estimating that "the average New Shipper could expect to achieve Regular Shipper status in 10,000 years."[145] In addition, the proposed restrictions on shipper history transfers "would essentially foreclose New Shippers or small Regular Shippers from using the secondary market as a means to obtain capacity on Colonial."[146] The FERC stated that these restrictions "eliminate[] the option for shippers to freely obtain capacity on Colonial in the secondary market."[147]

The FERC determined that the New Shipper lottery and the shipper history restrictions would combine to "essentially eliminate the only means through which a New Shipper could currently obtain access to the Colonial system."[148] The FERC further stated that Colonial's proposal "appears designed" to create an enduring capacity preference for large Regular Shippers, in violation of the ICA.[149] Colonial's proposed modifications to the lottery system and history transfers "work together to effectively preclude New Shippers from ascending to Regular Shipper status."[150]

139. *Id.* at P 7.
140. *Id.* at P 14.
141. *Id.* at P 6.
142. *Id.* at PP 4, 35-36.
143. 156 F.E.R.C. ¶ 61,001, at P 15.
144. *Id.* at P 19.
145. *Id.*
146. *Id.* at P 20.
147. *Id.*
148. 156 F.E.R.C. ¶ 61,001, at P 21.
149. *Id.* at P 22.
150. *Id.* at P 23.

13. Zydeco Pipeline Company LLC

In an order issued on December 31, 2015, the FERC accepted Zydeco Pipeline Company, LLC's (Zydeco) Tariff Nos. 3.2.0 and 5.2.0 that cancelled certain discounted through rates.[151] The through rates had provided a significant discount off the sum of the local transportation rates for the same movements. Three shippers protested the tariff filing, arguing that the change proposed by Zydeco would result in significant rate increases and would increase the pipeline loss allowance.[152] The FERC found that its precedent clearly permits an oil pipeline to cancel discounted rates at any time, even if it results in increased shipper charges. Zydeco's "removal of the discounted through rates would leave the effective local rates intact at [their] applicable ceilings," which was consistent with FERC policy.[153] The pipeline loss allowance concern was rendered moot after Zydeco filed an amended tariff, Tariff No. 3.2.1, to remove the pipeline loss allowance of an affected route.[154]

14. Buckeye Pipe Line Company, L.P.

In October 2012, Buckeye Pipe Line Company, L.P. (Buckeye) filed an application for market-based rates in its New York City origin and destination markets in Docket No. OR13-3-000 (OR13-3).[155] "Various airlines challenged the portion of Buckeye's . . . application related to [the transportation of] jet fuel . . . ."[156] Buckeye ultimately reached a settlement with the airlines in June 2015, which resolved numerous dockets, including OR13-3.[157] As part of the settlement, "Buckeye agreed to withdraw the portion of its [OR13-3] application for market-based rates related to [the transportation] of jet fuel . . . ."[158] The FERC issued an order approving the settlement on September 29, 2015, and Buckeye filed a notice on October 5, 2015 that "partially withdrew its application for market-based rates with respect to" the transportation of jet fuel.[159]

While FERC Trial Staff did not accept the analyses Buckeye used to assess market power, FERC Trial Staff supported Buckeye's modified application for market-based rates, finding that Buckeye did not possess market power in its New York City origin and destination markets.[160] On February 11, 2016, Buckeye and FERC Trial Staff jointly "requested waiver of an initial decision and issuance of a final" order approving Buckeye's application for market-based rates, as modified.[161] The FERC granted the joint request for waiver of an initial decision, finding that neither of the remaining participants in OR13-3 desired briefing or oral

151. *Zydeco Pipeline Co., LLC*, 153 F.E.R.C. ¶ 61,383 at P 1 (2015).
152. *Id.* at P 6.
153. *Id.* at P 15.
154. *Id.* at P 16.
155. Letter Order, *Buckeye Pipe Line Co.*, 155 FERC ¶ 61,052 at P 2 (2016).
156. *Id*.
157. *Id.* at P 3.
158. *Id*.
159. *Id*.
160. 155 FERC ¶ 61,052, at PP 4-6.
161. *Id.* at P 1.

argument, and granted Buckeye's revised application for market-based rates in the New York City origin and destination markets.[162]

D. Select Petitions for Declaratory Order

1. Marathon Pipe Line LLC

On July 1, 2015, the FERC issued a Declaratory Order approving Marathon Pipe Line LLC's (Marathon) petition for a declaratory order regarding "expansion of its crude oil pipeline [system] from Patoka, Illinois to Lima, Ohio" in order to provide needed capacity and eliminate bottlenecking.[163] Among the proposed terms and conditions of service that the FERC approved in its Declaratory Order, the proposed rate structure for Committed Shippers (i.e., shippers that executed a transportation services agreement with Marathon during the open season) was unique, as further discussed below.[164]

The rate structure for Committed Shippers included a "Minimum Fixed Rate" component, based on the estimated costs of the expansion, and a "Variable Rate" component, based on fuel and power costs.[165] "The Minimum Fixed Rate reflect[ed] estimated costs to complete the expansion," and would "be tiered based on the duration of commitment" by the Committed Shipper (i.e., the longer the commitment the lower the rate).[166] The Minimum Fixed Rate may be adjusted either up or down by up to 15% prior to the in-service date to reflect the actual costs of the expansion.[167] In addition, the Minimum Fixed Rate would be increased four percent annually.[168] The Variable Rate would reflect the fuel and power cost and would be set at the same rate per barrel regardless of the level of the commitment term.[169] The FERC approved Marathon's proposed rate structure and terms and conditions of service as just and reasonable, concluding that it does not unduly discriminate or provide undue preference.[170]

2. NuStar Logistics, L.P.

NuStar Logistics, L.P. (NuStar) submitted a petition for a declaratory order on May 22, 2015, seeking "approval of [a] Second Open Season [that NuStar] held for its South Texas Crude Oil Pipeline System Expansion Project (Expansion Project)."[171] NuStar had held an initial open season for its Expansion Project in July and September, 2013 seeking long-term volume commitments on the pipeline from shippers in exchange for e priority service.[172] "On February 28, 2014, the [FERC] issued a Declaratory Order approving the proposed terms and conditions

162. *Id.* at P 9.
163. *Marathon Pipe Line LLC*, 152 F.E.R.C. ¶ 61,005 at P 1 (2015).
164. *Id.* at P 16.
165. *Id.* at PP 8-12.
166. *Id.* at P 8.
167. *Id.*
168. 152 F.E.R.C. ¶ 61,005, at P 8.
169. *Id.* at P 10.
170. *Id.* at P 21.
171. *NuStar Logistics, L.P.*, 152 F.E.R.C. ¶ 61,100 at P 1 (2015).
172. *Id.* at P 4.

of service" offered during the initial open season held for the Expansion Project (February Declaratory Order).[173]

After issuance of the February Declaratory Order and "during the construction of the Expansion Project, NuStar learned of shipper interest for a [potential] new origin point" on the Expansion Project at Hwy 99, McMullen County, Texas, which was not contemplated during the initial open season.[174] NuStar determined both that the addition of a new origin point on the Expansion Project would not detrimentally impact the completion timing of the Expansion Project,[175] and that it would be "capable of transporting more barrels than [what NuStar had] originally estimated."[176] Therefore, NuStar held a well-publicized second open season, during which any prospective shipper or any existing committed shipper that participated in the initial open season, had the ability to designate Hwy 99 as an origin point in its transportation services agreement (TSA).[177] NuStar also offered both prospective shippers as well as existing committed shippers the ability to make a volume commitment on the additional capacity that became available during construction of the Expansion Project.[178]

In its petition for declaratory order submitted following conclusion of the second open season, NuStar requested that the FERC find that: (1) the second open season held by NuStar properly followed the FERC's guidelines; (2) NuStar appropriately allowed committed shippers that had participated in the initial open season to amend their existing TSAs during the second open season "to add Hwy 99 as an origin point and/or increase their volume commitments" for firm rights on the additional capacity that became available on the Expansion Project; and (3) the regulatory assurances provided by the FERC in its February Declaratory Order would not be affected by the second open season held by NuStar or by the proposed amendments to a committed shipper's TSA during such second open season.[179] The FERC granted NuStar's requested assurances, finding that all shippers had a fair and equal opportunity to participate in the second open season and that NuStar had appropriately allowed committed shippers that had participated in the initial open season to amend their existing TSA.[180]

3. Oryx Southern Delaware Oil Gathering and Transport LLC

On February 1, 2016, the FERC issued a Declaratory Order approving Oryx Southern Delaware Oil Gathering and Transport LLC's (Oryx) petition for a declaratory order (Petition) regarding a "proposed [new] greenfield gathering and trunk line pipeline that [would] transport crude petroleum from the production areas within [the] Southern Delaware Basin . . . to a delivery point in Crane and

173. *Id.* at P 5.
174. *Id.* at P 6.
175. *Id.*
176. 152 F.E.R.C. ¶ 61,100, at P 7.
177. *Id.* at PP 8-9.
178. *Id.* at P 9.
179. *Id.* at P 15.
180. *Id.* at PP 17-19.

Midland, Texas" (the Pipeline).[181] In its Petition, Oryx requested approval of multiple aspects of its open season process and the terms of service set forth in the transportation agreements that it entered into with shippers that were interested in making either acreage dedications or volume commitments to the Pipeline in exchange for receiving firm capacity rights on the Pipeline.[182] While many of the requested approvals sought by Oryx in its Petition had previously been approved by the FERC, Oryx's Petition was unique in certain respects.

First, each shipper that made a long-term acreage dedication to the Pipeline by executing a TGSA (an Acreage Dedication Shipper) would receive an amount of firm capacity on the Pipeline each month equal to its "Deemed Volume Commitment."[183] The Deemed Volume Commitment for each Acreage Dedication Shipper was determined based on an evaluation of the production capabilities of the acreage being dedicated to the Pipeline by the Acreage Dedication Shipper.[184] The TGSA provided that, if upon the fourth anniversary of the TGSA, and "each anniversary thereafter, an Acreage Dedication Shipper has . . . [shipped less than] 90 percent of its then-effective Deemed Volume Commitment, on average, during the prior 12-month period, Oryx may reduce [the level of the] Acreage Dedication Shipper's Deemed Volume Commitment."[185] However, if the Acreage Dedication Shipper was subsequently able to show that it was "capable of producing and shipping volumes up to or in excess of its Initial Deemed Volume Commitment" level, then the shipper had a first right, subject to there being available firm capacity on the Pipeline, "to increase its Deemed Volume Commitment up to [an amount equal to] its Initial Deemed Volume Commitment" (i.e., the Deemed Volume Commitment attributed to the Acreage Dedication Shipper during the open season).[186] The FERC approved the mechanism for reducing and/or increasing an Acreage Dedication Shipper's Deemed Volume Commitment, finding that it struck "a balance between the needs of [Acreage Dedication Shippers] to have a certain amount of firm capacity on the pipeline and the needs of Oryx to ensure that [the] [P]ipeline is being utilized to the greatest extent possible."[187]

Second, Oryx proposed a mechanism in the transportation agreements that allowed shippers, including committed shippers and uncommitted shippers, "the ability to secure additional pipeline capacity on the [P]ipeline following the conclusion of the open season."[188] In its Petition, Oryx noted that it had designed the

181. *Oryx S. Del. Oil Gathering & Transp. LLC*, 154 F.E.R.C. ¶ 61,065 at P 1 (2016).

182. *Id.* at P 6. Oryx offered two separate transportation agreements during the open season: (1) shippers interested in obtaining firm gathering and transportation services from the tank battery receipt points on the Pipeline executed a transportation and gathering services agreement (TGSA), and (2) shippers interested in obtaining firm transportation services for the truck station origin points on the Pipeline executed a trucking transportation services agreement (or TTSA). The TGSA and TTSA are collectively referred to as the "transportation agreements." *Id.*

183. *Id.* at P 9.

184. *Id*.

185. *Id.* at P 19.

186. 154 F.E.R.C. ¶ 61,065, at P 20.

187. *Id*.

188. *Id.* at P 21.

Pipeline in order to meet both current production needs as well as future production needs.[189] In particular, Oryx noted that "more than 45 percent of the Pipeline's capacity remain[ed] unsubscribed" following the open season, "35 percent of which [would be] available for commitment" by shippers pursuant to the Additional Pipeline Capacity provisions set forth in the TGSA and TTSA,[190] as further discussed below.[191] With respect to the allocation of Additional Pipeline Capacity, any Acreage Dedication Shipper that had its Deemed Volume Commitment reduced has the first right to secure Additional Pipeline Capacity, as noted in the paragraph above. Oryx would then make any Additional Pipeline Capacity available to "existing" committed shippers, meaning those shippers that have executed transportation agreements with Oryx, to the extent such shippers have met the requirements set forth in their transportation agreements establishing their need for such Additional Pipeline Capacity.[192] Upon thirty-days' notice to existing committed shippers, Oryx would have the right "to offer any Additional Pipeline Capacity to [both] Committed Shippers and Uncommitted Shippers by issuing a press release and posting a notice on its public website of the availability of such Additional Pipeline Capacity."[193] Notwithstanding the ability of shippers to obtain Additional Pipeline Capacity, Oryx made clear that it would not accept commitments resulting in more than 90% of the Pipeline's total capacity being reserved for committed shippers.[194] The FERC approved Oryx's mechanism for allocating additional firm capacity, finding that it was "consistent with the principle recognizing the appropriateness of sizing a pipeline [to] meet both current and future shipper needs," and noted that "all shippers were aware of this mechanism and it will not affect the 10 percent of capacity set aside for Uncommitted Shippers."[195]

Third, the transportation agreements included detailed provisions addressing the recovery of compliance costs that Oryx may incur as a result of a change in law.[196] Oryx "agreed to accept responsibility for up to $1 million of any costs incurred as a result of a [c]hange in [l]aw, and . . . that the application of any rate adjustment or surcharge [would] not cause the Committed Rates [—i.e., the rates applicable to Committed Shippers—] to increase by more than 25 percent of the then-current Committed Rate level."[197] Further, the transportation agreements provided that, to the extent the costs incurred "involve[d] the addition of any facilities with a useful life longer than" the remainder of the term of the transportation agreements, a committed shipper's surcharge or rate increase would be "reduced in accordance with the formula specified" in the transportation

189. *See also* Petition for Declaratory Order, *Oryx S. Del. Oil Gathering & Transp. LLC*, Docket No. OR16-3-000 at 7 (Nov. 3, 2015) [hereinafter Oryx Petition].

190. *Id.* at 4-5.

191. *Id.* at 8-9.

192. *Id.* at 26.

193. *Id*.

194. Oryx Petition, *supra* note 189, at 29-30.

195. 154 F.E.R.C. ¶ 61,065, at P 21.

196. Oryx Petition, *supra* note 189, at 24-25.

197. *Id.* at 24.

agreements.[198] The FERC approved Oryx's proposed approach for recovering any compliance costs incurred during the term of the transportation agreements.[199]

4. Saddlehorn Pipeline Company, LLC

On June 1, 2016, the FERC issued a Declaratory Order approving Saddlehorn Pipeline Company, LLC's (Saddlehorn) petition for a declaratory order (Petition) regarding a new crude oil pipeline designed to transport crude oil from "the D-J Basin region near Platteville, Colorado to the Cushing, Oklahoma crude oil hub for delivery to connecting carriers" (the Pipeline).[200] Saddlehorn had previously filed a petition for declaratory order that was approved by the FERC.[201] In the Petition, Saddlehorn requested that the FERC: (1) "approve the results of a supplemental open season," (2) "reaffirm the regulatory assurances provided" in the 2015 Declaratory Order, (3) "permit Saddlehorn to clarify its line fill provisions in Item 180 of its Rules and Regulations Tariff," and (4) "declare that [the] regulatory assurances provided by the [FERC] in its 2015 Declaratory Order are not affected by the changes to Item 180."[202]

Subsequent to the issuance of the 2015 Declaratory Order, Saddlehorn entered into an agreement with Grand Mesa Pipeline, LLC (Grand Mesa) to combine the two companies' projects into an undivided joint interest (UJI) pipeline, which decision was influenced by the decreasing price of crude oil and the lower projected production from the D-J Basin.[203] "Saddlehorn and Grand Mesa [would] share the construction and capital costs for the Pipeline, as well as operational costs."[204] In response to the changes brought by the UJI arrangement, Saddlehorn initiated a supplemental open season to allow committed shippers to adjust the commitment levels in their agreements, in which 10% of the project capacity was held open for spot shippers, as approved in the 2015 Declaratory Order.[205] The new agreements reached in the supplemental open season provided for lower volume commitments for shippers to receive the incentive rates, which was done in order to reflect the lower anticipated crude oil production in the D-J Basin.[206] Under the new structure, shippers meeting the volume thresholds receive discounted rates, whether committed or uncommitted.[207] However, "[c]ommitted shippers with relatively larger volume commitments receive greater discounts for uncommitted barrels shipped in excess of their commitments than both committed shippers with relatively smaller volume commitments and uncommitted shippers."[208] Finally, the clarification to the line fill policy in Item 180 that Saddlehorn requested provided that "line fill apportionment for each owner's pipeline" would

198. *Id.* at 24-25.

199. 154 F.E.R.C. ¶ 61,065, at P 23.

200. *Saddlehorn Pipeline Co., LLC*, 155 F.E.R.C. ¶ 61,225 at P 3 (2016).

201. *Saddlehorn Pipeline Co.*, 153 F.E.R.C. ¶ 61,067 at PP 1-2 (2015) (approving rates and service terms for anchor shippers and terms for sale of remaining capacity and expansion capacity).

202. 155 F.E.R.C. ¶ 61,225, at P 1.

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

204. *Id.* at P 5.

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

206. *Id.* at P 11.

207. 155 F.E.R.C. ¶ 61,225, at P 15.

208. *Id.*

be determined by the joint operator and each owner would "cause their shippers to provide the line fill in accordance with the operator's instructions."[209]

In seeking FERC approval for the rulings requested, Saddlehorn pointed out that the "terms and conditions approved by the Commission in the 2015 Declaratory Order are the identical terms and conditions set forth in the Supplemental Open Season TSA," aside from the modifications to the volume incentive structure.[210] The FERC granted the Petition, noting that the supplemental open season appeared to have been offered "in an open, fair, and non-discriminatory fashion" and that prior FERC decisions have "found that terms and conditions that are unchanged from and previously approved in the context of the prior open season should be approved in the context of the supplemental open season."[211] Thus, since the Petition was consistent with FERC precedent and unopposed, the FERC approved the requested rulings.[212]

E. *Temporary Waiver Orders*

During the period July 1, 2015, to June 30, 2016, the FERC issued four orders concerning requests for temporary waiver of the tariff filing and reporting requirements of sections 6 and 20 of the ICA,[213] and parts 341 and 357 of the FERC's regulations.[214] The FERC granted the request for waiver in each case.[215]

In each case, the FERC evaluated whether the applicant satisfied four well-established criteria: (1) "the pipeline [applicant] requesting [the] temporary waiver (or its affiliates) must own 100 percent of the throughput on the line"; (2) "there [is] no demonstrated third-party interest in gaining access to or shipping upon the line"; (3) "there [is] no likelihood [that] such third-party interest will materialize"; and (4) "there is no opposition to granting the waiver[]."[216] Any waiver granted by the FERC is subject to revocation should circumstances change. Each successful applicant "must [immediately] report [to the FERC] any change including, but not limited to, increased accessibility of other pipelines or refiners" to the subject pipeline, changes in the ownership of the pipeline or throughput shipped on the pipeline, and shipment tenders or requests for service by any third person.[217] Pipelines granted a waiver must keep their books and records consistent with the FERC's Uniform System of Accounts, and such books and records must be made available to the FERC or its authorized agents upon request.[218]

209. *Id.* at P 16.

210. *Id.* at P 20.

211. *Id.* at P 28..

212. 155 F.E.R.C. ¶ 61,225, at P 29.

213. Interstate Commerce Act, 49 U.S.C. §§ 6, 20 (1988).

214. 18 C.F.R. pts. 341, 357 (2013).

215. *Noble Midstream Servs., LLC*, 152 F.E.R.C. ¶ 61,147 (2015); *Noble Energy, Inc.*, 152 F.E.R.C. ¶ 61,148 (2015); *Saddle Butte Rockies Midstream, LLC*, 152 F.E.R.C. ¶ 61,239 (2015); *Breitburn Operating LP*, 154 F.E.R.C. ¶ 61,042 (2016).

216. 152 F.E.R.C. ¶ 61,147, at P 3; 152 F.E.R.C. ¶ 61,148, at P 6; 152 F.E.R.C. ¶ 61,239, at P 7; 154 F.E.R.C. ¶ 61,042, at P 5.

217. 152 F.E.R.C. ¶ 61,147, at P 7; 152 F.E.R.C. ¶ 61,148, at P 9; 152 F.E.R.C. ¶ 61,239, at P 10; 154 F.E.R.C. ¶ 61,042, at P 8.

218. 18 C.F.R. pt. 352 (2003).

In all four cases, the applicants requested the waivers for crude oil gathering lines. Three of the cases involved facilities in Colorado,[219] while the other case addressed facilities in Oklahoma.[220] The pipelines involved in these applications varied in length from three and a half miles to thirty-nine miles,[221] and one pipeline was expected to be extended to sixty-nine miles by the end of 2015.[222] In three cases, the applicants owned the subject facilities,[223] while the other case involved leases of capacity on four separate pipelines that the applicant would operate as a gathering system.[224]

Notably, in one case, the applicant, Noble Energy, Inc. (Noble), was seeking temporary waiver after the FERC rejected a prior application.[225] The FERC had rejected the original application because Noble had not unambiguously demonstrated that it owned 100% of the production to be transported on the subject facilities.[226] Noble represented that it had since acquired title to 100% of the production to be transported.[227]

II. SIGNIFICANT LITIGATION WITH THE FERC

A. BP Pipelines (Alaska) Inc., et al.

On November 20, 2015, the FERC issued its Opinion No. 544 addressing the 2009 and 2010 rate filings on the Trans Alaska Pipeline System (TAPS).[228] The FERC generally affirmed the Initial Decision's rulings regarding the prudence of the TAPS Strategic Reconfiguration (SR) project, the treatment of supplemental ad valorem taxes, the appropriate base and test period to use for purposes of developing rates, and the treatment of certain oil spill recovery costs incurred by the TAPS carriers.[229] However, the FERC reversed the Initial Decision's rulings concerning the recovery of litigation expenses and modified the Initial Decision's ruling concerning the appropriate remedy based on its finding that the SR project was imprudent.[230]

With respect to the issue of prudence of the SR project, the FERC noted that it evaluates the prudence of an investment on whether a "'reasonable utility manager' would have made the same investment under the same circumstances."[231] Based on its evaluation of the various reports and data that was submitted during the underlying proceeding and that were discussed in the Initial Decision, the

219. 152 F.E.R.C. ¶ 61,147, at PP 1-2; 152 F.E.R.C. ¶ 61,148, at P 3; 152 F.E.R.C. ¶ 61,239, at P 2.
220. 154 F.E.R.C. ¶ 61,042, at P 1.
221. 152 F.E.R.C. ¶ 61,148, at P 3.
222. 152 F.E.R.C. ¶ 61,239, at P 3.
223. 152 F.E.R.C. ¶ 61,147, at P 2; 152 F.E.R.C. ¶ 61,239, at P 2; 154 F.E.R.C. ¶ 61,042 at P 2.
224. 152 F.E.R.C. ¶ 61,148, at P 2.
225. *Id.* at P 1.
226. *Bracewell & Giuliani*, 150 F.E.R.C. ¶ 61,073 at P 13 (2015).
227. 152 F.E.R.C. ¶ 61,148, at P 4.
228. Opinion No. 544, *BP Pipelines (Alaska) Inc.*, 153 F.E.R.C. ¶ 61,233 (2015).
229. *Id.* at PP 1, 15, 117.
230. *Id.* at P 104.
231. *Id.* at P 12.

FERC found that serious doubts had been raised by the protesting parties regarding the prudence of the SR project[232] and found that the SR project was imprudent.[233]

Based on its finding that the SR project was imprudent, the Initial Decision concluded that it would permit the pipelines to recover only a small portion of the SR project investment costs, $229.2 million, "as a matter of equity."[234] "The Initial Decision held that this sum was to be amortized over the remaining life of the pipeline and that the pipeline would not earn a rate of return on [the amount] during the period of amortization."[235] The FERC generally affirmed the Initial Decision's ruling, but "require[d] the removal of all costs related to pump station 1" that were embedded in the $229.2 million.[236] This was because the pump station 1 costs were not included in the TAPS carriers 2009 and 2010 rates at issue, and therefore were not costs at issue in the proceeding.[237]

The FERC also affirmed the Initial Decision's use of actual data from the last twelve months of each respective 21-month base and test period for 2009 and 2010 to calculate the 2009 and 2010 costs of service.[238] The FERC determined that the more recent data more accurately represented the TAPS carriers' ongoing expenses.[239]

With respect to ad valorem taxes, the TAPS carriers sought to include in their 2010 rates supplemental ad valorem tax payments that were paid in 2010 as a result of an Alaska Superior Court decision finding that the TAPS carriers had "underpaid their 2006 ad valorem taxes."[240] In affirming the Initial Decision, the FERC determined that the 2006 supplemental ad valorem tax payments, which were paid in 2010, "should be excluded from [the 2010] cost-of-service because the taxes were non-recurring [and] [t]he 2010 cost-of-service [was] meant to project future costs."[241] The FERC also found that the TAPS carriers' recovery of such costs was barred because it would violate the rule against retroactive ratemaking.[242]

With respect to litigation expenses, the FERC reversed the Initial Decision's holding that the recovery of litigation expenses should be normalized, with the amount of litigation expenses that could be recovered for the 2009 rate period to be based on the average litigation expenses incurred from 2007 to 2009 and the amount that could be recovered for the 2010 rate period to be based on the average litigation expenses incurred from 2008 to 2010.[243] The FERC ruled that the TAPS

232. *Id.* at P 14.
233. 153 F.E.R.C. ¶ 61,233, at P 12.
234. *Id.* at P 89.
235. *Id*.
236. *Id.* at P 98.
237. *Id*.
238. 153 F.E.R.C. ¶ 61,233, at P 114.
239. *Id*.
240. *Id.* at P 117.
241. *Id.* at P 127.
242. *Id.* at P 128.
243. 153 F.E.R.C. ¶ 61,233, at P 130.

carriers could recover their reasonable FERC litigation costs incurred for the "proceeding through a six-year surcharge."[244] The FERC also affirmed the Initial Decision's holding "exclud[ing] expenses related to [a] May 2010 oil spill from the cost-of-service[,] and to include an upward volume adjustment based on the time that the pipeline was shut down."[245] The FERC's reasoning was that such expenses are "properly characterized as extraordinary, non-recurring items."[246]

B. Seaway Crude Pipeline Company, LLC

On February 1, 2016, the FERC issued Opinion No. 546, which reaffirmed its policy of permitting oil and liquids pipelines to set committed rates through an open season process.[247] In Opinion No. 546, the FERC reversed significant portions of the Initial Decision on Remand (Remand ID) issued by the presiding Administrative Law Judge (ALJ) in the proceeding.[248]

The FERC first addressed the question of whether Seaway's committed rates were at issue in the case. The FERC reversed the ALJ's determination that committed rates must be modified to a cost-of-service level, explaining that whether a rate is just and reasonable is a question of law, not of fact.[249] This finding countered the Remand ID's conclusion to adjudicate the committed rates' justness and reasonableness, despite the FERC's committed shipper rate policy, because Seaway would be able to over-collect its cost-of-service.[250] The FERC reiterated that the ALJ's role was limited to reviewing whether the open season process was fair and did not extend to the right to review underlying committed rates.[251] The FERC explained that oil pipeline rates can be "just and reasonable" even if they allow the pipeline to over-collect its cost of service because FERC policy does not mandate cost-based rates for oil pipelines.[252]

The ALJ was critical of the FERC's committed shipper rate policy in the Remand ID. Among other things, she suggested that the FERC's Remand Order had bowed to an "industry propaganda machine"[253] and asserted that the ALJ should be "free from pressures" of the officials in the agency they serve.[254]

In Opinion No. 546, the FERC rejected the entire premise of the ALJ's argument in the Remand ID, explaining that "[a]n ALJ is a creature of statute . . . subordinate to [the agency on] matters of policy and interpretation[s] of law."[255] An agency ruling on a given matter is not open for "reargument" by the ALJ.[256] To the contrary, an ALJ is bound to follow the FERC's instructions on remand.[257]

244. *Id.* at P 134.
245. *Id.* at P 141.
246. *Id.* at P 142.
247. Opinion No. 546, *Seaway Crude Pipeline Co., LLC*, 154 F.E.R.C. ¶ 61,070 (2016).
248. *Id.* at P 2; *Seaway Crude Pipeline Co.*, 147 F.E.R.C. ¶ 63,009 (2014).
249. 154 F.E.R.C. ¶ 61,070, at P 46.
250. *Id.* at P 5.
251. *Id.* at P 40.
252. *Id.* at P 47.
253. 147 F.E.R.C. ¶ 63,009, at P 43.
254. *Id.* at P 40.
255. 154 F.E.R.C. ¶ 61,070, at P 23.
256. *Id.*
257. *Id.*

The FERC also explained that an ALJ's independence is limited to specific matters unrelated to the FERC's policy and interpretations of law, such as compensation, promotion, and tenure.[258]

The FERC also addressed what rate methodology should be used to calculate Seaway's uncommitted rates. The FERC affirmed the use of the trended original cost (TOC) methodology, which is the methodology that oil pipelines must use unless the FERC grants an express exemption.[259]

Seaway had sought recovery of an acquisition premium paid by Enbridge Inc. (Enbridge) when it purchased a 50% ownership in the pipeline in 2011, prior to reversing the flow. The other 50% ownership remained with Enterprise Products Partners L.P. (Enterprise), who had been an owner when the pipeline still flowed from south-to-north. In the Remand ID, the ALJ found that Seaway met the "substantial benefits" test because the reversal of flow constituted a new use and the acquisition price of $585 million was less than the cost to build a new pipeline.[260] However, the Remand ID concluded that Enterprise would experience a windfall if Seaway collected the acquisition premium in rates because its ownership in the pipeline had not changed.[261] Further, the ALJ found that the acquisition premium could only be attributed to Enbridge, not to Seaway itself.[262] Finally, the Remand ID found that the partnership between Enterprise and Enbridge was not an arms' length transaction, but a "scheme" to override cost-based ratemaking and increase the cost of service to the customers.[263] Therefore, the ALJ rejected the inclusion of the acquisition premium in rates.[264]

Opinion No. 546 rejected the arms' length transaction analysis conducted by the ALJ.[265] The FERC explained that arm's length transactions are not shams simply because they result in an acquisition premium or upstream benefits to the parties. The "hallmark" characteristic is whether they are "negotiated rigorously, selfishly and with an adequate concern for price."[266] The facts in the record supported a finding that Enbridge's acquisition of its 50% interest in Seaway was arms-length.[267] The FERC also rejected the notion that the premium could not be collected because it was paid by Enbridge as opposed to Seaway.[268] Opinion No. 546 explained that the relevant test was whether the arm's length purchase of the paper ownership interest allowed the pipeline to be put to a new use and to provide substantial shipper benefits.[269]

The FERC also reversed the Remand ID's decision that goodwill should be excluded from the acquisition premium.[270] The ALJ argued for the exclusion of

258. *Id.* at P 22.
259. *Id.* at P 67.
260. 154 F.E.R.C. ¶ 61,070, at P 70.
261. *Id.* at P 96.
262. *Id.* at P 68.
263. *Id*.
264. *Id*.
265. 154 F.E.R.C. ¶ 61,070, at P 94.
266. *Id.* at P 93.
267. *Id.* at PP 94-95.
268. *Id.* at P 107.
269. *Id*.
270. 154 F.E.R.C. ¶ 61,070, at P 109.

goodwill because it is an "intangible value" that is not directly related "to the acquired asset's original cost."[271] The FERC clarified that if an asset passed the "substantial benefits" test for an acquisition premium, that test also applied to goodwill.[272]

The FERC then addressed the appropriate cost allowances to be included in Seaway's cost-of-service and affirmed the ruling in the Remand ID that "acquisition costs should not be included in" allowance for funds used during construction or AFUDC.[273] Among other things, the FERC also made determinations regarding the appropriate level of operating expenses,[274] level of depreciation expense,[275] dismantlement, removal, and restoration cost,[276] cost of capital,[277] appropriate cost of debt,[278] and rate of return on equity.[279]

In addition, Opinion No. 546 reversed the ruling in the Remand ID "that Seaway's rate design must employ a true-up mechanism to reallocate excess revenue between the pipeline, committed shippers, and uncommitted shippers."[280]Finally, the FERC affirmed the Remand ID's ruling "that it is not discriminatory [for Seaway] to charge different rates [for the transportation of] heavy crude and light crude [because they] have different properties and different impacts on oil pipeline operations."[281]

III. LEGISLATION, PRESIDENTIAL PERMITS AND PIPELINE SAFETY

A. *Elimination of Crude Oil Export Ban*

On December 18, 2015, President Barack Obama signed the "Consolidated Appropriations Act, 2016" into law.[282] As relevant to this report, the act authorized the export of crude oil from the United States without a license as part of a bipartisan budget deal.

> Exports to embargoed or sanctioned countries continue to require authorization. Prior to December [18,] 2015, crude oil exports [from the United States] were restricted to: (1) crude oil derived from fields under the State waters of Cook Inlet of Alaska; (2) Alaskan North Slope crude oil; (3) certain domestically produced crude oil destined for Canada; (4) shipments to U.S. territories; and (5) California crude oil to Pacific Rim countries.[283]

The Department of Commerce's Bureau of Industry and Security (BIS) published a final rule in the *Federal Register* on May 12, 2016 which amended "the

271. *Id.* at P 108.
272. *Id.* at P 110.
273. *Id.* at P 118.
274. *Id.* at P 119.
275. 154 F.E.R.C. ¶ 61,070, at P 128.
276. *Id.* at P 145.
277. *Id.* at PP 172-75.
278. *Id.* at P 184.
279. *Id.* at P 194.
280. 154 F.E.R.C. ¶ 61,070, at P 214.
281. *Id.* at P 223.
282. Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242 (2015).
283. *Petroleum & Other Liquids*, U.S. Energy Info. Admin. (Aug. 31, 2016), https://www.eia.gov/dnav/pet/pet_move_exp_a_EP00_EEX_mbbl_m.htm.

Export Administration Regulations (EAR) to remove the short supply license requirements that . . . applied to exports of crude oil from the United States" prior to December 18, 2015.[284] "Consistent with the exceptions in the act, exports of crude oil continue to require authorization from BIS to embargoed or sanctioned countries or persons and to persons subject to a denial of export privileges."[285]

B. Denial of TransCanada Corporation's Presidential Permit for Keystone XL

TransCanada Keystone Pipeline, L.P. (TransCanada) filed an application with the U.S. Department of State for a "Presidential Permit that would authorize the construction, connection, operation, and maintenance of pipeline facilities at the United States-Canada border in Phillips County, Montana to import crude oil from Canada into the United States."[286] "The proposed project, called Keystone XL, . . . would [have] consist[ed] of approximately 1,204 miles of new, 36-inch-diameter pipeline extending from Hardisty, Alberta, to Steele City, Nebraska."[287] Keystone XL "would have [had] the capacity to deliver up to 830,000 barrels per day (bpd) of crude oil."[288]

Under authority delegated by the President of the United States,[289] and following an evaluation of the proposed project, on November 6, 2015, the Secretary of State denied TransCanada's application for a Presidential Permit, finding that Keystone XL was not in the national interest of the United States.[290] Among other things, the Secretary of State concluded that moving forward with Keystone XL would significantly undermine the ability of the United States to combat climate change.[291]

C. Criminal Enforcement and Pipeline Safety

1. Plains All American Crude Oil Release in Santa Barbara, California

In May 2016, Plains All American Pipeline, L.P. (Plains) was indicted by a California grand jury on forty-six charges related to the company's May 2015 oil pipeline release near Santa Barbara.[292] The failure on Plains' Line 901 resulted in the release of "approximately 140,000 gallons of crude oil," some of which traveled through a culvert and reached the Pacific Ocean.[293] The charges include four felony violations of state laws regarding the spilling of oil and hazardous substances into state waters and "mak[ing] a false or misleading oil spill report" to

284. Removal of Short Supply License Requirements on Exports of Crude Oil, 81 Fed. Reg. 29,483 (May 12, 2016) (to be codified at 15 C.F.R. pts. 730, 740, 742, 744, 746, 754, 762, 772, and 774).

285. *Id*.

286. U.S. DEP'T STATE, RECORD OF DECISION & NAT'L INTEREST DETERMINATION: TRANSCANADA KEYSTONE PIPELINE, L.P. APPLICATION FOR PRESIDENTIAL PERMIT 2, https://keystonepipeline-xl.state.gov/nid/249254.htm (last visited Oct. 23, 2016).

287. *Id*.

288. *Id*.

289. Exec. Order No. 11,423, 3 C.F.R. § 742 (1966-1970), *as amended by* Exec. Order No. 12,847, 58 Fed. Reg. 29,511 (May 20, 1993); Exec. Order No. 13,337, 69 Fed. Reg. 25,299 (May 5, 2004).

290. U.S. DEP'T STATE, *supra* note 286, at 32.

291. *Id.* at 31.

292. Indictment, California v. Plains All Am. Pipeline, L.P., No. 1495091 (Cal. Super. Ct. May 16, 2016).

293. *Id.* at 1.

the Office of Emergency Services (OES).[294] The indictment also includes forty-two misdemeanor charges relating to timely reporting the release to the OES and the National Response Center (NRC) and the spill's impact on wildlife.[295] An individual employee also was charged with three misdemeanor violations for failing to provide timely notice of the spill to OES and NRC. The company's penalty could reach "$2.8 million in fines plus additional costs and penalties."[296] The maximum penalty for the employee is one year imprisonment for each charge and a fine of up to $550,000. The U.S. Pipeline and Hazardous Materials Safety Administration (PHMSA) failure investigation report for the Plains release identifies external corrosion as the direct cause of the failure.[297]

2. PHMSA Enforcement Order re ExxonMobil Pipeline Company Mayflower Pipeline Accident

On April 1, 2016, PHMSA issued its Decision on the Petition for Reconsideration submitted by ExxonMobil Pipeline Company (ExxonMobil) in response to PHMSA's Final Order regarding the March 2013 Pegasus pipeline failure.[298] The PHMSA's decision upholds the original findings in the Final Order, including a compliance order and civil penalty assessment of $2,630,000 for violating federal pipeline safety regulations regarding integrity management and operations and maintenance procedures.[299]

On March 29, 2013, an accident involving ExxonMobil's Pegasus pipeline resulted in the release of approximately 5,000 barrels of crude oil in Mayflower, Arkansas. The PHMSA's investigation concluded that the failure was caused by time intensified manufacturing defects. ExxonMobil has petitioned for judicial review of the decision,[300] and has requested that the court stay or extend the effective date of the compliance order pending its review.[301]

294. *Id.* at 1-2.

295. *Id.* at 2-11.

296. Press Release, California Dep't Just., Attorney General Kamala D. Harris Announces Indictment of Plains All-American Pipeline on Criminal Charges Resulting From May 2015 Santa Barbara County Oil Spill (May 17, 2016), https://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-announces-indictment-plains-all-american.

297. U.S. DEP'T TRANSP., PIPELINE & HAZARDOUS MATERIALS SAFETY ADMIN., FAILURE INVESTIGATION REPORT: PLAINS PIPELINE, LP, LINE 901 CRUDE OIL RELEASE, MAY 19, 2015 SANTA BARBARA CALIFORNIA 3 (May 2016), http://www.phmsa.dot.gov/staticfiles/PHMSA/DownloadableFiles/Files/PHMSA_Failure_Investigation_Report_Plains_Pipeline_LP_Line_901_Public.pdf.

298. *In re* ExxonMobil Pipeline Co., CPF No. 4-2013-5027, 2016 WL 2753318 (Dep't Transp. Apr. 1, 2016).

299. *Id.* at *13.

300. Petition for Review, ExxonMobil Pipeline Co. v. U.S. Dep't of Transp., No. 16-60448 (5th Cir. Aug. 11, 2016).

301. Motion to Stay or Extend Effective Date of Compliance Order Pending Judicial Review, ExxonMobil Pipeline Co. v. U.S. Dep't of Transp., No. 16-60448, *8 (5th Cir. July 6, 2016).

D. PHMSA Regulatory Initiatives

1. PHMSA October 2015 Notice of Proposed Rulemaking on Hazardous Liquids Pipeline Safety Requirements

In October 2015, PHMSA issued a Notice of Proposed Rulemaking (NPRM) proposing changes to the regulations for hazardous liquid pipelines.[302] The proposed rule responds to mandates from the 2011 amendments to the pipeline safety laws,[303] recommendations from the National Transportation Safety Board (NTSB) and the Government Accountability Office (GAO), and comments received in response to PHMSA's October 2010 Advanced Notice of Proposed Rulemaking.[304]

The PHMSA is proposing to require operators to perform in-line inspection (ILI) assessments of pipeline segments located outside of high consequence areas (HCA) every ten years. Alternative assessments, such as hydrostatic testing and direct assessment, would be allowed on prior notice to PHMSA if the operator could show that the pipeline is not capable of accommodating ILI tools and that the alternative technology is equivalent.[305] Discovery of anomalous conditions would be required within 180 days.[306]

The PHMSA would apply new, more conservative repair criteria and response timeframes to both HCA and non-HCA pipe.[307] For non-HCA segments, the proposed rule would establish new immediate repair conditions for: metal loss greater than 80%, burst pressures below 1.1 times the maximum operating pressure, any dent with metal loss, topside dents greater than 6%, indications of significant stress corrosion cracking (SSC), and selective seam weld corrosion (SSWC).[308] The NPRM also proposes a new eighteen-month repair requirement for other dents, corrosion, cracks, and other anomalies.[309] For HCA segments, immediate repair conditions would become more conservative and identical to the new, non-HCA immediate conditions discussed above. The proposed rule would eliminate sixty and 180-day repair categories and would replace them with a new 270-day repair category.[310]

The PHMSA proposes to require all hazardous liquid pipelines, including regulated rural gathering lines, to have leak detection systems.[311] This would expand current leak detection requirements beyond pipes subject to integrity management (IM).[312]

302. Pipeline Safety: Safety of Hazardous Liquid Pipelines, 80 Fed. Reg. 61,610 (Oct. 13, 2015) (to be codified at 49 C.F.R. pt. 195).

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

304. Pipeline Safety: Safety of On-Shore Hazardous Liquid Pipelines, 75 Fed. Reg. 63,774, 63,777 (Oct. 18, 2010) (49 C.F.R. pt. 195).

305. *Id.* at 63,799.

306. Pipeline Safety: Safety of Hazardous Liquid Pipelines, 80 Fed. Reg. at 61,613.

307. *Id.* at 61,613-14.

308. *Id.* at 61,640.

309. *Id.*

310. *Id.* at 61,642.

311. Pipeline Safety: Safety of Hazardous Liquid Pipelines, 80 Fed. Reg. at 61,614.

312. *Id.* at 61,614.

The PHMSA would impose more detailed requirements for the information analysis operators must perform under IM, including new requirements to assess spatial relationships among risk information.[313] The PHMSA would also require IM program development for new pipelines before the pipeline begins operation instead of one year after operations commence, and make other clarifying changes that tend to increase the stringency of the IM requirements.[314]

The PHMSA would require that all existing pipeline segments subject to IM be modified to accommodate ILI tools within twenty years, unless the pipeline's basic construction will not accommodate passage of an ILI device.[315] The new assessment requirements for non-HCA pipe would also include a preference for ILI tools.[316]

The PHMSA proposes to require operators of gravity pipelines, which are currently exempt from Part 195 of its regulations, to "submit[] annual, safety-related condition, and incident reports."[317] The PHMSA also is proposing to extend these reporting requirements to all hazardous liquid gathering lines, including unregulated gathering lines.[318]

The NPRM would require operators to perform an inspection of pipeline facilities potentially affected by an extreme weather event, including a hurricane, flood, earthquake, or natural disaster, within seventy-two hours of the end of the event to ensure that no conditions exist that could adversely affect the safe operation of the pipeline.[319] If an adverse condition is determined to exist, the operator would be required to take remedial action, including reducing operating pressure or shutting down the pipeline; modifying, repairing, or replacing damaged facilities; and implementing emergency response activities.[320]

2. PHMSA July 2015 Notice of Proposed Rulemaking affecting Operator Qualification, Special Permits, Accident Notification, Flow Reversals, Product Changes

In July 2015, PHMSA published an NPRM proposing a number of regulatory changes affecting operators of gas and hazardous liquid pipelines.[321] Among other things, the NPRM proposes to expand operator qualification (OQ) requirements by changing the definition of a "covered task" to include any operations, maintenance, construction, or emergency response activity, and would extend OQ requirements to Type B onshore gas gathering pipelines, Type A gas gathering lines in Class 2 locations, and regulated rural hazardous liquid gathering lines.[322] The proposed rule would require notification of an accident or incident to the NRC,

313. *Id.* at 61,614-15.

314. *Id.* at 61,615.

315. *Id.* at 61,614.

316. Pipeline Safety: Safety of Hazardous Liquid Pipelines, 80 Fed. Reg. at 61,614.

317. *Id.* at 61,611.

318. *Id.*

319. *Id.* at 61,610.

320. *Id.* at 61,612.

321. Pipeline Safety: Operator Qualification, Cost Recovery, Accident and Incident Notification, and Other Pipeline Safety Proposed Changes, 80 Fed. Reg. 39,916 (July 10, 2015) (to be codified at 49 C.F.R. pts 190, 191, 192, 195, and 199).

322. *Id.* at 39,918-19.

including the amount of product loss, "at the earliest practicable moment, but no later than one hour after 'confirmed discovery,'" which is a proposed new term.[323] The proposed rule would also require sixty-day advance notice to PHMSA of product changes and of certain flow reversals in a mainline pipeline, unless the system is designed for bi-directional flow, or the reversal would last for no more than thirty days.[324] The proposal would exempt farm taps from distribution integrity management requirements, but would require inspection of "pressure regulating [and] limiting device[s], relief device[s], and automatic shutoff device[s] every 3 years."[325] The NPRM would prescribe a "fee structure and assessment methodology" under which PHMSA would recover costs incurred in performing design reviews of proposed pipelines where design and construction costs are at least $2.5 billion, or if new or novel technologies or designs are employed.[326]

The proposed rule would also incorporate by reference industry consensus standards addressing welding procedures, welder qualifications, and the assessment of hazardous liquid pipelines using ILI and stress corrosion cracking direct assessment (SCCDA) tools.[327] Finally, the proposal would add procedures for renewing expiring special permits,[328] narrow the exceptions to post-accident drug and alcohol testing requirements for covered employees,[329] and establish procedures for requesting confidential treatment of information submitted to PHMSA.[330]

3. PHMSA's Proposed Expansion of the National Pipeline Mapping System

In June 2016, PHMSA issued a Notice and Request for Comments announcing that it submitted an Information Collection Request (ICR) to the Office of Management and Budget (OMB) seeking approval of changes to the data that operators of pipeline facilities, except distribution lines and gathering lines, must submit to the National Pipeline Mapping System (NPMS).[331] PHMSA first requested comments on proposed changes to the NPMS data collection in July 2014, noting that geospatial data and positional accuracy has improved since the data standards were first developed, and that additional data will be helpful to PHMSA's strategic mission, government officials, and emergency responders.[332]

323. *Id.* at 39,931.

324. *Id.* at 39,921.

325. *Id.*

326. Pipeline Safety: Operator Qualification, Cost Recovery, Accident and Incident Notification, and Other Pipeline Safety Proposed Changes, 80 Fed. Reg. at 39,917.

327. *Id.* at 39,921, 39,924.

328. *Id.* at 39,920.

329. *Id.* at 39,923.

330. *Id.*

331. Pipeline Safety: Request for Revision of a Previously Approved Information Collection: National Pipeline Mapping System Program, 81 Fed. Reg. 40,757 (June 22, 2016).

332. Pipeline Safety: Request for Revision of a Previously Approved Information Collection—National Pipeline Mapping System Program (OMB Control No. 2137–0596), 79 Fed. Reg. 44,246 (July 30, 2014).

The June 2016 notice responds to comments received in response to revisions that were proposed in August 2015.[333]

With the latest ICR, PHMSA is modifying the information proposed to be collected regarding positional accuracy, highest percent operating specified minimum yield strength (SMYS), decade of installation, year of last corrosion, dent, crack, and other ILI, whether the pipe is coated, year of last pressure test and its pressure, and gas storage field type.[334]

PHMSA plans to phase in the collection of the attribute data, with the bulk of data attributes collected within the first two years of submissions and positional accuracy submissions conforming to the new standards by 2024.[335] In recognition of security concerns, PHMSA also proposes to consider certain attributes as Sensitive Security Information (SSI) that would be released only to "covered" persons with a need to know the information, as provided in 49 C.F.R. Part 15.[336] Certain attributes would be restricted to government officials by inclusion in the Pipeline Information Management and Mapping Application, and other attributes would be available to the public.[337]

E. Reauthorization of the Pipeline Safety Act

On June 22, 2016, President Barack Obama signed the "Protecting Our Infrastructure of Pipelines and Enhancing Safety (PIPES) Act of 2016" (PIPES Act), reauthorizing appropriations for PHMSA's pipeline safety programs through fiscal year 2019.[338] The PIPES Act provides PHMSA with new authority to issue industry-wide emergency orders to abate "imminent hazards" without prior notice or opportunity for hearing.[339] Before issuance, PHMSA is required to consult with appropriate Federal and State agencies and other knowledgeable entities and consider certain impacts of the order.[340] Operators can subsequently seek administrative and judicial review of an emergency order.

The PIPES Act also requires that PHMSA issue regulations governing the safety of underground natural gas storage,[341] publish a rulemaking update every ninety days on a public website for each outstanding regulation required by the PIPES Act and previous pipeline safety acts,[342] and ensure that operators receive timely post-inspection information.[343] In addition, operators of hazardous liquid

333. Pipeline Safety: Request for Revision of a Previously Approved Information Collection: National Pipeline Mapping System Program (OMB Control No. 2137–0596), 80 Fed. Reg. 52,084 (Aug. 27, 2015).

334. Pipeline Safety: Request for Revision of a Previously Approved Information Collection: National Pipeline Mapping System Program, 81 Fed. Reg. at 40,758.

335. *Id.* at 40,765.

336. *Id.* at 40,763.

337. *Id.* at 40,764.

338. Protecting Our Infrastructure of Pipelines and Enhancing Safety (PIPES) Act of 2016, Pub. L. No. 114-183, § 2, 130 Stat. 514, 516.

339. *Id.* § 16.

340. *Id.* § 6.

341. *Id.* § 12.

342. *Id.* § 3.

343. Protecting Our Infrastructure of Pipelines and Enhancing Safety (PIPES) Act of 2016 § 7.

pipelines are required to "consider the impact of a discharge into or on navigable waters or adjoining shorelines" in their oil spill response plans.[344]

Finally, the PIPES Act requires a number of reports to Congress, including: (1) the Comptroller General's review of the effectiveness of hazardous liquid and gas pipeline integrity management programs;[345] (2) PHMSA's study of measures to improve damage prevention through technology advances;[346] (3) the Comptroller General's assessment of the feasibility and impacts of "odorizing all combustible gas in pipeline transportation";[347] (4) PHMSA's report on "lost and unaccounted for natural gas from distribution pipelines";[348] (5) PHMSA's review of State policies that "encourage the repair and replacement of leaking natural gas distribution pipelines";[349] and (6) a report on causes and recommendations relating to the "Aliso Canyon natural gas leak."[350]

344. *Id.* § 18.
345. *Id.* §§ 4, 5.
346. *Id.* § 8.
347. *Id.* § 28.
348. Protecting Our Infrastructure of Pipelines and Enhancing Safety (PIPES) Act of 2016 § 29.
349. *Id.* § 30.
350. *Id.* § 31.

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