

REPORT OF THE GAS, OIL, AND LIQUIDS STEERING COMMITTEE

This report summarizes policy developments and legal decisions that occurred at the Federal Energy Regulatory Commission (FERC or the Commission), the Pipeline and Hazardous Materials Safety Administration (PHMSA), and the United States Courts of Appeals in the area of Oil and Liquids regulation between December 23, 2021 and December 31, 2022.*

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I. PETITIONS FOR DECLARATORY ORDER

A. Magellan Pipeline Company, L.P., 180 FERC ¶ 61,102 (2022)

On August 23, 2022, FERC granted Magellan Pipeline Company, L.P.'s (Magellan) Petition for Declaratory Order approving proposed priority service and a rate structure for reserved capacity service on the pipeline's Mountain Expansion project.[1] In its Petition, Magellan requested five rulings: (1) that Magellan's Transition Service Agreement (TSA) with its committed shipper will govern provided transportation services; (2) that the Net Present Value (NPV) methodology that Magellan used to allocate capacity commitments in excess of the available Mountain Expansion project capacity, including the use of the optional Upstream Volume Commitment Agreement, was "reasonable and consistent with Commission precedent"; (3) that "Magellan may provide reserved capacity service on 100% of the Mountain Expansion capacity"; (4) that Magellan may establish Reserved Capacity Rates based on the "Base Tariff Rate applicable to uncommitted shippers for the same origin and destination (as adjusted annually) plus a Premium Firm Fee, and [that the rates] may vary based on the type of product shipped, length of term, and level of Minimum Annual Revenue Commitment"; and (5) that the Reserved Capacity Rates may be adjusted in the future as provided for in the TSA and treated as settlement rates when filed in accordance with 18 C.F.R. §342.4(c).[2]

FERC granted all five of Magellan's requested rulings. First, the Commission found that, consistent with prior rulings, the provisions of a TSA between Magellan and the unaffiliated committed shipper awarded the Mountain Expansion open season capacity will be honored for its term.[3] It concluded that Magellan's NPV methodology for allocating available capacity in the open season was consistent with FERC's policy for allocating over-subscribed capacity and further

1. *Magellan Pipeline Co.,* 180 FERC ¶ 61,102 at P 1 (2022).
2. *Id.* at P 12.
3. *Id.* at P 17.

approved Magellan's use of the value of a bidder's optional upstream volume commitment to calculate the NPV and award capacity.[4] FERC further allowed Magellan to provide reserved capacity service on the entire Mountain Expansion capacity, observing that there was no impairment to access by uncommitted shippers when "over 90% of the total . . . system capacity remain[ed] available to uncommitted shippers."[5] The order affirmed the proposed Reserved Capacity Rates, which were based on Magellan's base tariff rate available to uncommitted shippers plus a Premium Firm Fee, because the rate was "at least one cent per barrel more than the uncommitted rate" as well as rate variation based on product type, length of term, and level of commitment.[6] Finally, FERC confirmed that Magellan may adjust the Reserved Capacity Rates as provided in the TSA and "may file subsequent adjustments as settlement rates pursuant to Section 342.4(c)"[7] of the regulations.[8]

B. Tesoro Logistics Northwest Pipeline LLC, 177 FERC ¶ 61,221 (2021)

On December 23, 2021, FERC issued an order granting rulings requested by Tesoro Logistics Northwest Pipeline LLC (TLNP) with regard to the proposed expansion of its SLC Core Pipeline System.[9] The SLC Core Pipeline consists of two segments: Segment 1 "transports crude oil eastward from Wamsutter, Wyoming to Guernsey/ Fort Laramie, Wyoming"; Segment 2 "transports crude oil westward from Wamsutter . . . to Wahsatch Station, Utah."[10] Due to inactivity on Segment 1, TLNP proposed to reverse Segment 1, by installing new pumping capacity that would allow westbound movements from Fort Laramie to Wamsutter and increase Segment 2 capacity by approximately 10,000 bpd.[11] TLNP conducted an open season during which TLNP received commitments from several shippers.[12]

To establish the committed shipper rate, TLNP employed a bidding process in which interested shippers "bid on multiple tranches of committed capacity . . . subject to a minimum bid rate" established in the open season.[13] TLNP then set

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4. *Id.* at P 18.

5. 180 FERC ¶ 61,102, at P 19 (citing *SFPP, L.P.*, 169 FERC ¶ 61,001 at P 44 (2019); *Plantation Pipe Line Co.*, 167 FERC ¶ 61,025 at P 13 (2019); *Marathon Pipe Line LLC*, 164 FERC ¶ 61,014 at P 25 (2018)).

6. *Id.* at P 20 (citing *Cactus II Pipeline LLC*, 167 FERC ¶ 61,205 at P 31 (2019) (length of term and commitment level)*; Magellan Pipeline Co.,* 166 FERC ¶ 61,181 at P 36 (2019) (premium rate); *Enbridge Pipelines (Ill.) LLC*, 144 FERC ¶ 61,085 at P 11 (2013) (product type)).

7. 18 C.F.R. § 342.4(c) (2021).

8. 180 FERC ¶ 61,102, at P 21 (citing *Magellan Pipeline Co.,* 166 FERC ¶ 61,181 at P 40 (discussing TSA based rate adjustments). FERC also waived submission of a verified statement supporting future settlement rates. *Id.* (citing *Kinder Morgan Pony Express Pipeline LLC,* 141 FERC ¶ 61,249 at PP 17-18 (2012); *see Seaway Crude Pipeline Co.,* 142 FERC ¶ 61,201 at P 12 (2013); *see also Mark West Liberty Ethane Pipeline, LLC,* 145 FERC ¶ 61,287 at P 26 (2013)).

9. *Tesoro Logistics Northwest Pipeline LLC*, 177 FERC ¶ 61,221 at P 1 (2021).

10. *Id.* at P 2.

11. *Id.* at P 3.

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

13. 177 FERC ¶ 61,221, at P 7.

"the committed rate for all committed shippers at the lowest submitted bid rate that was associated with a specific tranche."[14] TLNP set the uncommitted rate at "one penny less than the committed rate."[15] FERC approved TNLP's rate structure for the project.[16] FERC also approved TLNP's transportation service agreement,[17] which included a provision requiring committed shippers to pay deficiency payments if that shipper's quarterly shipments are "less than [its] quarterly volume commitment."[18]

TNLP proposed a new prorationing policy that would apply only to Segment 1.[19] Under the policy, committed shippers would receive "a portion of the committed capacity equal to the lesser of [a] committed shipper's monthly volume commitment; or [its] . . . nomination."[20] For new shippers and regular shippers, the proration policy would "first allocate[] up to 10% of the available capacity to new shippers using a lottery system," and if there is remaining capacity "then each regular shipper will be allocated a percentage of the remaining available capacity."[21] "The allocation provided to a regular shipper [would] be calculated based upon the shipment of uncommitted volumes at the uncommitted rate during the base period on the available capacity."[22] FERC approved TNLP's proposal to reserve 10% of the expansion capacity for uncommitted shippers but declined to rule on other aspects of the proration policy—including the lottery mechanism-- "that were neither explained nor justified in the body of the Petition."[23] However, FERC stated that it "[had] concerns that aspects of the proposed prorationing policy . . . provide inadequate access for new and uncommitted shippers."[24]

II. Rulemaking Actions/Public Inquiry Dockets

A. *Five-Year Review of the Oil Pipeline Index, 178 FERC ¶ 61,023 (2022)*

In Order No. 561, issued in 1993, FERC established an "indexing method that allows oil pipelines to change rates based upon an annual index, as opposed to making cost-of-service filings."[25] FERC committed in Order No. 561 to "review the index level every five years to ensure that it adequately reflects changes

14. *Id.*
15. *Id.* at P 8.
16. *Id.* at P 23.
17. 177 FERC ¶ 61,221, at PP 22, 24.
18. *Id.* at P 11.
19. *Id.* at P 13.
20. *Id.* at P 14.
21. 177 FERC ¶ 61,221, at P 16.
22. *Id.*
23. *Id.* at P 25.
24. *Id.*
25. Notice of Inquiry, *Five-Year Review of the Oil Pipeline Index*, 171 FERC ¶ 61,239 at P 3 (2020) (citing Order No. 561, *Revisions to Oil Pipeline Regulations Pursuant to the Energy Policy Act of 1992*, [Regs. Preambles 1991-1996] FERC Stats. & Regs. ¶ 30,985 (1993), 58 Fed. Reg. 58,753 (1993)).

to industry costs."[26] On December 17, 2020, FERC issued an order setting the index level for July 1, 2021, through June 30, 2026, at PPI-FG +0.78 percent.[27] Several parties requested rehearing of FERC's order.[28]

On January 20, 2022, the Commission issued its order on rehearing and revised the five-year index from PPI-FG +0.78 percent down to PPI-FG -0.21 percent, based primarily upon two methodological revisions.[29] First, in the December 2020 order, FERC relied on a data set that included data for the middle 80 percent of cost changes of all oil pipelines.[30] On rehearing, the FERC elected to rely on data only for the middle 50 percent of oil pipelines.[31] FERC explained that "the index is not designed to recover extraordinary" or idiosyncratic cost changes, which would result from using the wider data range.[32] FERC concluded that the middle 50 percent was more representative of industry-wide cost changes as it excludes pipelines relatively far removed from the median.[33]

Second, FERC decided that the December 2020 order incorrectly excluded the impact of FERC's 2018 "Income Tax Policy Change"[34] by requiring pipelines organized as Master Limited Partnerships to remove the income tax allowance and ADIT balances from their cost of service.[35] Shippers argued that the index should reflect the impact of the Income Tax Policy Change, not exclude it.[36] On rehearing, FERC held it was proper to incorporate the effects of the Income Tax Policy Change.[37] Among other points, FERC reasoned that the index "was always intended" to capture changes to a pipeline's cost of service and comparing 2019 data (which reflects the policy change) with 2014 data (which does not) properly reflected the change.[38] FERC also explained that incorporating the change is consistent with historical practice because FERC has not previously adjusted cost data used for the index.[39]

FERC ordered oil pipelines to recalculate their index ceiling levels using the new index and directed oil pipelines whose rates exceed the ceiling level to file rates that comply with the new ceiling levels by March 1, 2022.[40] Shippers and

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26. Final Order, *Five-Year Review of the Oil Pipeline Index*, 86 Fed. Reg. 9,448 (2021) (to be codified at 18 C.F.R. pt. 342).
27. *Id.* at 9,448.
28. *Five-Year Review of the Oil Pipeline Index*, 178 FERC ¶ 61,023 at P 7 (2022).
29. *Id.* at PP 1-2.
30. *Id.*
31. *Id.*
32. 178 FERC ¶ 61,023, at P 44.
33. *Id.* at P 45.
34. *Id.* at P 2.
35. *Id.*
36. 178 FERC ¶ 61,023, at P 11.
37. *Id.* at P 2.
38. *Id.* at P 18.
39. *Id.* at P 19.
40. 178 FERC ¶ 61,023, at P 106.

pipelines have filed petitions for review, and the matter is pending in the D.C. Circuit Court of Appeals.[41]

B. The Liquid Shippers Group, 179 FERC ¶ 61,004 (2022)

On April 1, 2022, the Commission issued its Order on Petition, concluding a proceeding that commenced on Dec. 14, 2021, when the "Liquids Shippers Group [(LSG)] filed a petition [seeking] an expedited order [requiring all] pipelines to correctly record jurisdictional revenues in [Uniform System of Accounts (USoA) Account] Nos. 230-260 [(18 C.F.R. Part 352)], . . . report those revenues on page 700" of the carriers' Form 6; and "identify any changes to their accounting or reporting practices."[42]

The LSG contended that many pipelines were not complying with the directives of Order No. 783-A,[43] in which the Commission stated that "pipelines must report all jurisdictional revenues in Accounts 200-260 on line 10 of Page 700" when submitting their Form 6 reports.[44] In support of these requests, the LSG cited audit reports and orders issued involving Bridger Pipeline (Dkt. No. FA19-10-000) and Centurion Pipeline, L.P. (Dkt. No. FA19-4-000), in which the audit reports had faulted the pipelines' offsetting of allowance losses and revenues in Acct. 230, and the pipelines' omission of PLA revenues in Acct. 230 from Page 700.[45] In addition, the LSG provided a survey of Form 6s, which it alleged demonstrated that few pipelines reported PLA revenues on Page 700, and that many reported no such revenues in Acct. 230.[46]

In response to the petition, the Commission issued a notice inviting comments on December 21, 2021.[47] In response, carrier interests argued, *inter alia*, that the regulations and language of Order No. 783-A already fully addressed the issue, that the audits were not precedential, and that there were several valid reasons why pipelines might not report PLA revenues in Form 6.[48] Carrier interests also argued that the LSG did not specifically support its inclusion of Acct. Nos. 240-260.[49] Shipper interests filed comments in support of the relief sought by the LSG, arguing that the requested information was necessary to ensure accurate information in the Form 6 reports, which in turn was necessary for shippers to monitor pipeline rates and ensure that they are just and reasonable.[50]

41. Liquid Energy Pipeline Ass'n v. FERC, No. 22-1105, 2023 WL 183610, at *ii (D.C. Cir. Jan. 11, 2023).

42. *The Liquids Shippers Group*, 179 FERC ¶ 61,004 at P 1 (2022).

43. *Id.* at P 3.

44. *Id.* at P 13.

45. *Id.* at P 4.

46. 179 FERC ¶ 61,004, at P 4.

47. *Id.* at P 7.

48. *Id.* at P 10.

49. *Id.*

50. 179 FERC ¶ 61,004, at P 11.

In the Order, the Commission denied the Petition, finding that the Form 6 requirements were "well established and need no further clarification," citing, *inter alia*, Order No. 783-A.[51] However, the Commission did go on to emphasize that "[p]ipelines must completely and accurately report all jurisdictional revenues in Accounts 200-260, including those associated with PLA, on line 10 of page 700."[52] The Commission further stated:

> Regarding revenues and expenses associated with PLA . . . pipelines should record allowance oil revenues in Account 230 and expenses related to oil losses in Account 340. Thus, where an oil pipeline providing interstate transportation service collects per-barrel charges or in-kind volumes for product losses, the pipeline should record associated revenues in Account 230 separately from associated expenses in Account 340.[53]

The Commission also reiterated that if a pipeline made any "significant change" to its Form 6 accounting or reporting practices, it must disclose such change in its Form 6 and Form 6Q filings.[54] In addition, the Commission noted that there were various ways to ensure compliance with the accounting requirements, including audits and shipper complaints.[55] No further pleadings were submitted in the proceeding subsequent to the Order.

C. *Oil Pipeline Affiliate Committed Service, 181 FERC ¶ 61,206 (2022)*

On December 16, 2022, the FERC issued a Proposed Policy Statement (Policy), proposing revisions to its policy for evaluating "whether contractual committed transportation service between oil pipelines and their affiliates complies with the Interstate Commerce Act ('ICA')"[56] (*i.e.*, is just, reasonable, and not unduly discriminatory).[57] Specifically, the Commission proposes to introduce: (1) a safe-harbor mechanism that pipelines may use to demonstrate that Affiliate-Only Committed Service rates are just and reasonable; and (2) standards for evaluating whether Affiliate-Only Committed Service non-rate terms offered in the open season were structured to unduly discriminate against nonaffiliates.[58] The Commission seeks comment on various aspects of the proposal.[59] As noted in the dissent, the Commission previously explored this issue in a proposed policy statement two years ago but abandoned that effort after receiving comments.[60]

51. *Id.* at P 1.
52. *Id.* at P 13.
53. *Id*. at P 14.
54. 179 FERC ¶ 61,004, at P 15.
55. *Id*. at P 16.
56. Proposed Policy Statement, *Oil Pipeline Affiliate Committed Service*, 87 Fed. Reg. 78,670 (2022).
57. *Id.*
58. *Id*. at 78,673.
59. *Id.* at 78,671.
60. 87 Fed. Reg. 78,670, at 78,677 (Danly, Comm'r, dissenting).

1. Background

a. Oil Pipeline Contracting Arrangements.

Under the ICA, "an oil pipeline is a common carrier that must provide transportation to shippers upon reasonable request" and must "demonstrate that its proposed rates are just, reasonable, and not unduly discriminatory or preferential."[61] The Commission allows "oil pipeline transportation rates and terms of service pursuant to long-term contracts" with shippers.[62] Such committed contract shippers "may receive service as defined by the contract ([*i.e.*,] contractual committed service) that differs from uncommitted [common carrier] service."[63]

Commission precedent provides that contractual committed service complies with the ICA, and is presumed just and reasonable, when the "same rates and terms are offered in a public open season where all interested shippers have an equal opportunity to obtain," through an arm's-length agreement, the committed service.[64] If nonaffiliated contracting shippers are present during the open season, the Commission finds a presumption of reasonableness and nondiscrimination because "the Commission assumes that nonaffiliated shippers are sophisticated parties that can be relied upon to protect their own interests from those of the pipeline, ensuring the agreement responds to competitive conditions."[65]

b. Commission's Concerns with Affiliate-Only Committed Service

The Commission is concerned with "Affiliate-Only Committed Service," which occurs when the only shipper to agree to a committed transportation service is the pipeline's affiliate, because it can indicate: (1) a lack of fairness in the open season, with its terms designed to favor the affiliate;[66] (2) a lack of an arm's-length transaction supporting a presumption of reasonableness;[67] and (3) "an inherent incentive for the pipeline to unduly discriminate in favor of its affiliate."[68] For these reasons, the Commission proposes to revise its policies.

2. Proposed Policy

The Commission proposes to revise its policy for evaluating whether an open season resulting in Affiliate-Only Committed Service is just and reasonable, and

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61. *Id.* at 78,671. *See Laurel Pipe Line Co.,* 167 FERC ¶ 61,210, at P 24 (2019).

62. 87 Fed. Reg. 78,670, at 78,671.

63. *Id.*

64. *Id.*

65. *Id.*

66. 87 Fed. Reg. 78,670, at 78,672. The Commission notes that numerous parties in prior proceedings have pointed out that pipelines may be affording an undue preference to their affiliates during the open season process. *Id.*

67. *Id.* The Commission explains that one way for a pipeline to provide its affiliate unduly preferential access to capacity is to offer a contract rate that a nonaffiliate market participant would find "onerous" or "uneconomic," but would not otherwise meaningfully bind an affiliate. *Id.*

68. *Id.*

not unduly discriminatory under the ICA by introducing: (1) a safe-harbor mechanism that pipelines may use to demonstrate that Affiliate-Only Committed Service rates are just and reasonable; and (2) standards for evaluating whether Affiliate-Only Committed Service non-rate terms offered in the open season were structured to unduly discriminate against nonaffiliates.[69]

a. Safe-Harbor Mechanism

The Commission proposes a safe harbor if "a pipeline shows that it offered a rate at or below the cost-of-service over the full term of the agreement," the rate will be presumed "just, reasonable, and not unduly discriminatory."[70]

The Commission proposes two ways for satisfying the safe harbor.

> First, a pipeline could: (1) provide cost-of-service support for the initial rate; (2) provide in the contract that adjustments to the rate over the contract term by the pipeline would be pursuant to the Commission's cost-of-service and indexing regulations; (3) provide in the contract that the committed shipper has the right to directly challenge the committed rate on a cost-of-service basis during the term; and (4) provide that whenever the rate is established or changed during the contract term on a cost-of-service basis, the cost of service will be set at a 100% load factor (or some other reasonable limit).[71]

Second, a pipeline could satisfy the safe harbor by:

> (1) provid[ing] cost-of-service estimates to support the contract rate for the entire contract term; (2) provid[ing] in the contract that the committed shipper may have a one-time right to challenge such cost-of-service showing made in the pipeline's initial filing for the service; and (3) applying a 100% load factor (or some other reasonable limit).[72]

The Commission recognizes that "section 342.2(a) of the Commission's existing regulations require[s] a pipeline to provide a cost of service when filing an initial rate."[73] However, the Commission explains that in order to evaluate the fairness of the open season, it needs to consider the "contractual committed rate over the *full* term of the contract, not merely the initial rate at the time the committed service begins."[74] Therefore, the filing requirements of section 342.2(a) are insufficient.[75]

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69. *Id.* at 78,673. The Commission notes that the fact that no nonaffiliated shipper agrees to a contractual service does not, in and of itself, indicate undue discrimination in favor of an affiliate. *Id.* at 78,671. The Commission also emphasizes that the proposed policies do not represent a "blanket prohibition" on oil pipelines implementing Affiliate-Only Committed Service. *Id.* at 68,673.

70. 87 Fed. Reg. 78,670, at 78,674.

71. *Id.* The Commission clarifies that "when a pipeline establishes or adjusts a contract rate on a cost-of-service basis, the cost of service should use either a 100% load factor or an alternative load factor that reasonably approximates the pipeline's expected throughput over the life of the contract." *Id.* at 78,674-75.

72. *Id.* at 78,674.

73. *Id.* at 78,675.

74. 87 Fed. Reg. 78,670, at 78,675.

75. *Id.*

b. Affiliate-Only Committed Service Non-Rate Terms

The Commission recognizes that a pipeline may design non-rate terms (e.g., minimum volume commitments, minimum term-length requirements, deficiency provisions, or duty-to-support clauses) to discriminate against nonaffiliate market participants, and "the Commission may consider multiple factors to determine whether these non-rate terms were specifically structured to unduly discriminate against nonaffiliates."[76]

c. Remarketing Capacity

The Commission proposes to "apply a rebuttable presumption that Affiliate-Only Committed Service is unduly discriminatory" and unjust and unreasonable "where the affiliate, any time before or shortly after the committed service begins, remarkets the contracted capacity to one or more nonaffiliated third parties."[77] The Commission explains the fact that a nonaffiliate has purchased remarketed capacity from the affiliate indicates that the terms offered in the open season must have been less favorable and inconsistent with market demand, allowing the affiliate to commit to the capacity and remarket it outside of the constraints of the ICA, which bind the pipeline.[78] However, the Commission notes the presumption can be rebutted by factors such as:

> (1) the affiliate's business purpose at the time of the open season; (2) whether the affiliate is acting as a marketer or simply selling capacity in connection with the sale of its business; (3) whether the sale was a limited, one-time sale; and/or (4) how much time elapsed between the date of the open seasons and the affiliate's decision to sell the capacity.[79]

d. Stakeholder Input

The Commission seeks stakeholder input on the proposals, as well as any other approaches for oil pipelines to demonstrate that Affiliate-Only Committed Service is "just and reasonable and not the result of undue discrimination to exclude potential nonaffiliated committed shippers."[80] Further, the Commission seeks comment "regarding the policies [it] should apply to evaluate whether non-rate terms offered in the . . . season operated to exclude nonaffiliates.[81] The Commission also welcomes comments on any "issues or factors related to affiliate preferences or affiliate shippers' activities on the secondary market" that merit consideration in the policy statement.[82]

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76. *Id.* at 78,675.
77. *Id.*
78. 87 Fed. Reg. 78,670, at 78,675-76.
79. *Id.* at 78,676.
80. *Id.*
81. *Id.* at 78,675.
82. 87 Fed. Reg. 78,670, at 78,676.

3. Commissioner Danly's Dissent

Commissioner Danly issued a dissent against the Policy, stating that the policies proposed, particularly the safe harbor, are nearly identical to those proposed two years ago in the Commission's policy statement on *Oil Pipeline Affiliate Contracts*,[83] which was subsequently withdrawn two days after the expiration of the initial comment deadline.[84] Commissioner Danly states that the Commission "chooses to omit (and presumably ignore) comments that exposed profound weaknesses that counseled a more deliberate approach in that (and now this) proposed policy."[85]

Commissioner Danly identifies comments in prior proceedings alleging a lack of record evidence to support the Commission's concerns regarding affiliate preference, which Commissioner Danly argues the Commission ignores in this proposed Policy.[86] Commissioner Danly takes issue with the Commission's safe harbor proposal, noting commentors in the original docket argued that a safe harbor that requires carriers to allow shippers to unilaterally challenge a rate (like the one proposed in this policy statement) goes against the Commission's regulations by limiting the methodologies by which pipelines can adjust rates[87] "and by requiring the use of a 100% load factor for cost-of-service-based rate adjustments."[88]

Lastly, Commissioner Danly expressed disapproval over the Commission's lack of consideration of alternative approaches commenters offered in the prior proceeding, such as the alternative requirement that pipelines demonstrate that affiliate rates are aligned with those of competing pipelines or other modes of transportation.[89] Commissioner Danly concludes by stating:

> It is a mistake for the majority to repropose a policy shown to have irremediable vulnerabilities under the [Administrative Procedure Act] and a near certain chilling effect on investment. The Commission has the benefit of an existing record. Rather than ignoring it, the Commission should have made use of that record . . . .[90]

4. Commissioner Christie's Concurrence

Commissioner Christie provided a brief concurrence, agreeing that transactions between corporate affiliates are not arm's-length transactions and require a higher level of scrutiny.[91] He questions the proposed Policy's level of detail and the necessity of the proposed Policy itself, but is willing to put out the proposal for public comment.[92]

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83. *Id.* at 78,677 (Danly, Comm'r, dissenting).

84. *Id.* (Danly, Comm'r, dissenting) (citing Order Withdrawing Policy Statement, *Oil Pipeline Affiliate Contracts*, 173 FERC ¶ 61,250 (2020)).

85. *Id.* at 78,677-78 (Danly, Comm'r, dissenting).

86. 87 Fed. Reg. 78,670, at 78,678 (Danly, Comm'r, dissenting).

87. *Id.* (Danly, Comm'r, dissenting).

88. *Id.* (Danly, Comm'r, dissenting).

89. *Id.* at 78,678-79 (Danly, Comm'r, dissenting).

90. 87 Fed. Reg. 78,670, at 78,679 (Danly, Comm'r, dissenting).

91. *Id.* (Christie, Comm'r, concurring).

92. *Id.* (Christie, Comm'r, concurring).

D. Oil Pipeline Capacity Allocation Issues and Anomalous Conditions, 178 FERC ¶ 61,105 (2022)

On February 17, 2022, FERC issued a Notice of Inquiry (NOI) seeking comments on oil pipeline capacity allocation issues that arise when anomalous conditions affect the demand for oil pipeline capacity and what, if any, actions the Commission should consider addressing those allocation issues.[93] Initial Comments were due on April 25, 2022, and Reply Comments were due on May 25, 2022.[94]

The NOI arose from an earlier request of a collection of airlines for emergency relief due to impacts on shipper histories caused by less jet fuel being shipped by pipeline as a result of the steep decline in air travel during the COVID-19 heath emergency.[95] That emergency request was denied,[96] but the Commission promulgated the NOI to address the issue raised by these airlines and to seek stakeholder comments.[97]

Specifically, the NOI sought comment on a series of questions. On the issue of capacity allocation issues arising from anomalous conditions, the Commission requested comments on the following: (1) historical examples of anomalous conditions that affected pipeline history; (2) whether existing prorationing policies address the allocation of capacity under anomalous conditions; (3) whether the Commission should consider actions to mitigate the effect of anomalous conditions on capacity allocations; and (4) a description of the current availability of secondary transaction for acquiring shipper history and/or accessing pipeline capacity.[98]

On the issue of transporting jet fuel following the COVID-19 pandemic, the Commission sought comments on the following: (1) a list of particular pipelines and destination airports where the reduction of pipeline allocation during the pandemic would lead to deliveries below the airline's needs when the demand for air travel returns to normal; (2) whether there are pipelines transporting jet fuel that were not in prorationing over the last 12 months, and which would have been in prorationing if jet fuel had shipped at 2019 levels; (3) historical and projected levels of total jet fuel demand at airport destinations, starting in January 2018; (4) the total capacity of pipelines shipping jet fuel from January 2018; (5) descriptions of how nominations are awarded for products other than jet fuel on pipelines that ship both jet fuel and other products; (6) any actions the Commission should consider to address concerns regarding pipeline capacity to airports; and (7) a description of whether expansions of capacity on pipelines carrying jet fuel would help address current or future needs for jet fuel.[99]

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93. Notice of Inquiry, *Oil Pipeline Capacity Allocation Issues and Anomalous Conditions*, 87 Fed. Reg. 10,355 (2022).

94. *Id*.

95. *Id.*

96. *Order Denying the Request for Emergency Relief and Establishing Conference*, 176 FERC ¶ 61,065 (2021).

97. 87 Fed. Reg. 10,355, at 10,355.

98. *Id.* at 10,356.

99. *Id*. at 10,357.

III. TARIFF AND RATEMAKING ISSUES

A. *Epsilon Trading, LLC, et al. v. Colonial Pipeline Co., 179 FERC ¶ 63,008 (2022)*

On April 27, 2022, a FERC Presiding Administrative Law Judge issued a second partial Initial Decision (ID) on the Complaints shippers filed against Colonial Pipeline Company (Colonial) challenging Colonial's cost-of-service (COS) rates, market-based rates (MBR), and product loss allowance (PLA).[100] This second partial ID addressed the issues set for hearing regarding Colonial's COS rates. This concludes the completed ID for the Colonial matter, the first part of which was released on December 1, 2021, and concerned challenges to Colonial's MBR and PLA.[101]

The ID's COS analysis was conducted used a base period of the 12-month period of calendar year 2017,[102] stipulated throughputs for both the base and test period,[103] utilized the remaining life amortization methodology,[104] and adopted CITGO's witness's calculations for historical ROE and capital structure.[105]

The COS partial ID held that (1) Colonial's COS rates should not be afforded protected status as grandfathered rates;[106] (2) Colonial's Stand-Alone Cost methodology was inappropriate in the evaluation of indexed rates;[107] (3) Colonial's COS rates should be analyzed using the trended original costs method;[108] (4) Colonial failed to comply with FERC recordkeeping requirements, such that a new COS calculation should not be run, and Colonial's missing data should be replaced by test period collection amounts;[109] (5) Colonial's system integrity program costs should be partially capitalized and normalized over the complaint period;[110] (6) Colonial's non-jurisdictional costs should be excluded from its cost of service, but Colonial should be given the opportunity to make a one-time filing within 36 months showing that a certain portion of its non-jurisdictional costs should be recoverable;[111] (7) Colonial's product transfer orders should be revenue credited;[112] (8) Colonial's incident costs should be excluded from its cost of service;[113] (9) Colonial's prospective dismantlement, removal and restoration costs should not be credited to the cost of service;[114] (10) Colonial should amortize differed return

100. Partial Initial Decision, *Epsilon Trading, LLC,* 179 FERC ¶ 63,008 at P 5 (2022).
101. *Id*. at P 4.
102. *Id.* at P 15(a).
103. *Id.* at PP 609-56.
104. 179 FERC ¶ 63,008, at PP 657-703.
105. *Id.* at PP 704-37.
106. *Id.* at PP 560-65.
107. *Id.*
108. 179 FERC ¶ 63,008, at P 581.
109. *Id.* at PP 71-109.
110. *Id.* at PP 892-95.
111. *Id.* at P 375.
112. 179 FERC ¶ 63,008, at PP 285-86.
113. *Id.* at PP 1224-25.
114. *Id.* at P 1001.

and allowance for funds used during construction using the remaining life method;[115] (11) Colonial should amortize accumulated deferred income tax (ADIT) balances and unfunded ADIT;[116] (12) Colonial should adjust its Return on Equity (ROE) to 12.53% Nominal ROE and 10.20% Average Real ROE;[117] (13) Colonial's cost of service should reflect disputed tax refunds;[118] and (14) Colonial's litigation expenses should be offset by non-complaining shipper reparations.[119]

Calculation of reparations was left for a future compliance filing after the Commission issues its final order.[120] The parties have submitted Briefs on Exceptions and Briefs Opposing Exceptions, and the ID will now be reviewed and ruled upon by the Commission.

IV. MARKET BASED RATES

A. MPLX Ozark Pipe Line LLC, 180 FERC ¶ 61,053; reh'g denied, 181 FERC ¶ 61,242 (2022)

On July 28, 2022, FERC granted an application of MPLX Ozark Pipe Line LLC (MPLX Ozark) that requested market-based rate authority for the interstate transportation of crude oil from Cushing, Oklahoma, to Wood River, Illinois.[121] In so doing, FERC reversed an initial decision[122] that had denied market-based rate authority for the requested movement.[123] The Initial Decision recommended denial of MPLX Ozark's application after concluding that MPLX Ozark failed to show that it was unable to exercise market power in the geographic destination market.[124] In reaching this conclusion, the

> Initial Decision [found] that (1) the product market is the transportation of all grades of crude oil; (2) the geographic destination market is Wood River/Roxana, Illinois (Wood River); (3) the competitive alternatives in the geographic destination market are the crude oil pipelines, Platte, Keystone, and Capwood; and (4) the resultant HHI is within a range of 2,676 to 2,859, with a market share ranging from 30.1% to 34.5%.[125]

FERC found that the Initial Decision erred in limiting the geographic destination market to Wood River and held that the appropriate geographic destination market should include Patoka, Illinois as well.[126] FERC pointed out that prior FERC cases had held that the geographic destination market should be determined

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115. *Id.* at PP 807-26.
116. 179 FERC ¶ 63,008, at PP 802-06.
117. *Id.* at PP 1091-92.
118. *Id.* at PP 1244-48.
119. *Id.* at PP 1226-41.
120. 179 FERC ¶ 63,008, at PP 1263-64.
121. *MPLX Ozark Pipe Line LLC*, 180 FERC ¶ 61,053 at PP 1-2 (2022).
122. *See generally MPLX Ozark Pipe Line LLC*, 172 FERC ¶ 63,034 (2020).
123. *Id.* at PP 1-5.
124. *Id.* at PP 291-93.
125. 180 FERC ¶ 61,053, at P 6.
126. *Id.* at P 20.

by analyzing "the area in which a shipper may rationally look for transportation service."[127] That determination requires "consideration of the area within which the pipeline's shippers are supplying downstream needs," and for that reason, FERC "considers whether the appropriate geographic market . . . should be expanded based on where shippers may look for alternatives in the event of a price increase."[128]

Turning to MPLX Ozark's application, FERC found that a majority of the crude oil shipped on MPLX Ozark is actually destined for Patoka and that, in case of a price increase, shippers could transfer their business to pipelines that deliver to Patoka.[129] FERC also explained Patoka and Wood River are close together and that crude oil delivered to Patoka can be transported to Wood River.[130]

FERC considered and rejected arguments on which the Initial Decision relied. FERC rejected the hypothetical monopolist test and held that the test can be a useful tool but "is not always necessary to determine the geographic market" and that, in this case, "the behavior of market participants provides sufficient information to define the relevant geographic market."[131] FERC also rejected arguments that Patoka should not be included in the geographic market because an affiliate of MPLX Ozark is a significant shipper on the pipeline.[132] The FERC concluded that "[a] significant minority of Patoka-bound shipments are not affiliated with MPLX Ozark, and these shippers would help to discipline a supracompetitive price increase."[133] The FERC also rejected arguments that Patoka should be excluded because MPLX Ozark is affiliated with WoodPat Pipeline, which connects Wood River and Patoka.[134] FERC explained that MPLX Ozark had committed not to discriminate "by coordinating the rates of MPLX Ozark and WoodPat Pipeline" and, because WoodPat Pipeline's rate for deliveries to Wood River "is currently only 21.83 cents per barrel, MPLX Ozark would only be able to raise its rate to Wood River by up to that amount in order to have it be fully offset by the WoodPat Pipeline rate."[135]

Having concluded that the geographic destination market should include Patoka, FERC analyzed whether MPLX Ozark had market power within the destination market.[136] FERC found that with the geographic destination modified to include Wood River and Patoka, "the appropriate market power measures are an HHI ranging from 2,199 to 2,233 and a capacity-based market share for MPLX Ozark ranging from 22.9% to 23.3%."[137] Those measures, FERC held, "indicate

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127. *Id*. at P 19 (*quoting Guttman Energy, Inc.*, 161 FERC ¶ 61,180 at P 183 (2017)).
128. *Id*.
129. 180 FERC ¶ 61,053, at PP 20, 24.
130. *Id*. at P 21.
131. *Id*. at P 23.
132. *Id*. at P 25.
133. 180 FERC ¶ 61,053, at P 25.
134. *Id.*
135. *Id.* at P 27.
136. *Id.* at P 20.
137. 180 FERC ¶ 61,053, at P 52.

that the market is not highly concentrated and that MPLX Ozark does not possess significant market power."[138] Accordingly, FERC approved the pipeline's application and granted it market-based rate authority.[139]

On August 29, 2022, Husky Marketing & Supply Company and Phillips 66 Company (collectively, Petitioners) requested rehearing and moved to reopen the record.[140] On December 20, 2022, FERC denied rehearing and the motion to reopen.[141] The Petitioners first argued that FERC "erred in calculating the effective capacity HHI based on the capacity of the Wood River Refinery," which the Petitioners argued improperly ignores demand for transportation to Patoka and refineries downstream of Patoka.[142] FERC rejected this argument and explained that "[c]onsistent with [its] precedent, effective capacity is based on consumption in the destination market."[143] FERC stated that if the Petitioners wished to challenge the effective capacity method, they should have done so at hearing.[144] Moreover, FERC found, even if it were to accept the Petitioners' revised calculations, the results "would still not demonstrate MPLX Ozark possesses market power."[145]

The Petitioners argued that FERC should reopen the record and admit evidence regarding the effect of a capacity expansion into Patoka by the Dakota Access Pipeline, which was completed in the Fall of 2021.[146] FERC denied the motion, explaining that "reopen[ing] the record is discretionary" and only done in "extraordinary circumstances," a standard the Petitioners did not meet.[147] Furthermore, FERC found, the new evidence would not change the resulting HHI, contrary to the Petitioners' claims. [148]

Finally, the Petitioners argued that FERC erred by ignoring "secondary anticompetitive factors, including evidence that a majority of MPLX Ozark's throughput is shipped for an affiliate of the pipeline."[149] FERC rejected the argument and pointed out that "[s]econdary anticompetitive factors are typically only relevant where the HHI calculation indicates a close call as to whether market power exists," which FERC found was not true here.[150] Moreover, FERC explained, it considered this issue in reaching its decision and concluded that "significant volumes from non-affiliate shippers . . . would help to discipline a supracompetitive price increase."[151]

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138. *Id.* at P 52.
139. *Id.* at P 10.
140. *MPLX Ozark Pipe Line LLC*, 181 FERC ¶ 61,242 at P 1 (2022).
141. *Id.* at P 1.
142. *Id.* at P 10.
143. *Id.* at P 16.
144. 181 FERC ¶ 61,242, at P 16 n.44.
145. *Id.* at P 6.
146. *Id.* at P 11.
147. *Id.* at P 17.
148. 181 FERC ¶ 61,242, at P 17.
149. *Id.* at P 12.
150. *Id.* at P 18.
151. *Id.* at P 19.

B. West Texas Gulf Pipe Line Co. LLC, 178 FERC ¶ 63,020 (2022)

On April 30, 2019, West Texas Gulf Pipe Line Company LLC (WTG) filed an application for authorization to charge market-based rates for the interstate "transportation of crude oil from the Permian Basin to the Gulf Coast and the East Texas region surrounding Tyler, Texas."[152] "BP Products North America Inc. . . . and Husky Marketing and Supply Company ([collectively], the Joint Protestants) protested [WTG's] application."[153] FERC issued an order finding that WTG lacked market power in the origin markets, and setting for hearing whether WTG had market power in the destination markets.[154] On August 16, 2019, Permian Express Partners LLC (Permian and, with WTG, the Applicants) filed for authorization to charge market-based rates from the Permian Basin, Fort Worth Basin and Haynesville production areas to the Gulf Coast and Tyler destination markets.[155] Permian's application was not protested.[156] FERC issued an order finding that Permian lacked market power in the origin markets, and set for hearing whether Permian had market power in the destination markets.[157] Subsequently, the proceedings were consolidated.[158] A virtual hearing commenced on June 15, 2021, and concluded on July 23, 2021, and the presiding Administrative Law Judge issued an Initial Decision on March 18, 2022.[159]

The Initial Decision found that the product market should be defined as the "transportation of all grades of crude oil" and rejected Applicants' arguments that the product market should include the "supply" of crude oil, reasoning that including supply would be inconsistent with Commission guidance that emphasizes "transportation" as a key element of relevant product markets.[160]

The Administrative Law Judge next evaluated the geographic destination markets. For the Tyler, Texas destination market, the Administrative Law Judge adopted Applicants' and Trial Staff's approach of starting with the Delek US Holdings, Inc.'s Tyler refinery and expanding to include counties within a 100-mile radius of the refinery.[161] For the Gulf Coast destination markets, the Administrative Law Judge rejected Applicants' broad Gulf Coast Destination market and instead adopted two geographic destination markets: the Nederland, Texas, market, and the Anchorage, Louisiana, market, as well as counties/parishes within a 100-mile radius of each delivery point.[162]

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152. *West Texas Gulf Pipe Line Co.*, 178 FERC ¶ 63,020 at P 20 (2022).

153. *Id.* at P 2. Delek Refining, Ltd., Lion Oil Trading & Transportation, Inc., and Delek US Holdings, Inc. also protested but later settled and withdrew their protests. *Id.* at PP 21, 29-30.

154. *West Texas Gulf Pipe Line Co.*, 170 FERC ¶ 61,148 at PP 1, 36 & ordering para. B (2020).

155. *Permian Express Partners LLC*, 170 FERC ¶ 61,288 at P 1 (2020).

156. *Id.* at P 15.

157. *Id.* at PP 1-2, ordering para. B.

158. 178 FERC ¶ 63,020, at P 28.

159. *Id.* at P 34.

160. *Id.* at PP 58, 61-62, 69.

161. *Id.* at PP 95-96.

162. 178 FERC ¶ 63,020, at PP 127, 133, 160-61.

On the issue of competitive alternatives, the Administrative Law Judge found that one oil pipeline and transported local crude oil production serve as competitive alternatives in the Tyler destination market.[163] The Administrative Law Judge found that many oil pipelines as well as waterborne imports and rail serve as competitive alternatives in the Nederland and Anchorage destination markets.[164]

To apply market power measures, the Applicants proposed to exclude local production from the Tyler Refinery consumption before calculating the Herfindahl-Hirschman index (HHI); the other participants disagreed.[165] The Administrative Law Judge rejected the Applicants' approach, found the Tyler market had an HHI of 4,398 or 5,064, and concluded that the market is highly concentrated.[166] On the other hand, the Administrative Law Judge found Applicants do not have market power in either the Nederland or Anchorage destinations markets, finding the HHI for the Nederland destination market to be less than 768, with a market share of 12.3%, and for the Anchorage destination market, the HHI to be 975 with a market share 9.85%.[167] Accordingly, the Administrative Law Judge concluded that Applicants should be granted market-based rate authority for the Nederland and Anchorage destinations markets but not for the Tyler destination market.[168]

V. QUALITY BANK

A. *BP Pipelines (Alaska) Inc., 179 FERC ¶ 63,013 (2022)*

This initial decision addresses issues raised by Petro Star Inc. (Petro Star) regarding the Quality Bank on the Trans Alaska Pipeline System (TAPS).[169] The proceeding is on remand from the D.C. Circuit Court of Appeals.[170] TAPS transports crude petroleum received from different production fields in a common stream.[171] The Quality Bank compensates TAPS shippers for the differences in quality of the crude petroleum they tender to TAPS compared to the quality of the crude petroleum that shippers receive on redelivery.[172] The Quality Bank uses a distillation methodology to value each crude petroleum stream tendered to TAPS.[173] Each month, a laboratory performs distillation assays on each stream to divide it into nine components to which the Quality Bank then assigns values.[174]

163. *Id.* at P 219.
164. *Id.* at PP 257-58.
165. *Id.* at P 287.
166. 178 FERC ¶ 63,020, at P 318.
167. *Id.* at P 340(g).
168. *Id.* at P 341.
169. *BP Pipelines (Alaska) Inc.*, 179 FERC ¶ 63,013 at PP 1, 3 (2022).
170. *Id.* at P 22.
171. *Id*. at P 2.
172. *Id.*
173. 179 FERC ¶ 63,013, at P 11.
174. *Id.*

Petro Star alleged that the Quality Bank undervalues Resid, the heaviest of the nine Quality Bank components.[175] Market prices are not posted for Resid, so the Quality Bank derives a price based on (a) the products produced by coking Resid, multiplied by (b) the market value of those products, minus (c) a cost deduction to reflect the cost of coking.[176] "Th[e] cost deduction includes a 20% capital [recovery factor to] account[]s for the capital investment that would be required to build a hypothetical coker . . . capable of processing Resid . . . ."[177]

The Administrative Law Judge (ALJ) first addressed Petro Star's "less-than-a-barrel anomaly" claim, on which Petro Star claimed shows that the method for valuing Resid is flawed.[178] Petro Star demonstrated that, in some months, the market price for Alaskan crude is greater than the value the Quality Bank establishes at the post-distillation stage for Alaskan crude, which Petro Star argued does not make economic sense because distillation must add value.[179] The ALJ rejected this argument for several reasons, including that the anomaly disappears when evaluated over the long term[180] and that "Petro Star failed to [establish] a causal relationship between the value of Resid and the anamoly."[181]

Petro Star argued that the 20% capital recovery factor should be eliminated or greatly reduced for several reasons, including that 20% is excessive when compared to average equity returns for refiners.[182] The ALJ rejected this argument.[183] The ALJ explained that Petro Star's comparison of the 20% capital cost allowance with refinery returns was flawed because the capital cost allowance reflects a "return of capital, a return on capital, and . . . an income tax allowance."[184] The ALJ found that the "refiners are not subject to . . . cost-of-service [regulation]" and that Petro Star had failed to prove that the 20% capital recovery factor is excessive in light of real-world operations of West Coast cokers.[185]

Petro Star argued that the product yields the Quality Bank assumes from coking Resid are too low and should be based on average yields from a coker built in the year 2000, which is when the Quality Bank's hypothetical coker was assumed to be constructed.[186] The ALJ ruled that the FERC has held that "the objective of the QB methodology was to mimic a typical West Coast coker."[187] The ALJ found that the coker yields Petro Star proposed were not based on the operating conditions of a typical West Coast coker[188] and that Petro Star did not show that its coker

175. *Id.* at P 51.
176. *Id.* at P 17.
177. 179 FERC ¶ 63,013, at P 17.
178. *Id.* at P 49.
179. *Id.* at PP 49, 51.
180. *Id.* at P 64.
181. 179 FERC ¶ 63,013, at P 73.
182. *Id.* at P 101.
183. *Id.* at P 126.
184. *Id.* at P 117.
185. 179 FERC ¶ 63,013, at PP 122, 125.
186. *Id.* at P 312.
187. *Id.* at PP 318 (quoting *BP Pipelines (Alaska) Inc.*, 149 FERC ¶ 61,149 at P 65 (2014)).
188. *Id.* at PP 325-26.

yields were consistent with yields from a typical West Coast coker.[189] The ALJ concluded that Petro Star failed to prove that circumstances had changed since FERC's previous approval of the coker yields.[190]

The ALJ rejected Petro Star's argument that the Resid characteristics that are used to adjust coker product yields are outdated, finding that the Resid properties remain representative.[191] The ALJ also rejected Petro Star's claim that the TAPS Carriers violated their tariffs.[192]

Lastly, Petro Star argued that the effective date for the changes it proposed to the Resid methodology should be November 20, 2014, the date of the FERC order that was remanded by the D.C. Circuit.[193] Petro Star argued that precedent supported placing "Petro Star in the position it would have been had FERC not committed legal error."[194] The ALJ held that Petro Star had failed to prove that the Resid methodology is unjust and unreasonable and that, even if Petro Star had, it would not be entitled to retroactive relief.[195]

VI. PIPELINE SAFETY

A. PHMSA Adopts New Regulations Establishing Valve Installation and Rupture Detection Requirements for Certain Gas, Hazardous Liquid and Carbon Dioxide Pipelines.

On April 8, 2022, the Pipeline and Hazardous Materials Safety Administration (PHMSA) issued a final rule adopting new valve installation and rupture detection requirements for certain onshore gas, hazardous liquid, and carbon dioxide pipelines.[196] The Final Rule responded to recommendations of the National Transportation Safety Board and to a congressional mandate contained in the Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011.[197] The new regulations became effective October 5, 2022, and are intended to improve an operator's ability to respond to releases and ruptures that occur on pipeline systems to better protect the public and the environment.[198]

189. 179 FERC ¶ 63,013, at PP 327-28.

190. *Id.* at P 337.

191. *Id.* at PP 345, 360.

192. *Id.* at P 386.

193. 179 FERC ¶ 63,013, at P 440.

194. *Id.*

195. *Id.* at PP 447, 461.

196. Final Rulemaking, *Pipeline Safety: Requirement of Valve Installation and Minimum Rupture Detection Standards*, 87 Fed. Reg. 20,940 (2022) (to be codified at 49 C.F.R. pts. 192, 195).

197. *Id.* at 20,941 (citing Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011, Pub. L. No. 112-90, 125 Stat. 1904, 1906-1907 (Jan. 3, 2012)).

198. *Id.*

The final rule contains new requirements addressing the installation of rupture mitigation valves, valve spacing, valve shut-off requirements, notification requirements, valve maintenance, integrity management, and emergency response.[199]

1. Rupture Mitigation Valves

Operators of certain onshore gas, hazardous liquid, and carbon dioxide pipelines that are constructed or "entirely replaced" after April 10, 2023, must comply with new rupture mitigation valve (RMV) installation requirements.[200] An RMV is as an automatic shut-off valve (ASV), or remote-control valve (RCV) "that a pipeline operator uses to minimize the volume of gas released from the pipeline and to mitigate the consequences of a rupture."[201] The term "entirely replaced" means the replacement of two or more miles, in the aggregate, of any contiguous five miles of pipeline during a 24-month period.[202] The RMV installation requirements apply, however, only to entirely replaced pipelines where a valve is added, replaced, or removed as part of the replacement project.[203] Certain gas pipelines in less populated areas are not subject to the requirement.[204]

2. Valve Spacing

New or entirely replaced gas, hazardous liquid and carbon dioxide pipelines must comply with new valve spacing requirements, subject to certain exceptions for gas transmission and regulated gas gathering pipelines.[205] New valve spacing and RMV requirements also apply to certain class-location-related replacements of gas transmission pipelines performed to comply maximum allowable operating pressure requirements.[206]

3. Valve Shutoff Requirements for Rupture Mitigation

New valve shut-off requirements apply to certain new or "entirely replaced" onshore pipeline segments.[207] The new requirements apply to (1) gas transmission and gathering line segments located in high consequence areas (HCA) or Class 3 or Class 4 locations, but not to segments in less populated areas if the pipe has a potential impact radius of 150 feet or less and (2) hazardous liquid or carbon dioxide pipeline segments located in or that could affect an HCA.[208]

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199. *Id.*
200. 87 Fed. Reg. 20,940, at 20,972.
201. *Id.* at 20,972, 20,982.
202. *Id.* at 20,941.
203. *Id.*
204. 87 Fed. Reg. 20,940, at 20,963.
205. *Id.* at 20,965, 20,972.
206. *Id.* at 20,965-66.
207. *Id.* at 20,972.
208. 87 Fed. Reg 20,940, at 20,984, 20,987.

4. Notification of Potential Rupture and Response to Rupture Identification

Operators who are notified of a potential rupture must take certain actions. Upon notification, an operator must identify the rupture and isolate the ruptured segment within 30 minutes.[209]

5. Valve Maintenance

The Final Rule establishes new valve maintenance activities. If an RMV cannot respond within 30 minutes of notification of a rupture, an operator must revise its response efforts.[210] Any inoperable valves must be repaired or replaced within 12 months.[211] The final rule also establishes testing requirements for RMVs.

6. Integrity Management

Emergency flow restricting devices installed on certain new or entirely replaced hazardous liquid and carbon dioxide pipelines, and placed into service after April 10, 2023, must meet RMV requirements.[212] Operators of gas transmission pipelines must conduct risk assessments and install RMVs if the assessment shows that an RMV is an efficient means to protect an HCA.[213]

7. Emergency Response

Operators must create and maintain means of communicating with appropriate public safety answering points (i.e., 9-1-1 emergency call center), investigate failures, and implement lessons learned after an incident.[214] Operators' procedures must require immediate and direct access to 9-1-1 call centers or coordination with government officials.[215]

B. Direct Criminal Referrals to Department of Transportation Office of Inspector General

On May 11, 2022, PHMSA issued a final rule amending an existing procedural regulation governing criminal referrals to the Department of Transportation's (DOT) Office of Inspector General (OIG) to clarify that PHMSA employees may refer actual or possible criminal activity in connection with PHMSA's jurisdictional statutes directly to OIG.[216] The previous regulation had contemplated that employees report criminal activity through internal channels within PHMSA's

209. *Id.* at 20,977.
210. *Id.*
211. *Id.*
212. 87 Fed. Reg 20,940, at 20,975.
213. *Id.* at 20,986.
214. *Id.* at 20,942.
215. *Id.*
216. Final Rulemaking, *Administrative Rulemaking – Criminal Referrals*, 87 Fed. Reg. 28,779 (2022) (to be codified at 49 C.F.R. pts. 107, 190).

Office of Chief Counsel, which would then direct such allegations to the Department of Justice. The regulations, however, were silent with respect to whether employees could make criminal referrals directly to OIG.[217]

The final rule was issued in response to an August 22, 2018 OIG audit report.[218] The OIG audit report concluded that the previous regulations of DOT and its operating administrations, such as PHMSA, which required employees to report potential criminal activity through internal channels was outdated and could hinder employee referrals of actual or possible criminal activity to OIG.[219] Following issuance of that report, DOT issued Order 8000.8A expressly allowing employees to make criminal referrals directly to OIG.[220] PHMSA's clarification to § 190.293 makes its employee criminal referral process consistent with that of DOT. The final rule became effective May 11, 2022.[221]

217. *Id*.
218. *Id.*
219. *Id.*
220. 87 Fed. Reg. 28,779, at 28,779.
221. *Id.*