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 January 1, 2024, and December 31, 2024.*

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I. JURISDICTION

A. Cantium, LLC v. Rosefield Fourchon Operating, LLC, 187 FERC ¶ 61,155 (2024), Docket No. OR24-5-000.

On June 11, 2024, the Commission issued its "Order Dismissing Complaint," *Cantium, LLC v. Rosefield Fourchon Operating, LLC*.[1] The proceeding originated in a February 7, 2024, complaint filed by Cantium, LLC (Cantium) alleging that Rosefield Fourchon Operating LLC (Rosefield) had been providing transportation of Cantium's oil without a FERC tariff, in violation of the Interstate Commerce Act (ICA).[2] The Commission stated that Fourchon Terminal, located at Port Fourchon, Louisiana, consisted of de-watering equipment, tanks, terminal connecting lines, and metering equipment and that Fourchon was connected to upstream pipelines as well as two downstream pipelines, one owned by Chevron.[3] Rosefield owns three tanks, with appurtenant lines and metering facilities that it purchased from Chevron in 2023, and operates one of the tanks.[4] Cantium transports oil from offshore wells to the de-watering facilities at Fourchon and to the terminal facilities of Rosefield, then to the downstream pipelines sourced at Fourchon.[5] Chevron's previous FERC tariff on file for the Fourchon terminal services was canceled after selling the terminal assets to Rosefield, who did not file a FERC tariff but charges terminal fees posted on Rosefield's website.[6]

In its complaint, Cantium contended that Rosefield provided services that were "integral to interstate transportation" under the ICA, that the Fourchon terminal service was "part of a continuous interstate movement of crude from offshore" to Chevron's pipeline, that the de-watering service at Fourchon was necessary to meet quality specifications on the downstream pipeline, and that Chevron had provided the service under a FERC tariff.[7] Cantium also argued that FERC had found the de-watering and terminal service at Fourchon to be subject to ICA jurisdiction in a prior enforcement proceeding.[8] Cantium further argued that its transportation through Rosefield's terminal was part of a continuous interstate movement that was interstate in nature because it met four standards for interstate movements, demonstrated by a "fixed and persisting intent" to ship in interstate

1. *See, e.g.*, *Cantium, LLC v. Rosefield Fourchon Operating, LLC*, 187 FERC ¶ 61,155 (2024).
2. *Id.* at P 1.
3. *Id.* at P 2.
4. *Id.* at P 3.
5. 187 FERC ¶ 61,155, at P 4.
6. *Id.* at P 5.
7. *Id*. at P 6.
8. *Id.* (citing *S. Timbalier Pipeline Sys.*, 29 FERC ¶ 61,345 (1984)).

commerce, payment of a downstream FERC tariff, the movements were part of an uninterrupted, continuous interstate movement,[9] and no change in ownership of the crude had occurred during the movement. Cantium maintained that Rosefield's 270% increase in fees following the cancelation of Chevron's tariff was unreasonable and unlawful.[10] Rosefield opposed the complaint, contending that its service was a non-jurisdictional merchant storage service.[11] Rosefield further contended that there was no continuous interstate movement (the upstream pipeline not having a FERC tariff) and that a downstream break in transportation prevented Cantium from meeting the requirement of having a "fixed and persistent intent" to transport in interstate commerce;[12] Rosefield also contended that South Timbalier did not govern, *inter alia*, as a non-precedential order.[13]

The Commission found that the Rosefield service was a non-jurisdictional terminal service and dismissed the complaint.[14] The Commission noted that its jurisdiction was limited to pipeline transportation[15] and that Rosefield provided merchant storage and terminaling service not "integral to the transportation function" that occurred before interstate transportation commenced.[16] The Commission found the "continuous interstate movement" argument by Cantium to be inapplicable because the service provided by Rosefield was not "transportation."[17] The Commission also found *South Timbalier* not binding because it involved stipulated findings in a consent decree and further found that later precedents supported the conclusion that the service in question was not jurisdictional.[18]

B. Targa Badlands LLC, 186 FERC ¶ 63,023 (2024), Initial Decision, Docket No. OR23-2-000.

On March 26, 2024, Presiding Administrative Law Judge Patricia Hurt issued her "Initial Decision" (ID), *Targa Badlands LLC*,[19] in response to a Commission order initiating an investigation into whether: (1) the pipelines under review still qualified for a temporary waiver of tariff and reporting obligations and (2) whether the pipelines were providing transportation in violation of the ICA.[20] The investigation stemmed from a complaint filed in 2020 by Enerplus Resources (USA) Corporation (Enerplus) that alleged that Targa Badlands LLC and Targa Fort Berthold LLC (collectively, Targa) engaged in undue discrimination against Enerplus through the services provided (via purchase and sale agreements, a form of buy/sells); however, Enerplus did not challenge the continuation of the temporary

9. 187 FERC ¶ 61,155, at P 8.
10. *Id.* at P 9.
11. *Id.* at P 12.
12. *Id.* at P 13.
13. 187 FERC ¶ 61,155, at P 14.
14. *Id.* at P 15.
15. *Id.* at PP 15-16.
16. *Id*. at P 17.
17. 187 FERC ¶ 61,155, at P 18.
18. *Id.* at P 19.
19. *Targa Badlands LLC et al*., 186 FERC ¶ 63,023 (2024) (Initial Decision).
20. *Enerplus Re. (USA) Corp. v. Targa Badlands LLC*, 181 FERC ¶ 61,208 at P 2 (2022).

waivers that had been granted to Targa.[21] The Commission initially dismissed the complaint for failure to present "a coherent claim."[22] On rehearing, the Commission affirmed dismissal of the complaint but commenced an investigation into the two issues addressed by the ID.[23] In particular, the Commission found a need to further investigate whether there was third-party interest in transportation and whether such interest might occur in the future, in light of the purchase and sale agreements between Targa and various third parties.[24]

After submission of testimony and a hearing, the ID found that Targa's temporary waiver should be revoked on the grounds that it no longer met the four requirements for a waiver: 100% affiliated volumes;[25] no interest in third-party transportation;[26] no likelihood of interest in third-party transportation;[27] and no opposition.[28] The ID also found that Targa had not made required reports to the Commission regarding changes in circumstances affecting the temporary waivers that were a condition to continued waiver eligibility.[29] With respect to the question of whether Targa provided jurisdictional transportation subject to the ICA, the ID concluded that, consistent with *The Pipeline Cases*[30] and in contrast to *NGL Supply*,[31] Targa had been providing jurisdictional transportation.[32] Enerplus had also filed testimony alleging that Targa had unlawfully discriminated against it with respect to its volumes on the pipeline, and Targa had moved for summary disposition of those claims.[33] The ID denied the motion for summary disposition but also took "no position on the merits of Enerplus's undue discrimination claim."[34]

Following issuance of the ID, Enerplus and Targa filed briefs on exceptions, which are pending before the Commission.

21. 186 FERC ¶ 63,023, at P 8.

22. *Enerplus Res. (USA) Corp. v. Targa Badlands LLC et al.*, 174 FERC ¶ 61,241 at P 9 (2021).

23. 181 FERC ¶ 61,208, at PP 1-2.

24. *Id.* at P 15.

25. 186 FERC ¶ 63,023, at P 46 (finding the evidence that Targa owned the oil in its line "ambiguous at best").

26. *Id.* at P 69 (distinguishing cases relied upon by Targa).

27. *Id.* at P 75.

28. *Id.* at P 84 (although no shipper/producer opposition appeared on the record, the ID cited restrictive clauses in the purchase and sale agreements that prohibited opposition to the temporary waivers, as a factor that "cast doubt" on the absence of opposition, and concluded that "insufficient information" existed for a conclusion on the issue).

29. 186 FERC ¶ 63,023, at P 90.

30. *See, e.g.*, United States v. Ohio Oil Co. (The Pipeline Cases), 234 U.S. 548 (1914).

31. *NGL Supply Wholesale, LLC v. Phillips 66 Pipeline LLC*, 172 FERC ¶ 61,016 (2020).

32. 186 FERC ¶ 63,023, at P 115 (finding specifically that "Targa's PSAs are nothing more than a sham arrangement meant to disguise jurisdictional transportation service and evade Commission scrutiny").

33. *Id.* at P 116.

34. *Id.* at P 125.

II. TARIFF AND RATEMAKING ISSUES

A. Revision of the Index Ceiling Levels

1. Liquid Energy Pipeline Ass'n v. FERC, 109 F.4th 543 (D.C. Cir. 2024).

Every five years, FERC reviews the methodology used by oil pipelines to set their maximum rates. In 2020, FERC conducted its five-year review for the index cycle and issued its 2020 Index Order[35] setting an oil pipeline index level of Producer Price Index for Finished Goods (PPI-FG) plus 0.78% for the period July 1, 2021 to June 30, 2026, which became effective July 1, 2021.[36] Several parties sought rehearing, and, on January 20, 2022, FERC issued its Rehearing Order granting rehearing and setting a new index level of PPI-FG minus 0.21%, effective on March 1, 2022, for the remainder of the current index cycle.[37] Oil pipeline carriers and shippers both sought review of the Rehearing Order at the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit).[38]

On July 26, 2024, the D.C. Circuit granted the Liquid Energy Pipeline Association's (LEPA) petition for review and vacated the Rehearing Order, concluding that FERC had violated the Administrative Procedure Act (APA) in the issuance of the Rehearing Order by failing to comply with the APA's required notice-and-comment procedures.[39] The APA requires agencies such as FERC to provide notice of a proposed rule and opportunity to comment prior to a rule's promulgation, amendment, modification, or repeal.[40] The D.C. Circuit explained that the 2020 Index Order rule, which was promulgated after affording the APA's required notice-and-comment procedures, went into effect on July 1, 2021. At that point, the 2020 Index Order became a final rule and any further changes to that final rule equally required the notice-and-comment procedures set forth in the APA.[41] When FERC issued the Rehearing Order adjusting the final 2020 Index Order, however, it did so without affording the opportunity for notice-and-comment procedures; the D.C. Circuit therefore, found the Rehearing Order invalid.[42]

FERC argued that it complied with the APA because it properly undertook notice-and-comment procedures when first establishing the index in the 2020 Index Order and that the index proceeding remained ongoing through completion of FERC's rehearing proceedings such that further notice-and-comment procedures

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35. *See, e.g.*, *Five-Year Review of the Oil Pipeline Index*, 173 FERC ¶ 61,245 (2020) (2020 Index Order), *order on reh'g*, 178 FERC ¶ 61,023 (2022) (Rehearing Order), *order on reh'g*, 179 FERC ¶ 61,100 (2022), *vacated and remanded sub nom.*, Liquid Energy Pipeline Ass'n v. FERC, 109 F.4th 543 (D.C. Cir. 2024), *order on remand*, *Revisions to Oil Pipeline Regulations*, 188 FERC ¶ 61,173 (2024) (Remand Order).

36. *See* 2020 Index Order, 173 FERC ¶ 61,245, at P 63; *see also Liquid Energy Pipeline*, 109 F.4th at 546.

37. 178 FERC ¶ 61,023, at P 106.

38. *Liquid Energy Pipeline*, 109 F.4th at 546-549.

39. *Id*. at 549.

40. *Id.* at 547 (citing Humane Soc'y v. USDA, 41 F.4th 564, 568 (D.C. Cir. 2022); quoting Am. Hosp. Ass'n v. Bowen, 834 F.2d 1027, 1044 (D.C. Cir. 1987)).

41. *Id.*

42. *Liquid Energy Pipeline*, 109 F.4th at 547 (citing *Humane Soc'y*, 41 F.4th at 568; quoting *Am. Hosp. Ass'n*, 834 F.2d at 1044).

were not required in its issuance of the Rehearing Order.[43] The D.C. Circuit rejected the argument, concluding that because the Rehearing Order substantively changed a final valid agency rule — the 2020 Index Order that went into effect July 1, 2021 — the Rehearing Order could not evade the APA's notice-and-comment requirements, relying on Court precedent that there is no omnibus "rehearing exception" to the APA's notice-and-comment requirements.[44] In addition, the court rejected FERC's argument that LEPA failed to exhaust their APA challenge by failing to assert it before FERC.[45] Based upon FERC's failure to comply with the APA in the issuance of the Rehearing Order, the D.C. Circuit vacated the Rehearing Order and ordered FERC to reinstate the 2020 Index Order.

2. Supplemental Review of the Oil Pipeline Index Level, 189 FERC ¶ 61,030 (2024).

On October 17, 2024, the Commission issued a Supplemental Notice of Proposed Rulemaking (SNOPR) to establish the index level for oil pipeline rate increases at PPI-FG minus 0.21% for the remainder of the five-year period that began July 1, 2021.[46] On December 17, 2020, the Commission issued an order establishing the index level at PPI-FG plus 0.78%.[47] On rehearing, the Commission reduced the index ceiling to PPI-FG minus 0.21%.[48] In *Liquid Energy Pipeline Association v. FERC*, the D.C. Circuit held that the Commission had violated the APA by amending the initial index without providing notice and an opportunity to comment and accordingly vacated the Rehearing Order and ordered the Commission to reinstate the initial index.[49]

In the SNOPR, the Commission proposed to reinstate the same index level of PPI-FG minus 0.21% that it had established in the Rehearing Order.[50] This rate was calculated by using the data for the middle 50% of pipeline companies instead of the middle 80% used for the initial index because the Commission stated that this produces a more accurate measure of normal pipeline cost changes (80% includes pipelines with extraordinary cost changes not representative of ordinary pipeline operations, including extraordinarily high cost increase resulting for rate base expansion, plant retirement, or localized changes in supply and demand).[51] The Commission stated that just eight pipelines, representing only 2.10% of barrel-miles, account for most of the difference between using 50% and 80% and that

43. *Id.* at 548.

44. *Id.* (citing Clean Air Council v. Pruitt, 862 F.3d 1, 8-9 (D.C. Cir. 2017); Consumer Energy Council of Am. v. FERC, 673 F.2d 425, 445 n.71 (D.C. Cir. 1982)).

45. *Id.* at 546-47.

46. Supplemental Notice of Proposed Rulemaking, *Supplemental Review of the Oil Pipeline Index Level*, 189 FERC ¶61,030 (2024) [hereinafter SNOPR]

47. *See Five-Year Review of the Oil Pipeline Index*, 173 FERC ¶ 61,214 (2020).

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

49. *Liquid Energy Pipeline*, 109 F.4th at 549.

50. SNOPR, *supra* note 46, at P 12.

51. *Id*. at PP 13, 15.

the benefit of a larger sample size would not outweigh the risk that the additional data will distort the measurement of normal cost change.[52]

The other change from the initial index methodology proposed was to use data that reflects the effects of the Commission's 2018 policy change (Tax Policy Change) requiring Master Limited Partnership (MLP)-owned pipelines to eliminate the income tax allowance and previously accrued Accumulated Deferred Income Taxes balances from their cost of service.[53] Because oil pipeline rates have not incorporated the Tax Policy Change and because indexing is the Commission's primary ratemaking methodology for oil pipelines, the Commission's SNOPR index calculation addressed the Tax Policy Change.[54]

Finally, the SNOPR proposed that pipelines "recalculate their ceiling levels on a prospective basis as though the revised index was effective throughout the five-year period."[55] This approach, the Commission stated, "will set the going-forward index rates at the proper level in future years" and "reflect the appropriate use of the middle 50% (not the distortions caused by the adoption of the middle 80%) as well as the elimination of the MLP income tax allowance."[56]

3. Order Reinstating Index Level, 188 FERC ¶ 61,173 (2024).

On September 17, 2024, FERC issued its *Order Reinstating Index Level* to the original PPI-FG plus 0.78% level set by the Commission in the 2020 Index Order,[57] as required by the D.C. Circuit's order in *Liquid Energy Pipeline Ass'n v. FERC*.[58] FERC stated that "[p]ipelines may file to prospectively increase their indexed rates to their recomputed ceiling levels pursuant to section 342.3(e) of the Commission's regulations," including on less than thirty days' notice.[59] FERC also stated that any pipeline not filing tariffs pursuant to the reinstated index level is required to make informational filings within thirty days showing their recomputed ceiling levels reflecting the reinstated index level.[60] FERC indicated that it would address other issues related to the D.C. Circuit's opinion in *Liquid Energy Pipeline* in a subsequent order.[61]

52. *Id*. at P 17.
53. *Id*. at P 25.
54. SNOPR, *supra* note 46, at P 25.
55. *Id*. at P 37.
56. *Id*.
57. 188 FERC ¶ 61,173, at P 1.
58. *Liquid Energy Pipeline*, 109 F.4th at 549.
59. 188 FERC ¶ 61,173, at P 2.
60. *Id*.
61. *Id.* at P 3.

B. TransCanada Keystone Pipeline, LP, Opinion No. 590, 188 FERC ¶ 61,077 (2024).

On July 25, 2024, the Commission issued its Order on Initial Decision[62] both affirming and reversing in part the Administrative Law Judge (ALJ)'s ID.[63] The Commission directed TransCanada Keystone Pipeline, LP (Keystone) to file a compliance filing within forty-five days of the Order's issuance.[64]

The Commission reversed the ID's determination on choice of law and adopted the Joint Complainants' position that Canadian law should apply to the Transportation Service Agreements (TSAs).[65] The Commission also held that the record did not provide a persuasive basis to deviate from the TSAs' choice-of-law provision.[66]

The Commission affirmed the ID's holding that, according to the TSAs, capitalized General Plant and Maintenance Costs (GPMCs) and Non-Routine Adjustment Costs (NRA) are recoverable in the Variable Rate.[67] The Commission found that GPMCs are maintenance costs and therefore encompassed by the Operating, Maintenance and Administration (OM&A) costs which can be recovered through the Variable Rate.[68] The TSAs do not distinguish between capitalized and non-capitalized GMPCs, instead the TSAs allow the recovery of all maintenance costs.[69] The TSAs expressly provide that NRA costs can be recovered through the Variable Rate.[70] Likewise, the TSAs do not include language which distinguishes between capitalized and non-capitalized NRA costs or call for excluding capitalized NRA costs from the Variable Rate.[71]

The Commission affirmed the ID's finding that Keystone may include a return on all capitalized NRA costs in the Variable Rate; however, the Commission reversed and said that Keystone cannot earn a return on non-capitalized NRA costs or any GPMCs.[72] The Commission held that the TSAs permit Keystone to earn a return on capitalized NRA costs.[73] On the other hand, Keystone cannot include non-capitalized NRA costs because they are expenses that Keystone would ordinarily recover in the year they were incurred but for their magnitude.[74]

62. Opinion No. 590, *TransCanada Keystone Pipeline, LP*, 188 FERC ¶ 61,077 (2024).
63. *TransCanada Keystone Pipeline, LP*, 182 FERC ¶ 63,013 (2023).
64. 188 FERC ¶ 61,077, at P 2.
65. *Id.* at P 14.
66. *Id.* at P 15.
67. *Id.* at P 31.
68. 188 FERC ¶ 61,077, at P 31.
69. *Id.*
70. *Id.*
71. *Id.*
72. 188 FERC ¶ 61,077, at P 42.
73. *Id.* at P 43.
74. *Id.* at P 44.

The Commission reversed the ID's holding and found that Keystone must determine the amortization period for each capitalized NRA based on the applicable accounting rules as required by the TSAs.[75] Good accounting practice generally provides for the recovery of capitalized costs over time through amortization via depreciation.[76] Further, the Commission held that Keystone's current method for amortizing capitalized NRA costs for recovery in the Variable Rate is not consistent with "good accounting practice" and therefore the TSAs.[77]

The Commission upheld the ID's determination on Drag Reducing Agent (DRA) and that Keystone had appropriately recovered DRA commodity and DRA skid costs in the Variable Rate.[78] The Commission noted that the TSAs do not reference DRA costs; however, the TSAs do broadly define OM&A costs to include "all operating, maintenance and administration costs and expenses," including costs related to "pipeline inspection and pipeline repairs" and "all other costs and expenses similar in nature to any of the foregoing."[79] Therefore, DRA is properly classified as an OM&A cost because Keystone uses DRA to mitigate capacity constraints in operating Keystone.[80] Likewise, the costs of DRA skids installed for OM&A purposes are recoverable in the Variable Rate.[81]

The Commission generally affirmed the ID's holding that Keystone may recover Incident Costs from the three release incidents in the period at issue in the proceeding through the Variable Rate and that Keystone properly included these Incident Costs in the Variable Rate.[82] The Incident Costs are recoverable through the Variable Rate based on the TSAs' plan language as OM&A costs are defined broadly to include "all" costs and expense related to the OM&A of the pipeline.[83] The Commission did reject the ID to the extent it interpreted the TSAs to permit Keystone to recover imprudently incurred costs without any limitation.[84]

The Commission upheld the ID's approval of Keystone's allocation of Enterprise Service Costs to the Variable Rate.[85] The Commission determined that Enterprise Service Costs are a type of corporate overhead cost that is incurred with respect to Keystone U.S. and therefore is included in the definition of OM&A costs, which can be recovered through the Variable Rate.[86] The Commission also found that as there is no specific allocation methodology outlined in the TSAs, TC Energy's use of the Time Activity Analysis (TAA) methodology for allocating

75. *Id.* at P 52.
76. 188 FERC ¶ 61,077, at P 53.
77. *Id.* at P 54.
78. *Id.* at P 81.
79. *Id.*
80. 188 FERC ¶ 61,077, at P 83.
81. *Id.* at P 85.
82. *Id.* at P 97.
83. *Id.* at P 101.
84. 188 FERC ¶ 61,077, at P 111.
85. *Id.* at P 131.
86. *Id.* at P 132.

Enterprises Service Costs to Keystone U.S. in the Variable Rate is reasonable based upon the record.[87]

The Commission also affirmed the ID and adopted Trial Staff's proposed modification to Keystone's existing methodology for allocating cost between Keystone U.S. and Marketlink.[88] The TSAs do not directly specify a method for allocating costs to pipeline lessees, such as Marketlink.[89] Therefore, the Commission noted that when it is "choosing among different cost allocation methodologies, 'the Commission considers which methodology most closely conforms to the Commission's long-standing practice of trying to align cost allocation with cost causation' and avoids cross-subsidization between shippers."[90] The Commission used these principles to affirm the ID's decision that the Blended Allocator in Step Three of Keystone's Marketlink cost-allocation methodology was not just and reasonable and that Trial Staff's proposed replacement for the Blender Allocator was just and reasonable.[91]

Finally, the Commission affirmed the ID's determination that Joint Complainants' claims are not fully time barred and that the reparations period began on October 9, 2018.[92] The Commission stated that the ICA generally allows reparations for up to two years prior to the date of filing a complaint if the pipeline's rates exceeded what is a just and reasonable rate as established in the proceeding.[93] The ICA also states that the cause of action of a shipment of property will be deemed to accrue upon delivery or tender of delivery of the carrier and not after.[94] Therefore, Joint Complainants' claims accrued based on the date of delivery of each shipment on which a challenged rate was charged.[95] Further, for reparation limitation purposes under the ICA, a claim accrued as to each shipment under the TSAs on the date each shipment was delivered.[96] Because the Complaint was filed on October 9, 2020, Joint Complainants are only eligible for reparations as to shipments that were delivered on or after October 9, 2018.[97]

C. Colonial Pipeline Co., 186 FERC ¶ 61,213 (2024), Order on Rehearing, Docket No. IS23-225.

On March 25, 2024, the Commission issued the "Order Rejecting Request for Rehearing," in *Colonial Pipeline Company* (Colonial),[98] affirming its prior or-

87. *Id.* at P 134.
88. 188 FERC ¶ 61,077, at P 139.
89. *Id.* at P 168.
90. *Id.* (quoting Opinion No. 522, *SFFP, L.P.*, 140 FERC ¶ 61,220 at P 100 (2012)).
91. *Id.* at P 169.
92. 188 FERC ¶ 61,077, at P 182.
93. *Id.* at P 189.
94. *Id.*
95. *Id.*
96. 188 FERC ¶ 61,077, at P 198.
97. *Id.*
98. *See, e.g.*, *Colonial Pipeline Company*, 186 FERC ¶ 61,213 (2024) (Colonial Rehearing Order).

der accepting a tariff filing that, *inter alia*, allocated responsibility for damage related to a shipper's tender of off-specifications product to the shipper.[99] In the *Colonial Tariff Order*, the Commission had accepted Colonial's tariff revision to Item 10(b) of its Rules and Regulations (among other revisions); the revised Item 10(b) made shippers responsible for damage resulting from tendering off-specification product (subject to certain revisions and modifications to the originally filed language).[100] The Commission found that the pipeline had supported the need for the revision based on specific past quality problems,[101] found that the ICA's section 20(11) did not prevent the proposal,[102] found that it would not allow double-recovery,[103] and declined to exempt jet fuel shipments.[104] Shippers filed requests for rehearing on the damages issue. The Commission rejected the requests on procedural grounds[105] but also rejected the shippers' arguments on the merits.[106] The Commission declined to impose a specific burden of proof on the pipeline,[107] further declined to impose further clarification of the language relating to shipper causation,[108] and dismissed a request to impose additional explanatory obligation on the pipeline as being improperly raised for the first time on rehearing.[109]

D. Bayou Bridge Pipeline LLC, 188 FERC ¶ 61,091 (2024), Docket. Nos. IS24-36, et al.

On July 31, 2024, the Commission issued the "Order Rejecting Tariffs," *Bayou Bridge*,[110] which addressed the merits of protests to tariff records filed by six pipelines (the Carriers)[111] that proposed to impose a binding nomination process and a shortfall charge; in an earlier order,[112] the Commission had accepted and suspended the filings subject to the outcome of a paper hearing; on the basis of the paper record, the Commission determined to reject the tariff records. The Carriers' proposal involved imposing a nomination shortfall charge applicable when shippers' timely nominations exceeded tendered volumes; the charge being equal to the difference between volumes nominated and volumes delivered to a shipper in a month, multiplied by the applicable tariff.[113] Carriers argued that

99. *See, e.g.*, *Colonial Pipeline Company*, 185 FERC ¶ 61,209 (2023) (Colonial Tariff Order).
100. *Id.* at P 30.
101. *Id.* at P 33.
102. *Id.* at P 34.
103. 185 FERC ¶ 61,209, at P 35.
104. *Id.* at P 36.
105. 186 FERC ¶ 61,213, at P 9 (citing 18 C.F.R. § 385.713(c)(3) (2023)).
106. *Id.* at P 10.
107. *Id.*
108. *Id.* at P 11.
109. 186 FERC ¶ 61,213, at P 12.
110. *See, e.g.*, *Bayou Bridge Pipeline LLC et al.*, 188 FERC ¶ 61,091 (2024).
111. *Id.* at P 1 (The tariffs were filed separately in different dockets, but they were consolidated for decision).
112. *See, e.g.*, *Bayou Bridge Pipeline LLC et al.*, 185 FERC ¶ 61,229 (2023) (Paper Hearing Order).
113. 188 FERC ¶ 61,091, at P 3.

shippers could add additional volumes via supplemental nominations and, following numerous shipper protests, offered a number of modifications to address the protests, including a five percent tolerance band and a *force majeure* exception (two per year, defined as a total shutdown of supply of crude or refinery production).[114] Carriers contended that the proposal was intended to restrain persistent over-nominations by shippers, who would still retain flexibility to add volumes by later nominations, capacity permitting, and that such restrictions have been permitted in the absence of prorationing;[115] the Carriers included evidence of over-nominations, and attendant operational problems.[116]

Shippers raised numerous criticisms, including the absence of a requirement that the pipeline be in prorationing,[117] the focus of the charge on deliveries rather than tenders in a month,[118] the nature of the factual evidence of harm (specificity[119] and inapplicability to all of the carriers proposing the changes[120]), as well as faulting the accuracy/selectivity of the data used by the Carriers.[121] The Carriers responded, arguing that their proposed modifications mooted some of the criticisms,[122] reaffirmed the sufficiency[123] and accuracy[124] of their supporting data, argued that under-nominations would be more easily addressed than over-nominations,[125] contended that precedents supported imposition of such a charge in the absence of prorationing,[126] and asserted that the proposals would "harmonize" provisions among the participating pipelines.[127]

The Commission rejected the various arguments of the Carriers in support of the proposed revisions, citing in particular the failure to account adequately for events outside shippers' control,[128] the possible impacts of the charge on the accuracy of nominations,[129] the size of the proposed 5% tolerance level,[130] the scope of the *force majeure* exception,[131] which the Commission found collectively may have rendered the proposal "overly burdensome."[132] The Commission further found that the Carriers had not submitted sufficient evidentiary support for the

114. *Id*. at P 6.
115. *Id*. at P 7.
116. *Id*. at P 8.
117. 188 FERC ¶ 61,091, at P 9.
118. *Id*. at P 10.
119. *Id*. at P 11.
120. *Id*. at P 12.
121. 188 FERC ¶ 61,091, at P 13.
122. *Id.* at P 14.
123. *Id*. at P 15.
124. *Id*. at P 16.
125. 188 FERC ¶ 61,091, at P 17.
126. *Id*. at P 18.
127. *Id*. at P 19.
128. *Id*. at P 25.
129. 188 FERC ¶ 61,091, at P 26.
130. *Id*. at P 27.
131. *Id*. at P 28.
132. *Id*. at P 29.

proposal and faulted the data as being selective, limited in scope as to the shippers and the number of pipelines represented, and that the data failed to show the scope of over-nominations relative to throughput per pipeline, among other issues.[133] The Commission noted that other over-nomination proposals approved in the past operated during periods of allocation and that the one case involving penalties during non-allocated periods allowed greater shipper flexibility.[134] The Commission disagreed that the proposal gave shippers sufficient control and flexibility,[135] dismissed the significance of the alleged need for uniform implementation because of a shared scheduling group,[136] and dismissed as well the assertion that less well-supported penalty proposals had been accepted in the past.[137] The Commission concluded that the Carriers had failed to meet their burden to support the proposal.[138]

E. Liquids Shippers Group, 186 FERC ¶ 61,135 (2024).

On February 22, 2024, the Commission issued the "Order Dismissing Petition," *Liquids Shippers Group*,[139] dismissing a petition filed in February 2018 by the Liquids Shippers Group that had requested that the Commission adjust its liquids pipeline indexing policies to account for the effects of the Tax Cuts and Jobs Act of 2017 (TCJA). The TCJA had decreased corporate tax rates, and the Petition requested that the Commission take steps to ensure that the lower tax rates enacted by the TCJA be reflected in July 1, 2018, index filings by requiring revised Form 2, Page 700 filings for 2017 to include the lower tax rates, to allow use of such revised Page 700 data in protests to index filings to be effective July 1, 2018, and to establish a new policy for investigation of index filings.[140]

The Commission noticed the Petition, and carrier interests opposed the filing on both procedural and substantive grounds.[141] In *Liquids Shipper Group*, the Commission dismissed the Petition as having been "sufficiently addressed" by other, subsequent orders.[142] The Commission noted that other orders had addressed the tax status of master limited partnerships as well as the timing of the need to reflect the TCJA rates in Form 6 (the 2018 Form 6, due in 2019),[143] that

133. 188 FERC ¶ 61,091, at P 30; *see also id.* at P 31 (The Commission rebuffed other data of alleged problems as being isolated and insufficient).

134. *Id*. at P 32.

135. *Id*. at P 33.

136. *Id*. at P. 34.

137. 188 FERC ¶ 61,091, at P 35.

138. *Id*.

139. *See, e.g.*, *Liquids Shippers Group.*, 186 FERC ¶ 61,135 (2024).

140. Petition of the Liquids Shippers Group for Expedited Action Addressing the Impact of Federal Income Tax Changes on Indexed Rate Increases for Oil Pipelines, FERC Docket No. OR18-16-000 at 4-5 (Feb. 28, 2018).

141. *See*, *e.g*., 186 FERC ¶ 61,135, at P 4; *see also*, *e.g*., Initial Comments of the Association of the Liquids Shippers Group, FERC Docket No. OR18-16-000 (Apr. 12, 2018).

142. 186 FERC ¶ 61,135, at P 5.

143. *Id.* (citing *Inquiry Regarding the Commission's Policy for Recovery of Income Tax Costs, Revised Policy Statement*, 162 FERC ¶ 61,227 (2018), *order on reh'g*, 164 FERC ¶ 61,030 (2018)).

the TCJA tax effects had been incorporated by the later five-year indexation review,[144] that the proposed change in protest standards had been addressed by a separate order,[145] and that the requests were mooted by the filing and respective regulatory treatment accorded the 2018 index filings.[146]

III. MARKET BASED RATES

A. Husky Marketing & Supply Co. v. FERC, 105 F.4th 418 (D.C. Cir. 2024).

On June 21, 2024, the D.C. Circuit issued a decision on petitions for review filed by two customers of MPLX Ozark Pipe Line (Ozark) who objected to the Commission's orders approving MPLX LP's (MPLX) application for market-based rates.[147] Two customers, Husky Marketing & Supply Company (Husky) and Phillips 66 Company (Phillips 66), argued that FERC's determination of the relevant destination market was incorrect.[148] The D.C. Circuit found that FERC's decision was neither arbitrary nor capricious and denied the petitions for review.[149]

The D.C. Circuit upheld the Commission's conclusion that the destination market was both Wood River, Illinois — where the pipeline terminates — and Patoka, Illinois — where a "substantial majority" of Ozark's volumes continue downstream on another MPLX-owned pipeline.[150] The court reasoned that it was "entirely logical" for the Commission to conclude that "limiting the geographic destination market to Wood River alone would fail to account for other pipelines" that customers could use to ship their oil to Patoka if MPLX attempted to exercise market power.[151]

The court also found that the Commission was not required to undertake a "SSNIP" test to determine the relevant destination market.[152] The "SSNIP" or "hypothetical monopolist" test analyzes whether a hypothetical firm with a monopoly in a certain area would profit from a "small but significant and non-transitory increase in price."[153] In the ID, the ALJ used the SSNIP test to find that the destination market was only Wood River.[154]

In reversing the decision of the ALJ, the Commission used a "simple fact-based evaluation of alternative choices available to customers served by the applicant pipeline," which the court found appropriate.[155] Rejecting the contentions of

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

145. *Id.* (*citing Standard Applied to Complaints Against Oil Pipeline Index Rate Changes*, 181 FERC ¶ 61,057 at PP 59-62 (2022)).

146. 186 FERC ¶ 61,135, at P 5.

147. Husky Mktg. & Supply Co. v. FERC, 105 F.4th 418, 419 (D.C. Cir. 2024).

148. *Id.* at 422.

149. *Id.* at 425.

150. *Id.* at 421.

151. *Husky*, 105 F.4th at 423.

152. *Id.* at 425.

153. *Id.* at 421 n.*.

154. *Id.* at 421.

155. *Husky*, 105 F.4th at 423.

Husky and Phillips 66 that FERC needed to "consult market data to derive a competitive price for transportation service to Wood River" or "evaluate market prices of delivered crude oil at Wood River or Patoka," the court stated that "FERC is under no obligation to demonstrate that prices on alternative pipelines would be acceptable to an applicant's customers absent a reason to think they would not be."[156]

The court also found that the Commission did not violate its "'statutorily required' duty to 'adhere to basic economic and competition principles'"[157] The court stated that "basic economic and competition principles" does not mean that the Commission is required to "support its market-definition and market-power determinations with detailed economic analysis."[158] While other cases "may require a more detailed analysis," the court held that "FERC was not required to perform any additional empirical analysis in this case."[159]

B. West Texas Gulf Pipe Line Co., Opinion No. 584-A, 187 FERC ¶ 61,103 (2024).

On May 23, 2023, the Commission issued an Order on Rehearing (Rehearing Order)[160] addressing challenges to an Order on Initial Decision (Initial Order)[161] which denied an application for market-based rate authority for the West Texas Gulf Pipe Line Company LLC and Permian Express Partners LLC (together, Applicants) oil pipelines in the Tyler, Texas Destination Market (Tyler Destination Market). The Applicants challenged the Initial Order's conclusions on (1) the exclusion of three competitive alternatives from the market-power analysis, (2) the calculation of market concentration and market-power measures, and (3) the Commission's refusal to consider other "pro-competitive" factors.[162] In the Rehearing Order, the Commission rejected the Applicants' objections and denied the Applicants' request for rehearing.[163]

Turning first to the Applicants' proposed competitive alternatives, the Commission affirmed the Initial Order's standards for evaluating proposed entrants to the Tyler Destination Market.[164] The Applicants had proposed three "unused alternatives" — shipping alternatives that are not currently used by customers in the proposed destination market — that would compete with the Applicants' pipelines if they attempted to exert market power.[165] The Initial Order stated that a market-based rate applicant must provide a "detailed, fact-specific inquiry into the capital

156. *Id.* at 424.

157. *Id.* (quoting Mobil Pipe Line Co. v. FERC, 676 F.3d 1098, 1104 (D.C. Cir. 2012)).

158. *Id.* at 424-25.

159. *Husky*, 105 F.4th at 425.

160. *See, e.g.*, Opinion No. 584-A, *W. Tex. Gulf Pipe Line Co. & Permian Express Partners LLC*, 187 FERC ¶ 61,103 (2024) (Order on Rehearing).

161. *See, e.g.*, Opinion No. 584, *W. Tex. Gulf Pipe Line Co. & Permian Express Partners LLC*, 184 FERC ¶ 61,182 (2023) (Order on Initial Decision).

162. 187 FERC ¶ 61,103, at P 7.

163. *Id.* at P 1.

164. *Id.* at PP 13, 22-23.

165. *Id.* at PP 9, 13.

expenditures needed for entry into the market," an analysis which the Commission acknowledged is "a complex undertaking."[166] The Applicants argued that this standard departed from prior Commission precedent by "replac[ing] a purely economic analysis with a review of multiple subjective factors" that incorporated "the motivations of shippers and carriers."[167]

In the Rehearing Order, the Commission rejected these arguments and upheld the Initial Order's standard.[168] The Commission emphasized that "an individualized assessment" of oil pipeline market-based rate applications is necessary because each pipeline is "distinct with respect to its proposed market, timing, and proposed unused alternatives."[169] The Commission's evaluation of the "subjective assumptions and inputs" included in an Applicant's price analysis of new entrants is therefore not a "marked departure" from the Commission's precedent but instead an application of the principle that applicants "must justify [the] inclusion" of new entrants.[170]

The Commission then reviewed the price analysis offered to support the new entrants, affirming the Initial Order's findings that it was flawed.[171] The Applicants argued that the Initial Order was incorrect when it found "numerous concerns" with the price analysis.[172] The Commission rejected the Applicants' criticisms and found that, *inter alia*, the price analysis was flawed because (1) its claims that the new competitive alternatives would be economically advantageous were undercut by the reality that none of the proposed entrants had begun construction, (2) it overvalued the likelihood that the only potential builder of the new entrants would be incentivized to pursue the new projects when it already owned a portion of an existing pipeline in the destination market, and (3) the analysis relied on outdated data which exaggerated the economic benefit of the new entrants.[173] The Commission also faulted the applicants for not accounting for the new entrants' "lost opportunity costs" in entering the market, such as the disruption of existing contractual agreements or the costs associated with reversing flows of crude oil to enter the market.[174]

Looking next at the computation of market power, the Rehearing Order affirmed the Initial Order's calculation of the Herfindahl-Hirschman Index (HHI).[175] The HHI measures market concentration, with an HHI of 1,800 or less indicating that a market is competitive and an HHI of 2,500 or more indicating that an applicant has "significant market power."[176] Using the effective capacity method,

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166. 187 FERC ¶ 61,103, at P 14.
167. *Id.* at P 17.
168. *Id.* at PP 22-23.
169. *Id.* at P 22.
170. 187 FERC ¶ 61,103, at P 22.
171. *Id.* at P 26.
172. *Id.* at PP 17, 25.
173. *Id.* at PP 26, 33, 46, 55.
174. 187 FERC ¶ 61,103, at PP 87, 89.
175. *Id.* at PP 139-45, 159-62.
176. *Id.* at P 116.

which uses total consumption of crude oil in the market instead of the total physical capacity that could serve the market, the Initial Order found an HHI of 2,870.[177] Disputing this calculation, the Applicants argued that the Initial Order's treatment of local oil production improperly raised total consumption in the market and therefore raised the HHI above 2,500.[178] The Applicants argued that the Initial Order should have deducted local production from market consumption because local production is "cheaper and thus preferable to deliveries by pipelines."[179]

In the Rehearing Order, the Commission was "unpersuaded" by the Applicants' arguments and held that local production should not be treated "differently from other competitive alternatives."[180] The Commission stated that its "typical practice" is to include local production as a competitive alternative and that prior decisions cited by the Applicants which found otherwise were outliers where the deduction was unchallenged.[181] The Commission also highlighted that most crude oil used in Tyler is sourced from pipelines, indicating that local production is not inherently preferable to pipeline deliveries.[182] Even if it were preferable, that would not mean that it should be deducted; the removal of any competitor that competes within a market "would distort the Commission's evaluation of the competition."[183] Lastly, the Commission refused to consider oil production from up to 238 miles outside the Tyler Refinery as local production because doing so without including two additional refineries within that radius would "improperly skew the HHI."[184]

On other pro-competitive factors in the Tyler Destination Market, the Commission found that it was "appropriate" that the Initial Order "decline[d] to consider such . . . factors."[185] The Commission stated that other pro-competitive factors are only considered if it is a "close call" that the applicant possesses market power.[186] The Applicants argued that an HHI of 2,870 indicated such a "close call" and the Commission accordingly should have considered these factors.[187] The Applicants further argued that the proposed new entrants into the Tyler Destination Market should be considered as pro-competitive factors.[188]

In the Rehearing Order, the Commission stated that the market statistics presented by the applicants do not indicate a "close call."[189] The Commission noted that the HHI was above 2,870 — more than the 2,500 HHI threshold for market power — and that the Initial Order stated that this figure might undercount the

177. *Id.* at P 117.
178. 187 FERC ¶ 61,103, at PP 124-38, 149-58.
179. *Id.* at PP 127, 132.
180. *Id.* at P 139.
181. *Id.* at P 140.
182. 187 FERC ¶ 61,103, at PP 141-43.
183. *Id.* at P 144.
184. *Id.* at PP 159-62.
185. *Id.* at P 175.
186. 187 FERC ¶ 61,103, at P 163.
187. *Id.* at PP 166-67.
188. *Id.* at P 170.
189. *Id.* at P 175.

actual HHI.[190] Even if the Commission considered other pro-competitive factors, the Commission would not have included the Applicants' proposed market entrants in that consideration.[191] While the Commission stated that new entrants could have been considered as pro-competitive factors since they are not included in the calculation on market participants, an applicant must still support their inclusion with a "detailed price analysis."[192] Since the Commission already found that price analysis "unreliable" here, the Applicants did not "meet their burden for inclusion of the potential new entrants as pro-competitive factors."[193]

IV. PIPELINE SAFETY

A. *INGAA v. PHMSA, No. 23-1173 (D.C. Cir. Aug. 16, 2024).*

On August 16, 2024, the D.C. Circuit issued an opinion vacating portions of new natural gas-related pipeline-safety standards promulgated by PHMSA.[194] PHMSA originally published an Advance Notice of Proposed Rulemaking regarding the proposed changes in 2011, and a Notice of Proposed Rulemaking was published in 2016.[195] The final rule was promulgated in 2022.[196]

The Interstate Natural Gas Association of America (INGAA) challenged five standards included in the final rule, "alleging flaws in the rulemaking process and inadequacies in PHMSA's final justifications."[197] The court agreed with INGAA regarding four of the five challenged standards (the high-frequency-electric resistance welding (ERW) standard, the crack-maximum allowable operating pressure (MAOP) standard, the dent-safety-factor standard, and the corrosive-constituent standard), vacating the standards because of PHMSA's failure to adequately explain why the benefits of the final standards outweigh their costs.[198] The court denied the petition regarding the pipeline-segment standard, explaining that PHMSA stated in the record that the minor change in wording at issue on which INGAA based its challenges to the preliminary and final cost-benefit analyses does not implement any substantive change, and INGAA provides no reason to doubt the agency's representations.[199]

190. 187 FERC ¶ 61,103, at P 175.

191. *Id.* at PP 177-78.

192. *Id.*

193. *Id.* at P 178.

194. *See, e.g.*, Interstate Nat. Gas Ass'n of Am. v. Pipeline & Hazardous Materials Safety Admin., 114 F.4th 744 (D.C. Cir. 2024).

195. *Id.* at 748.

196. *Id.*

197. *Id.* at 747.

198. *INGAA*, 114 F.4th at 747, 749.

199. *Id.* at 755.

1. High Frequency-ERW Standard

PHMSA's final rule imposed the same requirement for repair on modern pipes manufactured through high-frequency ERW as it did for pipes produced using the traditional low-frequency ERW process.[200] The regulations previously incorporated a version of industry safety standards known as ASME/ANSI B31.8S, which required operators to repair a pipeline upon discovering metal loss along longitudinal seams formed by low-frequency ERW.[201] However, the safety standard did not reference pipelines formed from the more recently developed high-frequency ERW process.[202]

The court found that PHMSA's analysis of its costs was unsupported by the record and imposes a new repair requirement.[203] PHMSA did not recognize this change as imposing a new repair requirement and therefore did not consider the costs imposed.[204] Because the agency imposed a new safety requirement without properly addressing the cost of doing so, the court vacated the standard as applied to seams formed by high-frequency ERW.[205]

2. Crack-MAOP Standard

PHMSA's final rule sought to address when immediate repair of cracks would be required, increasing the requirement from the proposed rule that operators immediately repair any anomaly in pipes when the predicted failure pressure was less than or equal to the 1.1-times the MAOP to instead require immediate repair for any crack or crack-like anomaly when the predicted failure is less than 1.25-times the MAOP.[206] The court found that PHMSA failed to analyze costs altogether and did not properly evaluate costs specific to this change given that this threshold increased burdens on operators.[207] The court vacated the standard for failure to consider these impacts separately but declined to consider "the precise extent to which the agency must particularize its cost-benefit analyses, or the extent to which it can calculate the costs and benefits of related provisions together."[208]

3. Dent-Safety-Factor Standard

PHMSA's final rule included a new sub-provision that sets forth procedures an operator must use as part of its engineering analysis when evaluating dents if the operator seeks to utilize the exception to avoid or delay the normal repair requirements.[209] PHMSA failed to discuss the costs of this standard entirely, leading

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200. *See id.* at 749-50.
201. *Id.*
202. *INGAA*, 114 F.4th at 750.
203. *Id.*
204. *Id.*
205. *Id.*
206. *INGAA*, 114 F.4th at 751.
207. *See id.* at 752.
208. *Id.*
209. *Id.* at 752-53.

the court to conclude that the standard must be vacated.[210] The court rejected calls from INGAA to vacate only the sub-provision but to leave the exception in place, explaining that the court has substantial doubt that PHMSA would have adopted the exception to the repair requirements without the subsection dictating the relevant procedures.[211]

4. Corrosive-Constituent Standard

PHMSA's final rule expanded on the proposed rule's attempt to add more specific requirements for operators to monitor and prevent internal corrosion of pipeline walls.[212] The proposed rule added a standard that would "require monitoring for deleterious gas stream constituents."[213] However, commenters objected to the breadth of the proposed standard, and the advisory committee proposed limiting the rule to the transportation of corrosive gas rather than corrosive constituents.[214] In response, PHMSA narrowed the final rule, instead requiring operators to "develop and implement a monitoring and mitigation program to mitigate the corrosive effects, as necessary" without explicitly requiring operators to identify potentially corrosive constituents in the gas being transported.[215] In one place, PHMSA argued that because FERC regulations already require some operators to monitor corrosive constituents, the new standard is not expected to add any incremental compliance activities or costs and instead codifies existing practice into regulation.[216] However, "'PHMSA [elsewhere] acknowledged that while there may be compliance costs,' it was difficult to precisely predict or calculate those costs."[217] PHMSA's descriptions of the costs were therefore internally inconsistent, and the court was unable to discern the agency's reasoning.[218] The court concluded that PHMSA's explanation fails to meet the standard of reasoned cost-benefit analysis and vacated the standard.[219]

5. Subsequent Case Developments

On October 15, 2024, INGAA took an unusual step for a successful petitioner, filing an unopposed petition for panel rehearing to request a remand-only remedy for the dent-safety-factor standard provision vacated by the court in its entirety.[220] INGAA explained that PHMSA's implementation of the court's mandate may eliminate the ability of operators to use engineering analyses to defer immediate or near-term repairs of dents in pipelines, even ones that would not

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210. *INGAA*, 114 F.4th at 753.
211. *Id.*
212. *Id.* at 754.
213. *Id.*
214. *INGAA*, 114 F.4th at 754.
215. *Id.*
216. *Id.*
217. *Id.*
218. *INGAA*, 114 F.4th at 755.
219. *Id.*
220. Petitioner's Unopposed Petition for Panel Rehearing at 1-2, INGAA v. PHMSA, No. 23-1173 (D.C. Cir. Oct. 15, 2024).

have to be immediately replaced or repaired in the near term under the safety factor rejected by the court.[221] As a remedy, INGAA requested that the court allow operators to comply with the vacated safety-factor standard until PHMSA promulgates a new standard on remand.[222]

On November 12, 2024, PHMSA filed a response, explaining that while it believes the court did not err in its analysis, PHMSA agrees with INGAA that the remedy of remand without vacatur is justified here for the dent-safety-factor standard.[223]

On December 10, 2024, the court granted the petition, ordering that 49 C.F.R. § 192.712(c) (2024) be remanded without vacatur.[224] The high-frequency ERW standard, crack-MAOP standard, and corrosive-constituent standard remain vacated.

B. PHMSA — Pipeline Safety: Requirement of Valve Installation and Minimum Rupture Detection Standards: Response to Petition for Reconsideration; Additional Technical Corrections, Docket No. PHMSA-2013-0255 (June 28, 2024).

On April 29, 2024, PHMSA published a final rule titled "Periodic Updates of Regulatory References to Technical Standards and Miscellaneous Amendments."[225] The final rule amends the federal pipeline safety regulations to "incorporate by reference all or parts of more than 20 new or updated voluntary, consensus industry technical standards."[226] The rule also clarifies certain regulatory provisions and makes several editorial corrections.[227] On June 28, 2024, PHMSA published a technical correction to the final rule to address "text that was inadvertently deleted or omitted by the final rule."[228]

On June 28, 2024, in response to a petition for reconsideration filed by American Petroleum Institute and GPA Midstream Association, PHMSA issued additional technical corrections codifying a decision of the D.C. Circuit regarding the final rule titled "Pipeline Safety: Requirement of Valve Installation and Minimum Rupture Detection Standards," originally published on April 8, 2022.[229] The D.C.

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221. *Id.*

222. *Id.* at 2-3.

223. Respondents' Response to Petition for Panel Rehearing at 6-7, INGAA v. PHMSA, No. 23-1173, (D.C. Cir. Nov. 12, 2024).

224. Remand Order, *INGAA v. PHMSA*, No. 23-1173 (D.C. Cir. Dec. 10, 2024) (per curiam).

225. *See, e.g.*, Final Rule, *Pipeline Safety: Periodic Updates of Regulatory References to Technical Standards and Miscellaneous Amendments*, 89 Fed. Reg. 33,264 (Apr. 29, 2024) (to be codified at 49 C.F.R. pts. 192, 195).

226. *Id.* at 33,264-65.

227. *Id.* at 33,265.

228. *See, e.g.*, *Pipeline Safety: Periodic Updates of Regulatory References to Technical Standards and Miscellaneous Amendments; Technical Correction*, 89 Fed. Reg. 53,880 (June 28, 2024) (to be codified at 49 C.F.R. pt. 192).

229. *See, e.g.*, *Pipeline Safety: Requirement of Valve Installation and Minimum Rupture Detection Standards: Response to Petition for Reconsideration; Additional Technical Corrections*, 89 Fed. Reg. 53,877 (June 28, 2024) (to be codified at 49 C.F.R. pt. 192).

Circuit decision at issue vacated the Valve Rule's regulatory amendments as applied to gathering pipelines.[230] PHMSA issued a Correction Rule on August 1, 2023, in response to the D.C. Circuit's decision.[231] American Petroleum Institute and GPA Midstream Association then filed the petition for reconsideration on August 30, 2023. In response to this petition, PHMSA's June 28, 2024, technical corrections made the following further amendments to the pipeline safety regulations in conformity with the D.C. Circuit decision: (1) "PHMSA revise[d] § 192.617(b) through (d) to remove references to Type A gas gathering lines from those requirements and clarify that those provisions are inapplicable to gas gathering lines" and (2) "PHMSA revise[d] § 192.635 to add a disclaimer explicitly stating that the section does not apply to gas gathering lines within a new paragraph (c) to align with the previously revised definition for 'notification of potential rupture' at section 192.3."[232]

On December 30, 2024, PHMSA issued a final rule providing the "statutorily prescribed 2025 adjustment to civil penalty amounts that may be imposed for violations of certain [Department of Transportation] regulations."[233]

On December 30, 2024, PHMSA also issued a notice of advisory committee meeting to announce "a public meeting of the Technical Hazardous Liquid Pipeline Safety Standards Committee, also known as the Liquid Pipeline Advisory Committee, and the Technical Pipeline Safety Standards Committee, also known as the Gas Pipeline Advisory Committee, to discuss notices of proposed rulemakings titled 'Periodic Standards Update II' and 'Cost Recovery for Siting Reviews of LNG Facilities.'"[234] PHMSA will hold a public meeting on January 16, 2025.[235]

There are also several pending directives before PHMSA related to pipeline safety that Congress ordered the agency to address in the PIPES Act of 2020.[236] Notably, PHMSA's proposed leak detection rule for gas pipelines was sent to the Federal Register for publication on January 17, 2025.[237] Following the regulatory freeze instituted by the new presidential administration that took effect on January 20, 2025, the rule has not been published in the *Federal Register*.[238]

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230. *See* GPA Midstream Ass'n v. U.S. Dep't of Transp., 67 F.4th 1188, 1202 (D.C. Cir. 2023).

231. *See, e.g.*, *Pipeline Safety: Requirement of Valve Installation and Minimum Rupture Detection Standards: Technical Corrections*, 88 Fed. Reg. 50,056 (Aug. 1, 2023) (to be codified at 49 C.F.R. pts. 192, 195).

232. 89 Fed. Reg. 53,877, at 53,878.

233. Final Rule, *Revisions to Civil Penalty Amounts, 2025*, 89 Fed. Reg. 106,282 (Dec. 30, 2024) (to be codified at 49 C.F.R. pts. 107, 171, 190).

234. Notice of Advisory Committee Meeting, *Pipeline Safety: Meeting of the Liquid and Gas Pipeline Advisory Committees*, 89 Fed. Reg. 106,744 (Dec. 30, 2024).

235. *See, e.g.*, *id*.

236. *See, e.g.*, U.S. DEP'T OF TRANSP.: PIPELINE & HAZARDOUS MATERIALS SAFETY ADMIN., PIPES ACT OF 2020 OVERVIEW, https://www.phmsa.dot.gov/legislative-mandates/pipes-act-2020-overview (last updated Feb. 10, 2021).

237. *See* U.S. DEP'T OF TRANSP.: PIPELINE & HAZARDOUS MATERIALS SAFETY ADMIN., PIPES ACT OF 2020 WEB CHART, https://www.phmsa.dot.gov/sites/phmsa.dot.gov/files/2025-01/January%202025%20PIPES%20Act%20Chart.pdf (last updated Jan. 17, 2025).

238. *See generally* Memorandum on Regulatory Freeze Pending Review, 90 Fed. Reg. 8,249 (Jan. 20, 2025), https://www.govinfo.gov/content/pkg/FR-2025-01-28/pdf/2025-01906.pdf.