

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Inquiry Regarding Income Tax Allowances

Docket No. PL05-5-000

REQUEST FOR COMMENTS

(December 2, 2004)

1. On July 20, 2004, the Court of Appeals for the District of Columbia Circuit issued an opinion in *BP West Coast Producers, LLC, v. FERC*.¹ In reviewing a series of orders involving SFPP, L.P.,² the court held, among other things, that the Commission had not adequately justified its policy of providing an oil pipeline limited partnership with an income tax allowance equal to the proportion of its limited partnership interests owned by corporate partners. In that case, SFPP, Inc., the corporate partner owned some 42.7 percent of SFPP, L.P.'s limited partnership interests. Thus, under the Commission's ruling in the Opinion No. 435 orders, SFPP, L.P. was permitted an income tax allowance for 42.7 percent of the net operating (pre-tax) income expected from operations. Pursuant to the so-called *Lakehead* income tax allowance doctrine,³ SFPP, L.P. was denied an income tax allowance equal to the 57.3 percent of its limited partnership interests that were held by non-corporate partners. The rationales for this doctrine the court rejected include: (1) the double taxation of corporate earnings, (2) the equalization of returns between different types of publicly held interests,⁴ and (3) encouraging capital formation and investment.

¹ *BP West Coast Producers, LLC v. FERC*, 374 F.3d 1263 (*BP West Coast*), *reh'g denied*, 2004 U.S. App. LEXIS 20976-98 (2004).

² *Opinion No. 435* (86 FERC ¶ 61,022 (1999)), *Opinion No. 435-A* (91 FERC ¶ 61,135 (2000)), *Opinion No. 435-B* (96 FERC ¶ 61,281 (2000)), and an *Order on Clarification and Rehearing* (97 FERC ¶ 61,138 (2001)) (collectively the Opinion No. 435 orders.)

³ *Lakehead Pipe Line Company, L.P.*, 71 FERC ¶ 61,388 (1995), *reh'g denied*, 75 FERC ¶ 61,181 (1998) (*Lakehead*).

⁴ These were the stock of the corporate partner (which involves two layers of taxation of SFPP, L.P. earnings) and the limited partnership interests (which involve only one).

2. The Commission is seeking comments on whether the court's ruling applies only to the specific facts of the SFPP, L.P. proceeding,⁵ or also extends to other capital structures involving partnership and other forms of ownerships. For example, should the court's reasoning apply to partnerships in which: (1) all the partnership interests are owned by investors without intermediary levels of ownership; (2) the only intermediary ownership is a general partnership; (3) all the partnership interests are owned by corporations; and (4) the corporate ownership of the partnership interests is minimal, such as a 1 percent general partnership interest of a master limited partnership? If the court's decision precludes an income tax allowance for a partnership or other ownership interests under any of these situations, will this result in insufficient incentives for investment in energy infrastructure? Or will generally the same amount of investment occur through other ownership arrangements? Are there other methods of providing an opportunity to earn an adequate return that are not dependent on the tax implications of a particular capital structure?

3. The Commission invites interested persons to submit comments on the issues and specific questions identified in this notice. Comments are due by December 22, 2004. Comments must refer to Docket No. PL05-5-000.

By direction of the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

⁵ Now pending before the Commission on remand and rehearing in Docket Nos. OR92-8-000, *et al.*, and OR96-2-000, *et al.*, respectively.