ORAL ARGUMENT IS NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 04-1343, 04-1344 and 04-1349
(consolidated)

FRONTIER PIPELINE COMPANY, ET AL.
PETITIONER,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

ON PETITIONS FOR REVIEW OF AN ORDER OF THE
FEDERAL ENERGY REGULATORY COMMISSION

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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DECEMBER 1, 2005

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties

The parties are as stated in the brief of Frontier Pipeline Company, *et al.*

B. Rulings Under Review:

The rulings under review are as follows:

1. *Big West Oil Company v. Frontier Pipeline Company and Express Pipeline Partnership*, "Order Accepting and Consolidating Complaints and Establishing Settlement and Hearing Procedures," 94 FERC ¶ 61,339 (2001);

2. *Big West Oil Company v. Frontier Pipeline Company and Express Pipeline Partnership*, "Order Rejecting Compliance Filing," 106 FERC ¶ 61,171 (2004); and

3. *Big West Oil Company v. Frontier Pipeline Company and Express Pipeline Partnership*, "Order on Rehearing and Compliance Filing," 108 FERC ¶ 61,183 (2004).

C. Related Cases:

Counsel is aware of no related cases pending in this or any other court.

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December 1, 2005

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GLOSSARY

Big West	Big West Oil, LLC
Chevron	Chevron Products Company
CPL	Chevron Pipeline Company
Complainants	Big West and Chevron
EPAct	Energy Policy Act of 1992
Express	Express Pipeline Partnership
FERC or Commission	Federal Energy Regulatory Commission
Frontier	Frontier Pipeline Company
ICA	Interstate Commerce Act
Pipelines	Express and Frontier

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ON PETITIONS FOR REVIEW OF AN ORDER OF THE
FEDERAL ENERGY REGULATORY COMMISSION

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUES

1. Whether the Federal Energy Regulatory Commission properly determined that the pipeline-petitioners must pay reparations for charges exacted under joint rates, given that FERC's policy, developed pursuant to a statutory mandate for simplified oil pipeline ratemaking, is to measure the lawfulness of joint rates by the sum of the local intermediate rates involved, and given that the pipelines had stipulated that one of the local rates had been unjust and unreasonable.

2. Whether the Commission properly determined that shipper-complainants were not entitled to reparations for shipments by third parties, where the third parties owned the oil at the time of transportation, arranged for its transportation, and did not sell the oil to complainants until after it reached its destination.

STATUTES AND REGULATIONS

The applicable statutes and regulations are contained in the addendum to this brief.

STATEMENT OF THE CASE

I. Nature of the Case, Course of Proceedings, and Disposition Below

This proceeding involves reparations arising from excessive payments made for the transportation of crude oil under joint rates charged by, *inter alia*, Frontier Pipeline Company ("Frontier") and Express Pipeline Partnership ("Express") (jointly, "Pipelines"). Big West Oil, LLC ("Big West") and Chevron Products Company ("Chevron") (jointly, "Complainants") filed complaints alleging that Frontier's local rates for crude oil transportation and the Frontier/Express joint rates were unjust and unreasonable under the Interstate Commerce Act ("ICA"), and seeking reparations and a future prescription.

Subsequently, Frontier and Complainants settled the local rate issues, agreeing that Frontier's just and reasonable local rate for the period in question was $0.57 per barrel, not the $1.51 per barrel Frontier had charged, and Frontier paid

reparations accordingly for the local shipments. But for shipments moving under their joint rates, the Pipelines contended that reparations were not owed unless the Pipelines' overall costs were less than the joint rate as a whole, and that, in any case, Complainants were not entitled to reparations for third party shipments.

The Commission's simplified oil pipeline ratemaking policy, developed pursuant to the Energy Policy Act of 1992 ("EPAct"), for joint rates adopted the ICA requirement that joint rates not exceed the sum of the intermediate local rates. Thus, the reasonableness of a joint rate is measured by the sum of the filed local rates of the participating carriers. As the Pipelines stipulated that Frontier's local rate had been too high, the Commission found that their joint rate had been unreasonable and ordered reparations. *Big West Oil Company v. Frontier Pipeline Company and Express Pipeline Partnership*, "Order Rejecting Compliance Filing," 106 FERC ¶ 61,171 (Feb. 18, 2004) ("February Order"), R 119, JA 365; "Order on Rehearing and Compliance Filing," 108 FERC ¶ 61,183 (August 10, 2004) ("August Order"), R 137, JA 531. Pursuant to long-standing precedent, FERC also concluded that Complainants were not entitled to reparations for shipments by third parties, where the third parties owned the oil at the time of transportation, arranged for its transportation, and sold the oil to Complainants at destination.

II. Statement of Facts

A. Statutory and Regulatory Background

The Commission's regulation of oil pipeline rates is dictated by the ICA as it stood on October 1, 1977, 49 U.S.C. §§ 1-15 (1976), *reprinted in* 49 U.S.C. App. §§ 1-15 (1988),[1] and by Title 18 of the EPAct.[2] ICA § 6(1), 49 U.S.C. App. § 6(1), requires oil pipelines to file all rates, fares, and charges. ICA §§ 1(5)(a) and 3(1) require that all rates charged for oil pipeline transportation be just and reasonable and not unduly discriminatory. 49 U.S.C. App. §§ 1(5)(a) and 3(1).

ICA §§ 1(4) and 6(1) speak specifically to through rates. ICA § 1(4) requires that through routes be established as part of the common carrier duty to provide transportation on reasonable request, and that the through rates be reasonable. 49 U.S.C. App. § 1(4). It is unlawful, moreover, for an oil pipeline to charge a through rate that is greater than the aggregate of the rates for the intermediate points. ICA § 4(1). ICA § 6(1) gives the carriers the option to file either joint rates (a carrier's "rates between points on its own route and points on

[1] Jurisdiction over oil pipelines was transferred to FERC from the Interstate Commerce Commission ("ICC") on October 1, 1977. See Department of Energy Organization Act, Pub. L. No. 95-91, § 402(b), 91 Stat. 565, 584 (1977), *codified at* 42 U.S.C. § 7172(b) (1988)(repealed 1994), *recodified as amended at* 49 U.S.C. § 60502 (West 1996). In the Revised Interstate Commerce Act, Pub. L. No. 95-473, 92 Stat. 1337 (1978), Congress recodified the ICA, *see* 49 U.S.C. §§ 10101-11917 (1988), but provided that oil pipeline regulation remained governed by the ICA as it existed on October 1, 1977. *See* Pub. L. 95-473, § 4(c), 92 Stat. at 1470.

[2] Pub. L. No. 102-486, §§ 1801-1804, Oct. 24, 1992, 106 Stat. 2776, 3010-12 (1992), reprinted in 42 U.S.C. § 7172 note (1994).

the route of any other carrier . . .") or "separately established rates . . . applied to the through transportation." 49 U.S.C. App. § 6(1).

Prior to the EPAct, FERC generally applied cost-of-service ratemaking to determine oil pipeline rates. *See generally Association of Oil Pipe Lines v. FERC,* 83 F.3d 1424, 1428-29 (D.C. Cir. 1996) (summarizing history of oil pipeline rate regulation). Because cost-of-service adjudications tended to be long, complicated, and costly, the EPAct directed FERC "to issue a final rule which establishes a simplified and generally applicable ratemaking methodology for oil pipelines," EPAct § 1801(a), 106 Stat. at 3010, and which would "streamline procedures of the Commission relating to oil pipelines rates in order to avoid unnecessary regulatory costs and delays." EPAct § 1802(a), 106 Stat. at 3010.

In response, the Commission issued Order Nos. 561, 571, and 572 that, taken together, provide the regulatory processes and procedures for oil pipeline ratemaking and complaints.[3] Order No. 561 established indexed ratemaking, under which pipelines could raise their rates at the same pace as the pipelines are predicted to experience cost increases. *See* 18 C.F.R. § 342. The indexing

[3] Order No. 561, Revisions to Oil Pipeline Regulations Pursuant to the Energy Policy Act of 1992, FERC Stats. & Regs. Preambles ¶ 30,985 (1993), *on reh'g*, Order No. 561-A, ¶ 31,000 (1994); Order No. 571, Cost of Service Reporting and Filing Requirements for Oil Pipelines, FERC Stats. & Regs. Preambles ¶ 31,006 (1994), *on reh'g*, Order No. 571-A, ¶ 31,012 (1994); Order No. 572, Market-Based Ratemaking for Oil Pipe Lines, FERC Stats. & Regs. Preambles ¶ 31,007 (1994), *on reh'g*, Order No. 572-A, 69 FERC ¶ 61,412 (1994).

methodology uses the EPAct's grandfathered rates[4] (or subsequently filed initial rates) as a baseline, and sets caps for rate increases (or decreases) based on an inflation index. *See generally Ass'n of Oil Pipelines*, 83 F.3d at 1430, 1438; *Flying J, Inc. v. FERC*, 363 F.3d 495, 496-97 (D.C. Cir. 2004). Although FERC intended indexing to be the generally applicable approach for changing rates, Part 342 also permits carriers to establish cost-of-service rates, market-based rates, and settlement rates under certain circumstances. *See* Order No. 571 at 30,947; 18 C.F.R. § 342.

B. The Complaints And The First Challenged Order

Big West and Chevron ship crude oil purchased in Canada to their respective refineries in the Salt Lake City, Utah area under joint rate tariffs filed by Express. The joint rates at issue cover movements from: (1) the Canadian Border near Wild Horse, Alberta via Express to Casper, Wyoming; (2) from Casper to Anschutz Station, Utah via Frontier; (3) from Anschultz Station to Kimball Junction, Utah via Anschutz Ranch East Pipeline, Inc. ("Anschutz"); and (4) from Kimball Junction to Salt Lake City via Chevron Pipe Line Company ("CPL").[5]

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[4] The EPAct declared that oil pipeline rates that had not been protested or opposed for a one-year period before October 24, 1992, were "deemed to be just and reasonable" within the meaning of ICA § 1(5), subject to narrow exceptions. EPAct § 1803(a), 106 Stat. at 3011.

[5] CPL was not a party to the joint rates challenged by Complainants. Joint Stipulation at 4, R 115, JA 195. Anschutz and Complainants resolved all issues raised in the complaints against Anschutz, including joint tariff reparation issues. On February 8,

On January 5, 2001, Big West filed a complaint challenging, *inter alia*, the lawfulness of: (1) certain local rates charged by Frontier for crude oil and sycrude transportation service and (2) Frontier's "portion" of certain joint rates established in tariffs published by Express. Big West later amended the complaint to allege that it had paid joint rates in excess of the sum of the lawful local tariff rates of the carriers participating in the Express joint tariff in violation of FERC's pricing rules. Big West sought reparations for the unlawful local and joint rates charged in the past and reduced local and joint rates for the future.

The first order challenged here accepted Big West's complaint, consolidated it with a similar Big West complaint against Anschutz and Express, and set the complaints for settlement judge proceedings and hearing procedures. *Big West Oil Company v. Frontier Pipeline Company and Express Pipeline Partnership*, 94 FERC ¶ 61,339 at (March 28, 2001) ("March 2001 Order"), R 43, JA 162. The Commission also ruled that if settlement procedures failed, the hearing was to determine whether Frontier's local rates are and have been just and reasonable. *Id*. at 62,260, JA 166. As to the joint rate allegations, citing *Texaco Pipeline, Inc*., 72 FERC ¶ 61,313 (1995) ("*Texaco*"), the Commission stated that its "policy has been that a joint rate is just and reasonable if it is less than or equal to the sum of the

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2002, Complainants withdrew their complaints with respect to Anschutz. February Order at P 7 fn. 10. Consequently, the only pipeline-petitioners are Frontier and Express.

local interstate rates currently on file with the Commission." *Id*. at 62,259, JA 165. If the local rates were found to be just and reasonable, it could be assumed that the joint rate was just and reasonable; if the local rates were not just and reasonable, the joint rate would be recalculated in accordance with *Texaco*. *Id*. at 62,260, JA 166. On May 29, 2001, FERC denied rehearing. *Big West Oil Company v. Frontier Pipeline Company and Express Pipeline Partnership*, 95 FERC ¶ 61,281 (2001) ("May 2001 Rehearing Order"), R 57, JA 170.

Chevron filed a similar complaint against Frontier and Express on February 15, 2001 and against Anschutz on February 28, 2001. On May 17, 2001, the Commission accepted Chevron's complaints and consolidated them with the ongoing Big West complaint proceedings. *Big West Oil Company v. Frontier Pipeline Company and Express Pipeline Partnership*, 95 FERC ¶ 61,229 (2001), R 55, JA 167. In 2002, the parties settled the issue of Frontier's local rates, with Frontier agreeing to publish reduced local rates for the future and to pay reparations for past shipments under the local rates. The administrative law judge then terminated the proceeding. *Big West Oil Company v. Frontier Pipeline Company and Express Pipeline Partnership*, 98 FERC ¶ 63,013 (January 24, 2002), R 111, JA 184.

On July 18, 2002, Big West, Chevron, and Frontier submitted a joint stipulation stating that the "only remaining issue . . . is the determination of the

reparations, if any, . . . to which Big West and Chevron are entitled for shipments under the joint tariff." Joint Stipulation at 7, JA 198. To "facilitate the Commission's determination of this matter," the parties stipulated, *inter alia*, that:

> For the purpose of calculating the reparations, if any, that Big West and Chevron are entitled to receive for their shipments on the joint tariff, the just and reasonable rate for Frontier's local tariff for the two year period prior to the date on which the Big West and Chevron Complaints were filed until February 1, 2002 was $0.57 for light petroleum.

Id. The stipulation also reflected the parties' expectation that no filings, other than a compliance filing by Frontier and Complainants' response, would be necessary to resolve the issue of joint rate reparations. *Id*. at 13, JA 204.

Frontier's August 9, 2002 compliance filing contended that Complainants were not entitled to reparations for shipments which had moved under the joint rates. Complainants responded on September 9, 2002, and requested that reparations be awarded.

C. The February Order

The February Order rejected Frontier's argument that the justness and reasonableness of a joint rate must be based upon an analysis of the costs of facilities underlying the rate, February Order at P 13, JA 367 rather than in accordance with ICA § 4. Following the statute, "the Commission's consistent policy has been that the rate for a joint movement may not exceed the sum of the local rates on file with the Commission and actually being charged for

transportation – whether the rates are at the applicable maximum ceiling levels or lower than the applicable maximum ceiling levels." *Id*. at P 12, JA 366. Parties may challenge the local rates on a cost-of-service basis, and if, as a result, the local rates are reduced, adjustments to the joint rate may be necessary. Here, the parties stipulated to a local rate of $0.57 per barrel, as compared to $1.51 charged, and that reduction "require[ed] a recalculation of the joint rate." *Id*. at P 13, JA 367.

FERC also found no merit in Frontier's assertion that under *Texaco*, reparations must be calculated based on the applicable indexed ceiling levels of the underlying local rates, rather than on the sum of the local rates actually on file and charged. February Order at P 14-17, JA 367. *Texaco* compared the joint rate to the sum of the local rates, finding the joint rate to be approximately 21 percent less than the sum of the filed local rates. *Id*. at P 15 (JA 367); *Texaco* at P 62,309. As the filed local rates happened to be set at the maximum indexed ceiling levels, the *Texaco* statement that the ceiling level of a joint rate is the sum of the ceiling rates was correct. Here, the sum of the filed local rates is lower than the sum of the applicable maximum ceiling rates. February Order at P 15, JA 367.

FERC also rejected Frontier's related contention that reparations should be based on the carriers' "regular rates," which are uncommitted or non-incentive rates, rather than on discounted rates. *Id*. at PP 18-20, JA 367-68. Complainants

had shipped entirely under five-year and fifteen-year term discounted rates, making no shipments under the uncommitted joint tariff. *Id*.

Finally, the Commission concluded that Complainants were not entitled to reparations for shipments where transportation had been paid by third parties. *Id*. at P 26, JA 368. The relevant contracts indicated that Complainants did not purchase and take title to the oil until after the transportation had been concluded in Salt Lake City. As the Complainants were not the parties in privity with the carriers for the transportation, they were not entitled to reparations for excess transportation charges. *Id*.

D. Order on Rehearing

The Commission affirmed its conclusion that reparations should be based upon the local rates on file and actually charged for transportation, not on the indexed ceiling levels to which those rates might have been raised. August Order at P 13, JA 533. Order Nos. 561 and 561-A, setting the indexed rate methodology, made it abundantly clear that the ceilings function only as caps on what rates pipelines could seek, and did not automatically reset the filed rates. *Id*. at PP 18-21, JA 534. The policy that a joint rate is just and reasonable if it is less than or equal to the sum of the local interstate filed rates is not novel, but is consistent with ICA §§ 6(7) and 4(1) and with *Texaco*. *Id*. at PP 14, 22, 38 (JA 533, 535, 537). Further, the Pipelines themselves, when they filed the joint rate at issue, had

acknowledged that *Texaco* contemplated the summation of actual local rates, not ceiling levels, by informing the Commission that the proposed rates were justified as being less than the sum of the individual rates "posted" by each carrier in accordance with *Texaco*. *Id*. at P 38, JA 537.

The Commission also found the cases cited by Frontier were inapposite because they were decided long before the EPAct and the implementation of indexing, and, in any event, do not support Frontier's position. *Id*. at PP 36 and 45, JA 537-38. Frontier's assertion that FERC cannot award reparations without a hearing was unavailing because by reaching a settlement after hearing procedures had been set, the parties eliminated the need for a hearing. *Id*. at P 40, JA 538.

Frontier's arguments that a joint rate can be challenged only as a whole and not on the basis of its components were also off the mark. Under simplified ratemaking, the measure of the reasonableness of a joint rate is the sum of the filed local rates. Complainants challenged one of the filed local rates used as a measure of the reasonableness of the joint rate. *Id*. at 44, JA 538. When a challenged local rate was determined by the stipulation to have been unjust and unreasonable, the joint rate, measured against the sum of the local rates, was also unjust and unreasonable, which entitled Complainants to reparations. *Id*. at P 50, JA 539.

The Commission again rejected Frontier's assertion that its undiscounted rates, rather than local discounted term rates, should have been the measure for

determining the appropriate joint rates. Complainants made no shipments under the uncommitted (*i.e*., undiscounted) joint rates, and "it is unjust and unreasonable to calculate reparations with reference to rates that shippers did not pay." *Id*. at P 52, JA 539.

Turning to Complainants' rehearing request, FERC affirmed its denial of reparations for shipments arranged by third parties. *Id*. at P 66, JA 542. The cases cited by Complainants did not control because they involved shippers who were acting as agents for the owners of the commodity being transported. *Id*. Here there was no agency relationship; the shippers owned the oil being transported and Complainants did not take title to the oil until after the transportation had been completed. *Id.* As the Supreme Court has stated, "The general tendency of the law, in regard to damages . . ., is not to go beyond the first step . . . Behind the technical mode of statement is the consideration well emphasized by the Interstate Commerce Commission, of the endlessness and futility of the effort to follow every transaction to its ultimate result." *Id*. at P 67, JA 542, (*quoting Southern Pacific Co. v. Darnell-Taenzer Lumber Co*., 245 U.S. 531, 533-34 (1918) (citations omitted) ("*Darnell-Taenzer*")).

The petitions for review followed.

SUMMARY OF ARGUMENT

I.

The Commission's post-EP Act policy, following ICA § 4(1), measures the reasonableness of oil pipeline joint rates by the sum of the local intermediate rates on file. This policy satisfies the EPAct's requirement for simplified ratemaking and accords with the policy embodied in the ICA that joint rates should generally not be higher than the sum of the local intermediate rates. In this case, once the Pipelines stipulated to the local rates, nothing remained except the calculation of the reparations due under the recomputed joint rate.

The Pipelines' contention, that reliance on ICA § 4 in awarding reparations is misplaced and contrary to ICC precedent, lacks merit. The cases the Pipelines rely on were decided long before the EPAct-mandated simplified ratemaking and are thus of limited relevance. In any case, ICC and Supreme Court precedent has long recognized that generally joint rates should be equal to or less than the sum of the filed intermediate local rates because the costs of a through movement are generally less than those for a series of intermediate movements, and that when joint rate charges have been found unreasonable, reparations are awarded without any additional showing of injury.

The Pipelines' assertion, that a joint rate's reasonableness must be analyzed on an overall cost basis, ignores the fact that the EPAct sought a substitute for protracted and expensive cost-of-service oil pipeline ratemaking. Moreover, even if, as the Pipelines contend, they were entitled to a hearing in which to rebut the

presumption of unreasonableness, they forfeited such a hearing by settling and stipulating to a limited set of filings for resolving the issue.

The Pipelines' contention that *Texaco* is not relevant because it did not address reparations misses the point. *Texaco* established a ratemaking methodology that compares a joint rate to local filed rates (not ceiling levels for local rates). This methodology, applied here, resulted in a finding of unjust and unreasonable rates and, as is usual when rates have been found unreasonable, an order directing reparations followed.

The Commission also properly compared the joint rates against discounted local rates, rather than against uncommitted rates, because Complainants had shipped under five-year and fifteen-year discounted rates. Exclusion of the Platte Pipeline Company local rate from the aggregate-of-intermediates calculation was proper because Platte did not participate in the joint tariff.

II.

The Commission's determination that Complainants are not entitled to reparations for transportation charges paid by third parties was proper. Complainants did not purchase and take title to the oil until after the transportation had been completed at Salt Lake City. Under long-standing Supreme Court precedent, the parties that owned the oil at the time of shipment and were liable

under the tariff for the transportation charges are the ones that may bring suit for reparations. Neither a court nor the Commission is required to engage in the "endlessness and futility of the effort to follow every transaction to its ultimate result" in an effort to apportion damages between the party in privity with the pipeline and others that may later have purchased the transported commodity.

Complainants' argument, that the Supreme Court precedent relied upon by the Commission has been modified by subsequent developments in antitrust law, lacks merit. The third-party rule applied here was developed under the transportation laws and does not depend upon doctrines developed under the antitrust laws. In any case, the antitrust decisions cited by Complainants are consistent with FERC's findings, including the Supreme Court cases relied upon, in that they allow only direct purchasers (not indirect purchasers such as Complainants) to seek damages. While *dicta* in the antitrust decisions theoretically allow for a possible exception to the direct purchaser rule, such an exception would have to satisfy the policy underlying the rule. As the Commission demonstrated, the circumstances here do not come close to warranting an exception.

Finally, assuming that lower court decisions are relevant, the Commission's determination that Complainants are not entitled to reparations for transportation charges paid by third parties is consistent with those decisions.

ARGUMENT

I. Standard of Review

The Court reviews FERC orders under the Administrative Procedure Act's arbitrary and capricious standard. *See e.g.*, *Sithe/Independence Power Partners v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999). The relevant inquiry for a court under that standard is whether the agency has "examine[d] the relevant data and articulate[d] a rational connection between the facts found and the choice made." *Motor Vehicle Manufacturer's Ass'n v. State Farm Mutual Automobile Ins. Co*., 463 U.S. 26, 43 (1983). "If satisfied that the agency has taken a hard look at the issues . . ., the court will uphold its findings, though of less than ideal clarity, if the agency's path may reasonably be discerned." *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970), *cert denied*, 403 U.S. 923 (1971) (citations omitted).

The level of a court's "surveillance of the rationality of agency decisionmaking, moreover, depends upon the nature of the task assigned to the agency." *Nat'l Cable Television Ass'n v. Copyright Royalty Tribunal*, 724 F.2d 176, 181 (D.C. Cir. 1983). Here, the Commission applied a simplified ratemaking methodology, as required by the EPAct, to determine the amount of reparations due. "Because [i]ssues of rate design are fairly technical, and, insofar as they are not technical, involve policy judgments that lie at the core of the regulatory mission, our review of whether a particular rate design is just and reasonable is

highly deferential." *Northern States Power Co. v. FERC*, 30 F.3d 177, 180 (D.C. Cir. 1994) (internal quotation marks and citations omitted).

Courts, moreover, review a federal agency's interpretation of its enabling statute in accordance with *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S.C. 837, 842-43 (1984). *See Whitman v. American Trucking Assn's*, 531 U.S. 457, 481 (2001). In reviewing an agency's construction of a statute it administers, the Court must first ask whether Congress has directly spoken to the issue. If so, that is the end of the matter and Congress' intent controls. If the statute is silent or ambiguous with respect to the issue, the Court's inquiry is limited to whether the agency's interpretation is a permissible construction of the statute. *Chevron*, 467 U.S. at 842-43. If the statute is "silent or ambiguous" with respect to the issue, then the Court "must defer to a reasonable interpretation made by the . . . agency." *Whitman v. American Trucking Assn's*, 531 U.S. at 481 (citation omitted).

II. The Commission Properly Determined The Amount Of Reparations Arising From Payments Under The Joint Rates.

A. Comparing Joint Rates To The Sum Of The Intermediate Local Rates Reasonably Responded To The EPAct's Requirement For A Simplified Ratemaking Methodology.

The Pipelines accuse the Commission (Br. at 23) of violating the "venerable principle of [ICA] rate regulation that the reasonableness of a rate is to be assessed on a 'through basis' – that is to say, a shipper may challenge only the rate of the

origin-to-destination route as a whole, rather than the reasonableness of rates charged for a particular segment of the route." *See Union Pacific R.R. v. STB*, 202 F.3d 337, 339 (D.C. Cir. 2000). They are mistaken. The Commission did evaluate the reasonableness of the joint rate as a whole based on the EPAct's simplified ratemaking approach and stipulated facts. The Pipelines simply do not like that method of evaluating the joint rate, and would require a cost-of service approach.

Because oil pipeline cost-of-service rate adjudications tended to be long, complicated, and costly, the EPAct required the Commission to find a simpler ratemaking method. *See* August Order at P 9, JA 532. FERC's policy of using the sum of the filed local intermediate rates as a simplified measure of reasonableness for joint rates is an appropriate response. This simple alternative to cost-of-service ratemaking is consistent with ICA § 4(1), which makes unlawful a through rate greater than the sum of the intermediate filed rates. Moreover, even before "the clause was inserted in section 4(1) . . . [in] 1910," the ICC applied a "principle of evidence" that "a through rate in excess of the aggregate of intermediate rates is *prima facie* unreasonable." *Moore Bros. v. Chicago, B. & Q.R. Co*., 210 I.C.C. 95, 97 (1935).

The Supreme Court also early on recognized the method as an appropriate measure of reasonableness for joint rates. "Through rates are, ordinarily, made lower than the sum of the intermediate rates. This practice is justified, in part, on

the ground that operating costs of a through movement are less than the aggregate costs of the . . . independent movements covering the same route." *Baltimore & Ohio R.R.. v. Settle*, 260 U.S. 166, 171-72 (1922); *Great Northern Railway Co. v. Sullivan*, 294 U.S. 458, 460 (1935) (a through rate covers fewer terminal services than do the corresponding local rates). Thus, the Commission's reliance on the aggregate of the intermediates as the simplified ratemaking for joint rates mandated by the EPAct is neither novel nor unreasonable.[6]

In this case, Complainants shipped over three pipelines subject to a joint rate, each with a local filed rate for its segment. Under the filed rate doctrine, embodied in ICA § 6, a pipeline could not collect more than its filed rate for a local movement. *See* August Order at PP 14-16 (JA 533), *citing Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 496 U.S. 116 (1990) ("*Maislin*"). Because the Pipelines were entitled to no more than the filed rate if the transportation at issue had occurred under local rates, the post-EPAct measure of reasonableness for joint rates should be the sum of the local filed rates, not the sum of possible local ceiling rates. August Order at PP 13, 25 (JA 533, 535). Using the filed local rates is consistent with ICA § 4(1) as well. February Order at P 12, JA 366. Thus, once

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[6] *See also Patterson v. Louisville & Nashville R.R. Co.*, 269 U.S. 1, 12 (1925) ("The Commission is correct in holding . . . that if a through rate higher than the aggregate of the intermediates is attacked under § 1, the *prima facie* presumption that such higher through rate is unreasonable . . . obtains now as it did before the 1910 amendment [*i.e.*, the enactment of § 4]".); *Humphreys-Godwin Co. v. Yazoo & Humphrey Valley R.R. Co.*, 31 I.C.C. 25, 27 (1914), discussed *infra* at 23.

the Pipelines stipulated that one of the local rates had been unjust and unreasonable, the reasonable joint rate for the entire route could readily be determined by summing the "local rates of the other joint carriers on file at the time of the shipments and the reduced local rate that the parties stipulated for Frontier." August Order at P 13, JA 533.

The Pipelines do not seem to dispute the logic underlying comparing joint rates with the filed local intermediate rates, *see* Br. at 21 (conceding the aggregate of the intermediates may create a presumption of unreasonableness). *See also* August Order at P 38, JA 537 (when the joint rate was filed, Pipelines justified the rate by stating that the rate was less than the sum of the individual rates "posted" by each carrier in accordance with *Texaco*). They contend, nonetheless, that the approach conflicts with the ICA, that the sum-of-the-intermediates findings should be rebuttable, and that the Commission misinterpreted *Texaco*. These assertions lack merit.

B. The Commission's Awarding Of Reparations Is Consistent With The ICA.

The Pipelines contend (Br. at 16-20) that the Commission's reliance on ICA § 4 is misplaced and contrary to ICC precedent. Specifically, they argue that FERC "contravened the longstanding interpretation that a section 4(1) violation does not give rise to reparations without proof of damages to the shippers" (Br. at 19). In context, § 4 cases requiring a showing of injury arise under a claim of rate

discrimination. *See*, *e.g.*, *Davis v. Portland Seed Co.*, 264 U.S. 403, 417-21 (1924) (complainant alleging infraction of § 4 bar compared to complainant seeking rebates that had been paid to more favored shipper; a public wrong in each instance but no damages unless a private injury had been inflicted); *Volkswagen of America v. Baltimore & Ohio R.R.*, 367 I.C.C. 493 (1983), 1983 ICC LEXIS 32, (where complainant tried but failed to demonstrate that rates were unreasonable and showed only that defendants violated the aggregate-of-the intermediates rule, damages not warranted). Damages are not automatically awarded in discrimination cases because a shipper does not necessarily suffer injury just because another shipper receives a lower rate. *See Davis v. Portland Seed Co.*, 264 U.S. at 421.

As the Commission emphasized, however, the cases the Pipelines relied on were decided long before the EPAct required implementation of simplified ratemaking[7] and are of limited value in addressing modern pipeline ratemaking issues. August Order at PP 36, 45; JA 537-38. All that FERC adopted from those cases was the aggregation-intermediates test as a simplified means to evaluate the

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[7] The Pipelines' brief cites *Volkswagen of America*, which post-dates the EPAct. However, *Volkswagen* was decided after enactment of the Staggers Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, which narrowed the ICC's jurisdiction over the reasonableness of railroad freight rates. After enactment of the Staggers Act, the ICC adopted rules providing that a violation of the aggregate-of-the-intermediates rule "will no longer create a presumption that the rate is unreasonably high." 1983 ICC LEXIS at 32 at 8. *Volkswagen* also agreed that there was ambiguity in traditional case law as to the awarding of reparations in § 4 cases. *Id.* at 7.

reasonableness of joint rates. *See* August Order at P 45, JA 538 (cases cited by the Pipelines "support the Commission's ruling that the calculation of reparations under a joint tariff must be made with reference to underlying filed rates"); *see also id*. at PP 42-50, JA 538-39, noting other distinctions.

As demonstrated *supra* at 19-20 and note 6, moreover, use of that test to judge the reasonableness of joint rates preceded § 4 enactment in 1910 with the understanding that a through rate in excess of the aggregate of intermediate rates was *prima facie* unreasonable. *See also Humphreys-Godwin Co. v. Yazoo & Humphrey Valley R.R. Co*., 31 I.C.C. at 27 ("if called upon to formally pass upon a case of this nature it would [the Commission's] policy to consider the through rate which is higher than the sum of the locals between the same points as *prima facie* unreasonable . . . .") (citation omitted); *Windsor Turned Goods Co. v. Chesapeake & Ohio Ry. Co*., 18 I.C.C. 162, 164 (1910) (same). Petitioners have not shown that adoption of that test as the simplified ratemaking for joint rates under the EPAct, or the result that flows from it, is arbitrary or capricious.

Adopting that test for EPAct ratemaking means reparations may be awarded without any separate showing of injury where joint rates exceed aggregated local filed rates. *See* August Order at P 50 (JA 539), quoting *Davis v. Portland Seed Co*., 264 U.S. at 421-22:

> [In *Darnell-Taenzer*] the shipper paid a published rate which the Commission afterwards found to be unreasonable. This court held he could recover, as the proximate damage of the unlawful demand, the excess above the rate which the Commission had declared to be reasonable.[8]

See also, *Louisville & Nashville R.R. v. Sloss-Sheffield*, 269 U.S. 217, 235 ("*Sloss-Sheffield*") (specific proof of pecuniary loss required for damages in an ICA § 2 suit for unjust discrimination and § 4 suit for violation of the long-and-short-haul clause, but "recovery for excessive freight charges can be had under § 1 without specific proof of pecuniary loss, and that the measure of damages is the amount of the excess exacted").

In this case, the Commission used the aggregate of the filed intermediates as the simplified ratemaking test for judging the reasonableness of the joint rate. August Order at P 50, JA 539. When the parties stipulated as to a reduced local rate for Frontier, the joint rate became unreasonable when measured against the stipulated aggregated local rates. Reparations followed as is customary under ICA precedent when carriers have charged unreasonable rates. *Id.*

C. The Commission Was Not Required To Analyze The Overall Cost-Of-Service For The Joint Rate.

[8] The Commission also distinguished *Davis* on the ground that that case involved the long haul/short haul rather than the aggregate-of-the intermediates provision of § 4(1). August Order at P 50, JA 539. In *Patterson v. Louisville*, 269 U.S. at 12, the Court indicated that the application of the *Davis* rule to violations of the aggregate-of-the-intermediates clause was still an open question.

The Pipelines contend that a joint rate is a unitary charge that cannot be found unjust and unreasonable unless it is not cost-justified on an overall basis (Br. at 23-26). However, as the Commission stated, Complainants are not "challenging the local rates of Frontier . . . on the basis that they are individual components that comprise a joint rate. Rather, [Complainants are] disputing these rates because they are used to determine the amount of joint rates." March 2001 Order at 62,259, JA 165. Under FERC's simplified EPAct ratemaking methodology for joint rates – that "a joint rate is just and reasonable if it is less than or equal to the sum of the local interstate rates currently on file," *id.*; February Order at P 13, JA 367 – a complaint "may challenge the local rates of the participating carriers on a cost-of-service basis as they did here, and if, as a result, the local rates are lowered, adjustments to the joint rate may be necessary." *Id.* That conclusion follows from adoption of the aggregation test for joint rates under simplified ratemaking.[9]

The Pipelines' recitation of cases (Br. at 26) for the proposition that "the starting point" for an ICA rate reasonableness analysis "is the cost of providing the

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[9] The cases cited by the Pipelines (Br. at 27-28) are not persuasive because they did not involve the use of local filed rates as a simplified measure of the reasonableness of joint rates. In *Metropolitan Edison Co. v. Conrail*, 5 I.C.C. 2d 385 (1989), 1989 ICC LEXIS 64, for example, the shipper contended that the joint through rate was excessive because Conrail's division was excessive. 1989 ICC LEXIS 64 at 31. "In the instant case, Complainants have not challenged Frontier's division of the joint rate." August Order at 43, JA 538. In *Great Northern*, *supra*, the shipper challenged combination rates, not joint rates. August Order at P 42, JA 538 (*citing Great Northern*, 294 U.S. at 460-61). The combination rates were based upon proportional rates, which serve precisely as do divisions of charges based on joint rates. *Great Northern*, 294 U.S. at 460.

service in question" similarly misses the point. The EPAct mandated a substitute for protracted and expensive cost-of-service oil pipeline ratemaking. Moreover, even if, as the Pipelines contend (Br. at 21-22), the carriers must have an opportunity to show that the through rate is reasonable, the Pipelines waived hearing by settling. As the August Order states, "the Commission originally set the complaints for settlement procedures and directed the establishment of hearing procedures should the settlement procedures fail to achieve a settlement. By reaching a settlement in the case, the parties eliminated the need for a hearing." August Order at P 40, JA 538. In addition, the parties stipulated that only Frontier's compliance filing and comments thereto were needed to resolve the reparations issue. Joint Stipulation at 13, JA 204.

More specifically, in 2001, FERC set the complaint for settlement and hearing and instructed the presiding judge to:

> examine the local interstate rates of Frontier and Anschutz . . . to determine whether they are just and reasonable. If it is established that such rates are just and reasonable, it can be assumed that the subject Express joint rates meet the standard set forth in *Texaco*. However, if it is shown that the local rates of Frontier and Anschutz are not just and reasonable, then the Express joint rates must be recalculated in accordance with *Texaco*.

March 2001 Order at 62,260, JA 166.

If the Pipelines believed that their joint rates could be cost-justified overall, they should have challenged the scope of the hearing or proffered evidence at that

time showing that the disputed issue could be resolved only through hearing. *Cf.*, *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) ("simple fairness . . . requires as a general rule that courts should not topple over . . . decisions unless the administrative body not only has erred but has erred against objection made at the appropriate time under its practice"); *Alexandria v. FERC*, 555 F.2d 1020, 1031-32 (D.C. Cir. 1977) (Commission acted commendably in expanding scope of hearing); *Cajun Elec. Power Coop v. FERC*, 28 F.3d 173 (D.C. Cir. 1994) (mere allegations insufficient to mandate a hearing); *Pennsylvania Public Utility Com. v. FERC*, 881 F.2d 1123, 1127 (D.C. Cir. 1989) (same). Instead of doing so, Express requested rehearing of the March 2001 Order only as to its liability for reparations and clarification as to its status as a respondent, and Frontier's rehearing request was limited to questioning the consolidation of the complaints against it and Anschutz. May 2001 Rehearing Order at 61,985-86, JA 172-73.[10]

The Pipelines state (Br. at 22) that Frontier proffered evidence in its Compliance Filing that the Express local rate was below Express's cost-of-service

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[10] Frontier's rehearing request also stated that it was not "acknowledging or conceding the validity or lawfulness of any other issue addressed or not addressed in the order, or in any way waiving their rights to challenge the order with regard to any such issue when final action is taken . . ." May 2001 Rehearing Order at 61,986, n. 8, JA 173. Such a generalized statement, of course, does not demonstrate what disputed factual issues can only be resolved by a hearing or otherwise entitle the Pipelines to a hearing at the time of their choosing.

level, and that, at a minimum, FERC was required to give the Pipelines an opportunity to demonstrate the reasonableness of the joint rates as a whole. But, by then, it was too late. During the hearing phase, the Pipelines stipulated to a rate of $0.57 per barrel for Frontier's local rate, and made no claim that the Express local rate was too low. In those circumstances, nothing further remained after the stipulation but for the Commission but to calculate reparations for the joint rate. February Order at P 13, JA 367.

The Pipelines' contention (Br. at 27, 38-40) that the simplified ratemaking methodology permits "cherry-picking" ignores their ability to counteract. If, in fact, the Pipelines had believed that the joint rate as a whole was just and reasonable on a cost-of-service basis, even if an individual local rate were not (as their example, Br. at 27, posits), they should have requested rehearing of the March 2001 Order and sought expansion of the scope of the hearing to evaluate the reasonableness of the joint rate in its entirety.

D. The Commission Properly Applied Its *Texaco* Policy In Awarding Reparations.

The Pipelines contend (Br. at 29) that *Texaco* is not relevant because it did not address reparations. However, *Texaco* established a simplified ratemaking methodology for joint rates, and the parties were on notice that FERC would apply *Texaco* and use the local filed rates to measure the reasonableness of the joint rate. March 2001 Order at 62,259 (JA 165) and *id*. at n. 12 (JA 165) (citing *Texaco*).

Under *Texaco*, reparations must be based on the local rate as filed with FERC, not on what the ceiling levels for the local rates might be. Pipelines may collect only the filed rate. ICA § 6(7); *Maislin*, 497 U.S. at 130. While a pipeline may index its filed rates up to the ceiling level, it is not required to do so. Ceiling levels, which limit the filed rate, are not filed rates themselves. That point was made abundantly clear in Order Nos. 561 and 561-A and the regulations promulgated thereunder. August Order at PP 18-21, JA 534. Even if, for example, the ceiling level would permit a rate of $2.00, a pipeline that had a filed local rate of $1.50, could collect only $1.50. Moreover, joint rates may not exceed the aggregate of the intermediate rates on file with FERC. ICA § 4(1). Consistent with these policies, *Texaco* held that rates on file, not ceiling levels, must be used to evaluate whether a joint rate is just and reasonable. Aug. Order at P 22, JA 535.

Some confusion arises because, in *Texaco*, the underlying filed rates were at the ceiling level; as a result, the order refers to "ceiling rates associated with individual tariff rates currently on file." *See Texaco*, 72 FERC at 62,310. Because in *Texaco* the filed rate was the ceiling rate, "the Commission's statement in *Texaco* regarding the ceiling level of a joint rate is consistent with the Commission's often-stated policy that a joint rate must be less than or equal to the sum of the local rates on file with the Commission." August Order at P 22, JA 535. Here, in contrast, the filed rate (*i.e.*, the stipulated rate) was below the ceiling

level. Nothing in *Texaco* supports bumping up the stipulated rate to the ceiling level (as the Pipelines propose) as a way of judging the reasonableness of the joint rate or the proper amount of reparations. Thus, there was no departure (see Br. at 36) from *Texaco*; both cases relied on the rates on file.

The Pipelines' argument (Br. at 36-38) that the "actual-rate test" contradicts the ceiling standard established in Order No. 561 is a red herring. While the ceiling level is presumptively just and reasonable (see Br. at 36), pipelines are not required to set rates at the ceiling level. If they do not, as was the case here, the lower, filed rate, which is also just and reasonable, is controlling.

In any event, the Pipelines would read *Texaco* as condoning conduct flatly inconsistent with the plain language of the ICA. As discussed above, § 4(1) says that it "shall be unlawful for any common carrier subject to this [Act] . . . to charge any greater compensation as a through rate than the aggregate of the intermediate rates . . . ." Under the Pipelines' interpretation, *Texaco* would allow them to charge the ceiling maximum for the through rate, even if the aggregate of the filed intermediate rates was substantially lower. It is simply not reasonable to read *Texaco* as shielding conduct that the statute declares unlawful.

E. The Commission's Use Of Discounted Local Rates Instead Of Higher Uncommitted Rates As the Standard Was Reasonable.

The Pipelines state (Br. at 40) that Express has a tiered rate structure in which its ceiling rate is provided as an "uncommitted rate" and lower, discounted

rates are available to shippers who participate in "term" discount programs. They contend that the reparations calculation should be based on the uncommitted rate rather than the discount rates. The challenged orders properly rejected this contention.

It is undisputed that Complainants shipped only under the Pipelines' five-year and fifteen-year term discount rates. February Order at P 19, JA 368; August Order at P 52, JA 539. They made the time and volume commitments required for those rates, and under the ICA are entitled to reasonable rates for shippers making those commitments. *See American Tel. & Tel. Co. v. Central Office Telephone, Inc*., 524 U.S. 214, 223-24 (1998) (explaining relationship between rates and terms of service). The Pipelines' contention that their reparations should be based on the reasonable rates for uncommitted shipments has no statutory foundation. Or, as the Commission found, basing reparations on uncommitted (not discounted) rates that the Complainants did not pay would be "essentially the same as arguing that ceiling levels should be applied in calculating the just and reasonable joint rate, and it lacks merit for similar reasons." August Order at P 52, JA 539.

F. The Commission's Exclusion Of The Platte Local Rate From The Aggregate-Of-Intermediates Calculation Was Proper.

The Pipelines argue (Br. at 22-23) that the Commission erred by excluding Platte Pipeline Company's local rate from the calculation because the movement at issue requires the use of certain Platte station facilities and equipment. It is

undisputed, however, that Platte was not a participating carrier in the joint rate. February Order at P 23, JA 369, and n. 24, JA 368; August Order at P 51, JA 539. Since Platte would not share in the revenue from the joint rate nor be liable for any reparations due under the joint rate, FERC's determination that its rate cannot be included in the calculation of the joint rates was reasonable. *See* August Order at P 51, JA 539.

III. The Commission Properly Determined That Complainants Are Not Entitled To Reparations For Transportation Charges Paid By Third Parties.

Complainants seek reparations for transportation charges paid by third-party shippers even though Complainants did not purchase or take title to the oil in question until after the transportation had been completed at Salt Lake City, nor did Complainants establish that the third-party shippers acted as their agents. *See* February Order at P 26 (JA 368); August Order at P 66 (JA 542). Instead, the third parties owned the oil, arranged the transportation for the oil, and were the parties in privity with the carriers throughout the entire shipment. The Commission's determination, that under these circumstances Complainants are not entitled to reparations for the transportation charges paid by these third parties, is consistent with both the ICA and precedent, and well-grounded with respect to the underlying policy considerations.

A. The Commission's Determination Accords With The Interstate Commerce Act And Supreme Court Precedent.

Complainants (Br. at 13-14) cite ICA §§ 1(4), 8, 13(1), and 16(1) for the proposition that ICA provisions permitting "any person" to file a complaint and receive reparations "evince[] an intent [for the ICA] to be as inclusive as possible in protecting firms that use interstate carriers," and contend that they are the "only persons" that suffered injury, and are thus entitled to reparations. Complainants' emphasis on "any person" misses the point, however. Complainants did not "use interstate carriers," to borrow their phrase. Reparations issue only to those who do use carriers, which, here, were the third-party shippers. Thus, as the Commission determined, under the relevant precedent, Complainants were not injured under the circumstances here.

As precedent that has existed from the early days of the ICA makes clear, Complainants are not entitled to reparations where the charges at issue were paid by third parties who owned the oil during its shipment and were liable under the tariff for the transportation charges. August Order at PP 67-68, JA 542 (*citing Darnell-Taenzer*, 245 U.S. at 533-34, and *Sloss-Sheffield*, 269 U.S. at 236-37). In *Darnell-Taenzer*, the Supreme Court found that only the party liable for the tariff charge was entitled to reparations, even if it had passed the freight charges on to its customers, because the "general tendency of the law" in regard to damages "is not to go beyond the first step":

> The only question before us is . . . whether the fact that the plaintiffs were able to pass on the damage that they sustained in the first instance by paying the unreasonable charge, and to collect that amount from the purchasers, prevents their recovering the overpayment from the carriers. The answer is not difficult. The general tendency of the law, in regard to damages . . . , is not to go beyond the first step . . . If it can be said that the whole transaction is one from a business point of view, it is enough to reply that the unity in this case is not sufficient to entitle the purchaser to recover, any more than the ultimate consumer who in turn paid an increased price. He has no privity with the carrier . . . The carrier ought not to be allowed to retain his illegal profit, and the only one who can take it from him is the one that alone was in relation with him, and from whom the carrier took the sum . . . Behind the technical mode of statement is the consideration well emphasized by the Interstate Commerce Commission, of the endlessness and futility of the effort to follow every transaction to its ultimate result.

254 U.S. at 533-34; *see* August Order at P 67, JA 542.

In *Sloss-Sheffield*, a case that the Complainants dismiss with no attempt to distinguish (Br. at 23-24), the carrier tried to distinguish *Darnell-Taenzer* by raising a cost-plus pass-through defense. 269 U.S. at 236-37. The underlying sales contract separately stated the cost of transportation, which it placed on the consignee, who bore the burden of any rate increase, and received the benefit of any decrease.[11] The Court nonetheless rejected the carrier's contention, finding that it was "settled [by *Darnell-Taenzer*] that where goods are sold f.o.b.

[11] The carrier argued that a sale at a delivered price of $14.85 was the legal equivalent of a sale of the oil at $10.50 plus a separate freight charge, so that a sale at a fixed price plus freight entitled the purchaser to the benefit of any decline in the freight rate, and that consequently, the seller did not suffer by reason of the excess freight charge.

destination, it is ordinarily the seller who bears the freight, who suffers from the excessive charge, and who consequently is entitled to sue." *Id*. at 235. The Court reasoned further that:

> The construction urged [by the carrier] ignores the commercial significance of selling at a delivered price. When a seller enters a competitive market with a standard article he must meet offerings from other sources. On goods sold f.o.b. destination, the published freight charge from the point of origin becomes, in essence, a part of the seller's cost of production. An excessive freight charge for delivery of the finished article affects him as directly as does a like charge upon his raw materials. . . .

Id. at 237-38. August Order at P 68, JA 542.

Despite these contrary Supreme Court rulings, Complainants contend (Br. at 14) that "it is undisputed" that they, "not the firms that shipped crude oil on their behalf," were the "only persons" that suffered an injury, thus entitling them to reparations. However, whatever Complainants may mean by shipping "on their behalf," it is undisputed that the third party shippers were not acting as Complainants' agents. February Order at P 26, JA 368 (contracts show that Complainants did not purchase and take title to the oil until after it arrived at Salt Lake City); August Order at P 83, JA 544 (same). Under these circumstances, the tariff charges became part of the seller's delivered price (like the cost of any other raw material) making the seller, if anyone, the only injured party. *Sloss-Sheffield*, 269 U.S. at 237-38; August Order at P 83, JA 544.

Complainants also ignore the logic of their own argument. If, indeed, § 8 means that any "person injured" can recover "the full amount of damages sustained," and "privity with the carrier is irrelevant" (Br. at 19), that also means that the Complainants' own customers – and not the Complainants – should be able to recover any portion of the overcharges the Complainants pass on. Deciding what part of alleged excessive rates have been passed on to those not in privity with the Pipelines would place the Commission right in the thick of the endless and futile inquiries that the *Darnell-Taenzer* rule was designed to avoid.

B. The Commission's Determination Does Not Conflict With Judicial Decisions Pertaining To Damages For Antitrust Violations.

Complainants contend (Br. 23-29) that even if FERC's interpretation of *Darnell-Taenzer* and *Sloss-Sheffield* is correct, FERC failed to consider subsequent developments in antitrust law. This argument is baseless. Whatever developments have occurred under the antitrust laws, neither the Commission nor this Court has the power to ignore established Supreme Court precedent under the Interstate Commerce Act. *See*, *e.g*., *Maislin*, 497 U.S. at 130-31.

Even if antitrust case law were applicable, the dictum on which Complainants rely from *Hanover Shoe, Inc. v. United Shoe Machinery Corp*., 293 U.S. 481 (1968) ("*Hanover Shoe*"), and *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) ("*Illinois Brick*"), was sharply limited by a much more pertinent decision that they should certainly have found, *Kansas v. Utilicorp United Inc*., 497 U.S.

199 (1990) ("*Utilicorp*"). In *Hanover Shoe*, the Court rejected a passing-on defense to an antitrust claim. In *Illinois Brick*, it similarly rejected a passing-on offense. In both it relied in part on the difficulty of establishing the amount that might have been passed on, but noted the possibility of situations, such as a pre-existing cost-plus contract, that might make any pass-on of damages relatively easy to trace. *See Illinois Brick*, 431 U.S. at 732 n. 12; *Hanover Shoe*, 293 U.S. at 484. In each case, however, the Court was simply noting that it need not decide the issue on the facts before it; it was reserving judgment on the point, not deciding it.

When a cost-plus argument was finally brought before it, the Court rejected the claim. In *Utilicorp*, *supra*, two groups of plaintiffs, the utilities that were direct customers and two states as *parens patriae* representing the indirect customer-consumers, sued a natural gas pipeline and its suppliers, alleging a price-fixing conspiracy. The states argued that they could recover because a regulatory scheme that allowed the pass-through of gas price increases was the equivalent of a cost-plus contract, but the Court was not convinced. While not "alter[ing] our observations about the possibility of an exception for cost-plus contracts," 497 U.S. at 218, it found that even regulatory authority to pass through the utilities' cost increases was not the equivalent of a pre-existing cost-plus contract. That narrow exception would allow indirect purchasers to sue only when two conditions were met: "the direct purchaser will bear no portion of the overcharge and

otherwise suffer no injury," such as a loss of sales; since the utilities had no such guarantee, their customers had no cause of action. *Id.* Moreover, the Court admonished against the creation of any broader exceptions to *Illinois Brick*, saying (*id*. at 216-17):

> The rationales underlying *Hanover Sh*oe and *Illinois Brick* will not apply with equal force in all cases. We nonetheless believe that ample justification exists for our stated decision not to "carve out exceptions to the [direct purchaser] rule for particular types of markets." . . . The possibility of allowing an exception, even in rather meritorious circumstances, would undermine the rule. . . . In sum, even assuming that any economic assumptions underlying the *Illinois Brick* rule might be disproved in a specific case, we think it an unwarranted and counterproductive exercise to litigate a series of exceptions.

Complainants have pointed to no decision since then where an exception has been allowed. Indeed, the Third Circuit has noted that "[t]he vitality of the 'pre-existing cost-plus contract' exception is doubtful . . . in light of *Utilicorp*." *McCarthy v. Recordex Service, Inc.*, 80 F.3d 842, 855 (3d Cir.), *cert. denied*, 519 U.S. 825 (1996).

Even if the pre-existing cost-plus contract is more than an abstract hypothetical, the Complainants here would not qualify for such an exception to the *Illinois Brick* rule. Their purchase arrangements with their f.o.b. sellers are plainly not "pre-existing." Like the consumers in *Utilicorp*, Complainants give the sellers no guarantee of a fixed quantity; in fact, their Brief (at 4) concedes the correctness of the Commission's finding that they have the option of buying oil at the

destination in Salt Lake City or prior to shipment. August Order at P 71, JA 543. That pattern evidences a conscious decision to forego the type of direct commitment involved in the theoretical exception. *See id*. at P 87, JA 545.[12]

Further, the Commission saw other difficulties of apportioning damages in the oil market that would also preclude application of the theoretical exemption here:

> The difficulties of isolating transportation costs in such circumstances can be illustrated easily. For example, if two sellers of crude oil offer it for sale at different prices following transportation on the same pipeline at the same rate on the same day, it would be problematic to attempt to determine whether the seller offering the lower price had absorbed a portion of the transportation rate or some other cost. Further, if a single purchaser acquired the crude oil at the same destination on different days when a single seller offered different prices to meet market conditions, one faces the complexity of trying to determine what portions of the different sales prices are attributable to transportation. Moreover, a subsequent purchaser may acquire the crude oil at yet a different price and claim that it actually bore the expense of the transportation.

August Order at PP 84, JA 544. The Commission also relied upon the "variety of considerations" the Pipelines offered as support for the practicality of the privity rule. *Id*. at P 82, JA 544; *see also id*. at PP 73-80, JA 543-44; Frontier's Response, filed April 6, 2004, at 16-28 (R 129, JA 490-502); and Express' Answer, filed

[12] Stating that "[r]efiners cannot have it both ways. They cannot seek the benefit of reparations without having assumed the legal and financial obligations inherent in contracting directly with the pipeline for shipment on the system."

April 5, 2004, at 7-13 (R 127, JA 466-72). In sum, no exception to the long-standing rule limiting reparations to direct shippers is warranted here.

C. The Commission's Determination Also Accords With Decisions Of Other Courts.

Complainants also err in their contention (Br. at 15) that the Commission's third party shipper rule conflicts with *OXY USA, Inc. v. FERC*, 64 F.3d 679 (D.C. Cir. 1995) ("*OXY*"). *OXY* involved the issue of standing to contest denial of refunds after the filing and suspension of a new tariff. Intervenors challenged OXY's aggrievement (and thus standing) on grounds that there was "no evidence that OXY would be contractually entitled to share in any rebate the Commission might order." *OXY*, 64 F.3d at 696. The court disagreed, finding that undisputed testimony, which indicated OXY had a contractual right to share in refunds, was a sufficient demonstration of injury for the purposes of standing. *Id.* In contrast, no evidence in the instant case shows that Complainants have any contractual right to share in any reparations that might be ordered.

Complainants cite language from *OXY* for the proposition that the ICA was intended "to protect the interests of a broad category of entities and that "nothing in the [ICA] suggests that concern is limited to parties in privity with common carriers." Br. at 17, quoting *OXY*, 64 F.3d at 697. This language, however, did not address the injury required for entitlement to reparations. Rather, OXY, which had

already provided sufficient proof of injury for standing purposes, was not to be denied standing merely because it was not a direct shipper.[13] *Id.*

Complainants' contention (Br. at 18) that other federal courts do not require privity with a pipeline for firms to collect reparations similarly lacks merit. In *Gabbert v. Atchison, T. & S.F. Ry. Co.*, 93 F.2d 562 (5th Cir. 1937) ("*Gabbert*"), the petitioners bought coal in Colorado that was shipped to them in Texas. Title passed to petitioners when the coal was loaded on rail cars in Colorado, not at the destination points in Texas. The consignors, acting as agents for the petitioners, advanced the money to pay the shipping charges and were later reimbursed by the petitioners. *Id*. at 562. The Fifth Circuit found under *Sloss-Sheffield*, petitioner could bring the action because the "one who bears the burden of the illegal charges that are paid for his account *by an agent* may sue to recover the damages awarded him by a reparation order." *Id*. [emphasis added]. *Gabbert* stands for the unremarkable proposition that a principal, not his agent, is the "person upon whom the burden of the unlawful charge falls" (see Compl. Br. at 19), and thus the one

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[13] Moreover, ICA § 13(2) states that, "No complaint shall at any time be dismissed because of the absence of direct damage to the complainant." This complements the language of § 13(1), quoted by the *OXY* court and broadly allowing any person, trade association, or municipality to file a complaint. This language, of course, has long peacefully co-existed with the case law limitations on the recovery of reparations. The effect is to make clear that those who suffer concrete, albeit indirect, injuries from unreasonable or discriminatory rates are within the protection of the statute and entitled to prospective relief under § 15.

who may recover reparations. February Order at P 28, JA 369. In contrast, here there was no agency relationship between Complainants and the Pipelines. *Id*.

Complainants' recitation of *McCarty Farms, Inc. v. Burlington Northern, Inc*., 91 F.R.D. 486 (D. Mont. 1981) ("*McCarty*") (Br. at 21) is also unpersuasive. The Commission noted that in *McCarty*, the owners of the commodity consigned it to agents who shipped on the owners' behalf. August Order at P 69, JA 542. In contrast, in the instant case, Complainants did not hold title to the crude oil prior to shipment, but, instead, merely purchased the crude oil subsequent to the transportation. *Id*.

D. The Possibility that Pipelines Might Retain Some Unlawful Charges Does Not Warrant Modifying The Third Party Rule.

Contrary to Complainants' contentions (Br. at 30), the third-party rule does not ensure that pipelines can retain unreasonably high charges. As *Utilicorp* and *Sloss-Sheffield* demonstrate, the direct shipper retains both the right and the incentive to file suit for reparations. The mere fact that the Complainants' sellers might already have been reimbursed once for their overcharges does not reduce their profit-maximizing incentive to recover them again. Moreover, the privity rule does not prohibit various sorts of private agreements among shippers, buyers, and pipelines. August Order at P 85, JA 545. Complainants, for example, might negotiate in the future for clauses in their oil purchase contracts that would require third party shippers to assign reparations claims to them. *See Spiller v. Atchison,*

T. & S.F. Ry., 253 U.S. 117, 134-35 (1920). *Accord*, *OXY*, 64 F.3d at 696 (recognizing contractual right to share in refunds). In any case, as demonstrated above, the Supreme Court has determined that countervailing policies warrant limiting reparations to direct purchasers of oil pipeline transportation.

CONCLUSION

For the reasons stated, the Commission's orders should be affirmed in all respects.

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