ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

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

Nos. 06-1166, *et al.*
(Formerly Nos. 06-1153, *et al.*)

PETRO STAR INC., *ET AL.*,
PETITIONERS,

v.

FEDERAL ENERGY REGULATORY COMMISSION AND UNITED STATES OF AMERICA,
RESPONDENTS.

ON PETITIONS FOR REVIEW OF ORDERS OF THE FEDERAL ENERGY REGULATORY COMMISSION

BRIEF FOR RESPONDENTS FEDERAL ENERGY REGULATORY COMMISSION AND UNITED STATES OF AMERICA

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Section 4412 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. No. 109-59, 119 Stat. 1144 (2005) ("SAFETEA-LU").................19, 26-27, 72-91

REGULATION:

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GLOSSARY

ALJ	Administrative Law Judge
Commission	Federal Energy Regulatory Commission
Complaint Order	*Flint Hills Resources Alaska, LLC v. ConocoPhillips Alaska, Inc.*, 113 FERC ¶ 61,061 (2005)
Complaint Rehearing Order,	*Flint Hills Resources Alaska, LLC v. ConocoPhillips Alaska, Inc.*, 114 FERC ¶ 61,322 (2006)
ConocoPhillips	Intervenor ConocoPhillips Alaska, Inc.
Exxon Mobil	Petitioner Exxon Mobil Corporation
FERC	Federal Energy Regulatory Commission
Flint Hills	Petitioner Flint Hills Resources Alaska, LLC
Initial Decision	*Trans Alaska Pipeline System*, 108 FERC ¶ 63,030 (2004)
Opinion 481	*Trans Alaska Pipeline System*, 113 FERC ¶ 61,062 (2005)
Opinion 481-A	*Trans Alaska Pipeline System*, 114 FERC ¶ 61,323 (2006)
Opinion 481-B	*Trans Alaska Pipeline System*, 115 FERC ¶ 61,287 (2006)
OPIS	Oil Price Information Service
Petro Star	Petitioner Petro Star Inc.

PIMS	Process Industry Modeling System
Platts	Platt's Oilgram Price Report
SAFETEA-LU	Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users § 4412(b)(1), Pub. L. No. 109-59, 119 Stat. 1144 (2005)
TAPS	Trans Alaska Pipeline System

IN THE UNITED STATES COURT OF APPEALS
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Nos. 06-1166, *et al.*
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PETRO STAR INC., *et al.*,
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FEDERAL ENERGY REGULATORY COMMISSION

BRIEF FOR RESPONDENTS
FEDERAL ENERGY REGULATORY COMMISSION
AND UNITED STATES OF AMERICA

STATEMENT OF THE ISSUE

The issue presented for review in this case, concerning the shipment of Alaskan crude oil, is whether the Federal Energy Regulatory Commission's ("Commission" or "FERC") rate determinations, which were made after an extensive evidentiary hearing and substantially affirmed the Administrative Law

Judge's ("ALJ") rate determinations, were reasonable and, therefore, should be upheld.

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutory and regulatory provisions are contained in the Appendix to this Brief.

INTRODUCTION

This case involves the Trans Alaska Pipeline System ("TAPS"), which provides the only means for shipping crude oil pumped from Alaska's North Slope oil fields to Valdez, Alaska. *Tesoro Alaska Petroleum Co. v. FERC*, 234 F.3d 1286, 1287 (D.C. Cir. 2000); *Exxon Company, U.S.A. v. FERC*, 182 F.3d 30, 34 (D.C. Cir. 1999); *Oxy USA, Inc. v. FERC*, 64 F.3d 679, 684 (D.C. Cir. 1995). Because there are multiple shippers and only one pipeline, the shippers' oil, which is of varying quality, is necessarily commingled during shipping, and each shipper takes delivery of a share of the common stream at Valdez. *Oxy*, 64 F.3d at 684.

"The TAPS 'Quality Bank' is an accounting arrangement approved by [FERC] that makes monetary adjustments between shippers in an attempt to place each in the same economic position it would enjoy if it received the same petroleum at Valdez that it delivered to TAPS on the North Slope." *Oxy*, 64 F.3d at 684. Thus, "the Quality Bank charges shippers of relatively low-quality

petroleum who benefit from commingling and distributes the proceeds to shippers of higher quality petroleum whose product is degraded by commingling." *Id.*

Because the oil at issue is not sold until after it is commingled and shipped to Valdez, there is no independent market upon which to base the relative price of the various streams shipped on TAPS. *Exxon*, 182 F.3d at 35. The Quality Bank determines the relative value of the oil using a "distillation" methodology. *Tesoro*, 234 F.3d at 1289; *Exxon*, 182 F.3d at 35. "Under that methodology, the crude stream is separated into its component parts, or 'cuts,'[[1]] market values are assigned to each cut, and the value of a crude stream is determined by the relative weighting of the cuts." Opinion No. 481 at P 4, JA 1327. Each cut is assigned a Gulf Coast and a West Coast price. *Tesoro*, 234 F.3d at 1289.

Of the nine cuts, only three -- Naphtha, VGO, and Resid -- are at issue in these consolidated cases. While the Oil Price Information Service ("OPIS") or Platt's Oilgram Price Report ("Platts") provide acceptable indicators of market value for most cuts, no such indicators exist for the three cuts at issue here. *Tesoro*, 234 F.3d at 1289.

---

[1] "The nine cuts, from lightest to heaviest, are (1) Propane; (2) Isobutane; (3) Normal Butane; (4) Light Straight Run ("LSR"); (5) Naphtha; (6) Light Distillate; (7) Heavy Distillate; (8) Vacuum Gas Oil ("VGO"); and (9) Resid." *Trans Alaska Pipeline System*, 108 FERC ¶ 63,030 (2004) ("Initial Decision") at n.15, JA 319 (quoting Exh. PAI-1 at 6).

After an extensive evidentiary hearing, the Commission affirmed virtually all of the ALJ's rate determinations. *Trans Alaska Pipeline System*, 113 FERC ¶ 61,062 (2005) ("Opinion 481"), *order on reh'g*, 114 FERC ¶ 61,323 ("Opinion 481-A"), *order on rehearing*, 115 FERC ¶ 61,287 (2006) ("Opinion 481-B"). Certain of those determinations are challenged in this appeal by several groups of Petitioners.

STATEMENT OF FACTS

I. Events Leading To The Challenged Orders

A. *Oxy* Proceeding

When the Quality Bank was first instituted in 1984, it used a gravity methodology to determine the monetary adjustments between shippers. *Oxy*, 64 F.3d at 685; *see also Tesoro*, 234 F.3d at 1288; *Trans Alaska Pipeline System*, 29 FERC ¶ 61,123 (1984) (approving the Quality Bank and its use of the gravity methodology). In 1993, however, as the components of the oil shipped on TAPS had changed, the Commission found use of the gravity methodology was no longer just and reasonable, and approved use of the distillation methodology as the just and reasonable replacement. *Oxy*, 64 F.3d at 686, 687; *see also Tesoro*, 234 F.3d at 1288-89; *Trans Alaska Pipeline System*, 65 FERC ¶ 61,277 (1993) (approving the Quality Bank's use of the distillation methodology).

This Court affirmed the Commission's determinations to replace the gravity methodology with the distillation methodology and to apply the distillation methodology only prospectively. *Oxy*, 64 F.3d at 689-92, 696-700, 701. The Court remanded, however, as to the method for valuing Resid and another TAPS Quality Bank cut (Distillate) which is not at issue here. *Id.* at 692-96, 701.

B. *Exxon* Proceeding

On review of FERC's orders on the partial remand ordered in *Oxy*, this Court substantially upheld FERC's determinations, including that the TAPS Quality Bank should value Resid based on its use as a feedstock for "cokers," *i.e.*, refinery equipment that breaks Resid down into its constituent products. *Exxon*, 182 F.3d at 36, 40-41, 42, 46. The Court remanded for lack of substantial evidence, however, the Commission's determination to use an adjusted market price as the proxy for the market value of Resid. *Id.* at 41-42, 50. The Court also found that the Commission "abused its discretion when it failed without adequate explanation to make the revaluation and concomitant Quality Bank adjustments retroactive to 1993, when the distillation method was adopted." *Id.* at 50; *see also id.* 47-50.

C. *Tesoro* Proceeding

In 1996, while the *Oxy* remand was pending, Exxon filed a complaint challenging use of the distillation methodology. *Tesoro*, 234 F.3d at 1289.

"Upholding an ALJ decision, the Commission dismissed the complaint, holding that Exxon had failed to produce evidence of changed circumstances to justify re-examination of the 1993 adoption of the distillation method." *Id.* (citing *Exxon Co., U.S.A. v. Amerada Hess Pipeline Corp.*, 87 FERC ¶ 61,133 at 61,527-30 (1999)).

Then, in 1998, Tesoro filed a complaint challenging the Naphtha and VGO cut valuations. *Id.* The Commission dismissed Tesoro's complaint, finding that no changed circumstances justified re-examining those valuations. *Id.* (citing *Tesoro Alaska Petroleum Co. v. Amerada Hess Pipeline Corp.*, 87 FERC ¶ 61,132 at 61,517-20 (1999)).

On review, this Court remanded to the Commission, finding that the Commission had not responded meaningfully to Exxon's and Tesoro's evidence of changed circumstances. *Id.* at 1294, 1295.

D. The Hearing On Remanded Issues

On November 1, 2001, the Commission ordered a hearing before an ALJ to address, among other things, the remanded distillation methodology issue, and valuation issues regarding the Resid, West Coast Naphtha, and VGO cuts. *Trans Alaska Pipeline System v. Amerada Hess Pipeline Corp.*, 97 FERC ¶ 61,150 at 61,652 (2001). The hearing took place over a 108 day period (from October 15,

2002 through June 13, 2003), involved 19 witnesses, 1,474 exhibits, and resulted in over 13,000 transcript pages. Opinion 481 at P 11, JA 1329; Initial Decision at P 21, JA 313.

E. Quality Bank Administrator's Notice Regarding Basis On Which Naphtha Is Valued

Under TAPS' Tariff, the Naphtha cut for both the Gulf and West Coasts was to be valued using Platts' Gulf Coast spot quote for Waterborne Heavy Naphtha, which included both Naphtha barge (typically 50,000 barrel volumes) and Naphtha cargo (up to 250,000 barrel volumes) transactions. R. 1114, Quality Bank Administrator Notice at 2-4, JA 265-67. Beginning May 1, 2003, however, Platts began publishing two Gulf Coast Waterborne assessments for Heavy Naphtha: one labeled "Heavy Naphtha," which assesses only cargo transactions; the other labeled "Heavy Naphtha Barge," which assesses only barge transactions. *Id.* at 2-3, JA 265-66.

Thus, on June 18, 2003, in accordance with the Tariff, the Quality Bank Administrator notified the Commission that, "although Platts continues to report a price assessment for Heavy Naphtha, the specifications or other basis for that quotation ha[ve] been radically altered, since it now covers only transactions in cargos." *Id.* at 4, JA 267 (internal quotation omitted); *see also id.* at 1, 3, JA 264, 266. The Quality Bank Administrator recommended that the replacement price for

the Naphtha component be "the arithmetic average of the average monthly price for Gulf Coast Waterborne 'Heavy Naphtha' and Gulf Coast Waterborne 'Heavy Naphtha Barge' as reported by Platts." *Id.* at 4, JA 267.

The Commission accepted the Quality Bank Administrator's proposed replacement product price, effective August 17, 2003, and consolidated the issues raised by the Quality Bank Administrator's notice with the ongoing hearing proceedings regarding the Quality Bank methodology and valuations. *Trans Alaska Pipeline System*, 104 FERC ¶ 61,201 (2003).

The ALJ set additional hearings to address the Quality Bank Administrator's proposal, but on October 17, 2003, the ALJ accepted the parties' October 10, 2003 stipulation, R. 1144, JA 284-92, to admit certain exhibits into evidence in lieu of an evidentiary hearing. R. 1145, JA 293-94.

F. The Initial Decision

1. Resid Cut Issues

a. Resid Cut Valuation Methodology

Resid is the portion of the petroleum stream remaining after distillation of all other cuts at lower boiling points, *i.e.*, the material that does not boil out until the temperature reaches or exceeds 1050° Fahrenheit. Initial Decision at P 1134, JA 669. While there is no active Resid market upon which to base its value, *see*

Exxon, 182 F.3d at 42, the parties stipulated before the hearing that "Resid shall be valued as a Coker[[2]] feedstock,"[3] and that "[t]he Coker feedstock value of Resid shall be determined in accordance with the following formula: Resid = Before-Cost Value of Coker Products – (Coking Costs * Nelson Farrar Index)." R. 989 at 1, JA 38 ("October 3, 2002 Stipulation"); *see also* Initial Decision at P 1135, JA 670. Parties raised issues concerning both the "Before-Cost Value of Coker Products" and "Coking Costs" components of the formula.

---

[2] A coker is "refinery equipment which breaks Resid down even further into lighter fuel products and a heavy residue . . . ." *Exxon*, 182 F.3d at 36. As Exxon's witness Mr. O'Brien explained, a coker is:

> a process unit within a refinery that takes the very heaviest portion of the barrel and it subjects that portion of the barrel that's called resid, subjects it to high temperature and to certain conditions of pressure, but most importantly very high temperature, and it effectively cooks the material.
>
> That causes the large molecules to break into smaller molecules and produces a lot more of the kinds of products that we use in our cars and trucks and trains. You would not be able to use the resid for that, unless you put it through this coker first to transform it first into these lighter products.

R. 1003, Transcript at 967, quoted in Initial Decision at n. 16, JA 319.

[3] A feedstock is something that has to be processed further. Initial Decision at n. 17, JA 320 (citing R. 1069, Transcript at 9423, JA 253).

(1) The Before-Cost Value of Coker Products

(a) Assays

The October 3, 2002 Stipulation provided that the "Before-Cost Value of Coker Products" should be calculated using a three step process. R. 989 at 1, JA 38. The first step uses the Process Industry Modeling System ("PIMS") to simulate refinery operations and determine the yield of each product (fuel gas, propane, isobutene, normal butane, Light Straight Run, Naphtha, Heavy distillate, VGO, and coke) that would be produced after running the Resid through a Coker. R. 989 at 1-2, JA 38-39; Initial Decision at PP 1135, 1144, JA 670, 674; Opinion 481 at P 18 and n.26, JA 1322 (citing R. 1595, Exh. PAI-1 at 11, JA 1534; R. 1599, Exh. PAI-5, JA 1556). As part of this step, assays are used to determine the American Petroleum Institute gravity, sulfur content, and carbon content of the Resid, which are then input into the PIMS yield spreadsheet from which Coker yields are derived. Initial Decision at P 1144 and n. 408, JA 674 (citing R. 1138, Eight Parties' Initial Br. at 17, JA 278).

During the hearing, the parties proffered different assay combinations they believed should be used to determine the Coker product yields for the past period at issue here. *See* Initial Decision at P 1144, JA 674. Exxon proposed the use of the following 10 assays: (1) the February 1994 Haverly/Chevron; (2) the August

1994 Exxon; (3) the 1995 Haverly/Chevron; (4) the January 1995 Williams/BP (Caleb Brett); (5) the 1996 Haverly/Chevron; (6) the April 1996 Exxon; (7) the October 1996 ARCO (Caleb Brett); (8) the 1998 Haverly/Chevron; (9) the January 2000 Exxon; and (10) the December 2001 Phillips (Caleb Brett). Initial Decision at P 1154 and n. 412, JA 677 (citing R. 2466, Exhibit No. EMT-277, JA 1947).

The Eight Parties,[4] on the other hand, proposed only the use of three of those assays: (1) the August 1994 Exxon; (2) the October 1996 ARCO (Caleb Brett); and (3) the December 2001 Phillips (Caleb Brett). Initial Decision at P 1154 and n.413, JA 677 (citing R. 1716, Exh. PAI-122, JA 1597). As all parties agreed that those three assays should be used, the only issue before the ALJ was whether any of the remaining proposed assays should be used as well. Initial Decision at P 1154, JA 677.

After carefully considering the testimony and arguments regarding the remaining proposed assays, the ALJ determined that the April 1996 Exxon and January 2000 Exxon assays should be used in addition to the three uncontested assays. Initial Decision at PP 1155-65, JA 677-81. The ALJ found no merit to

[4] The "Eight Parties" were BP Exploration (Alaska) Inc., BP America Production Company (collectively, "BP"), OXY USA Inc., Petro Star Inc. ("Petro Star"), the State of Alaska, Union Oil Company of California, Williams Alaska Petroleum Inc ("Williams"), and ConocoPhillips Alaska, Inc. ("ConocoPhillips").

the argument that these two assays should be excluded because "the reported Resid yields . . . are outside of the range of Resid volume yields in the assays taken each month of the year by the" Quality Bank Administrator. Initial Decision at P 1159, JA 679 (citing R. 1138, Eight Parties' Initial Br. at 22, JA 283). That argument compared assays taken on a single day to the Quality Bank monthly sample average, and "the small deviation of a daily sample from a monthly average should not be cause for excluding them." Initial Decision at PP 1160, 1163, JA 680. Moreover, the ALJ noted, parties opposing the use of these two assays "had not proved, or even suggested, that there was anything incorrect in the manner in which these assays were performed." Initial Decision at P 1163, JA 680.

(b) Coke Value

Coke is one of the products produced after running the Resid through a coker. Initial Decision at P 1135, JA 670. "It is unique in that . . . it is a solid, not a liquid or a gas as are all of the other products produced from crude oil, and 'can be moved only by truck, rail, or solid bulk vessel.'" Initial Decision at P 1173, JA 683 (quoting R. 2224, Exh. No. EMT-31 at 10-11, JA 1714-15). Moreover, coke's "price is sometimes so low that coke is sold at a deficit when the cost of moving it to the vessel is considered." *Id.* (citing R. 2224, Exh. No. EMT-31 at 11-12, JA 1715-16). Nevertheless, coke "must be removed from the refinery, even at a loss,

'because the refinery cannot store it and still continue its refining operation.'" *Id.* (quoting R. 2224, Exh. No. EMT-31 at 12, JA 1716).

The record established "that coke is a product which is unique enough to warrant being treated differently than the other Coker products," and "that refiners must incur costs related to their sale of coke inordinate to their costs for sales of other products related to the Quality Bank process." *Id.* at P 1175, JA 683-84 (citing R. 2224, Exh. No. EMT-31 at 9-19, JA 1713-23). In these circumstances, the ALJ found that, if he were "truly to determine the *value* of coke," he "must consider certain refinery cost factors, . . . and not just the market price at a delivered location." *Id.* at P 1174, JA 683.

(2) Coking Cost Issues

To determine the costs incurred to coke Resid, the Eight Parties proposed using their witness John O'Brien's coker cost curve estimate, in which Mr. O'Brien "based his calculations on a 'typical large West Coast refinery . . . .'" Initial Decision at P 33, JA 321 (quoting R. 1595, Exh. PAI-1 at 17, JA 1536); *see also* Initial Decision at PP 33-82, JA 320-38; R. 1595, Exh. PAI-1 at 16-36, JA 1535-55. Exxon proposed, on the other hand, using its witness Jenkins' itemized cost estimate of a hypothetical coker. Initial Decision at P 1178, 1179, JA 684, 685.

The ALJ determined that:

> neither Exxon's nor the Eight Parties's "overall approach" is satisfactory. I am troubled with the complexity and subjectivity of Jenkins's itemized list of components. Also, I question whether Jenkins expended the effort necessary . . . to actually do a detailed estimate which I could accept as accurate. While I am troubled by O'Brien's lack of detail, in the final analysis, as will be seen below, I can adjust O'Brien's estimate in ways which satisfy me that the end result is as close a cost estimate as possible given the limitations of what can be accomplished in the hypothetical world in which we are trying to determine the cost of a Delayed Coker.[[5]] I can find no way of modifying Jenkins's estimate to satisfy me that the end result is accurate and fair to all parties. In sum, there is nothing in Jenkins's testimony or Exxon's arguments that convinces me that Jenkins's itemized cost approach is objective or accurate enough to satisfy the needs of using it as part of the formula which will result in a determination of the value of Resid. Therefore I hold that, as modified below, O'Brien's cost curve should be used.

Initial Decision at P 1184, JA 687 (footnote omitted).

The ALJ modified Mr. O'Brien's Inside Battery Limits costs[6] to include: (1) a four-drum, rather than a two-drum, coker, Initial Decision at P 1194, JA 692; (2) automatic deheading equipment (equipment used to open up a coke drum to permit coke to be removed) for both the top and bottom heads, Initial Decision at PP 1195, 1199, JA 692, 694; (3) adequate coke handling equipment, *i.e.*, a coke pit

[5] "'[D]elayed coker' is the term used for newer cokers." Opinion 481 at n.31.

[6] Inside Battery Limits costs are direct costs, *i.e.*, the costs of the Coker itself and related downstream refinery units. Initial Decision at P 1185, JA 687.

and crane, chutes and conveyor systems, and covered storage, Initial Decision at PP 1200, 1204, JA 694, 696; and (4) a coker gas plant, which is used to process the gases produced in coking Resid, Initial Decision PP 1205-08, JA 697-99.

The parties agreed that Outside Battery Limits costs[7] typically are calculated as a percentage of Inside Battery Limits costs. Initial Decision at P 1212, JA 700. Consistent with that, Mr. O'Brien proposed that Outside Battery Limits be calculated as 35 percent of Inside Battery Limits costs. Initial Decision at P 1209, JA 699. Mr. Jenkins proposed a different, atypical approach. *Id.* at P 1210, JA 699. The ALJ determined that O'Brien's typically-used approach should be adopted. *Id.* at P 1212, JA 700.

(3) Just And Reasonable Finding

The ALJ found, "based on a reading of the entire record, that the Resid value established in the Initial Decision is just and reasonable . . . ." Initial Decision at n.871, JA 1206.

b. Effective Date of Resid Cut Valuation Methodology

The ALJ determined that the Resid Cut valuation methodology should be applied retroactively to the date the distillation methodology was adopted. Initial

[7] Outside Battery Limits costs are indirect costs, *i.e.*, the costs of the facilities necessary to support the refinery processing units such as storage facilities, steam generation systems, and finance costs. Initial Decision at P 1185, JA 687.

Decision at PP 2941, 2945, JA 1205, 1206. Although this Court affirmed the Commission's 1993 findings that the gravity methodology was no longer just and reasonable and should be replaced with the distillation methodology, *Oxy*, 64 F.3d at 689-92, the Court did not affirm the Resid valuation portion of that methodology. Initial Decision at P 2939, 2945, JA 1204, 1206. Thus, the ALJ found, "the proxy which is determined herein for Resid is the only just and reasonable value for it since December 1, 1993, and it must be made effective on that date notwithstanding any equitable considerations." *Id.* at 2945, JA 1206.

2. Effective Date of VGO And Naphtha Cut Valuation Methodologies

Unlike with the Resid methodology, there were just and reasonable VGO and Naphtha methodologies in place when the ALJ was presented with determining the effective date of the replacement VGO and Naphtha methodologies. As a result, the ALJ held that the new VGO and Naphtha methodologies should be effective only prospectively. Initial Decision at PP 2731, 2770, JA 1141, 1152.

3. Quality Bank Administrator's Averaging Proposal

The ALJ found that "Platts ha[d] split what previously was the Heavy Naphtha assessment into a Heavy Naphtha assessment that relates to cargo sized transactions and a Heavy Naphtha Barge assessment that only relates to barge-

sized transactions." Initial Decision at P 2741, JA 1144. Thus, the "claim that the manner in which Platts assessed Gulf Coast Naphtha was not radically changed by its decision to report barge and cargo transactions separately ha[d] no basis in fact." *Id.* at P 2744, JA 1145.

Furthermore, the ALJ found that averaging Platt's Heavy Naphtha cargo and barge assessments was consistent with the manner in which other Quality Bank cuts are valued. *Id.* at PP 2745-47, JA 1145-46. For instance, the proposal to value the Resid cut in the instant case, which was supported by all the parties, "will use a weighted average of *nine* reported price assessments." *Id.* at P 2745, JA 1146 (quoting TAPS Carriers' Reply Br., R. 1158 at 13, JA 296).

The ALJ also found the Quality Bank Administrator's 1998 determination not to use an arithmetic average of barge and cargo High Sulfur VGO to value the VGO cut was made "under the facts involved in those circumstances," and "does not bar him from making a different determination in 2003 . . . under different circumstances." Initial Decision at n.821, JA 1144.

G. Flint Hills' Complaint

On July 11, 2005, after the Initial Decision had issued, Flint Hills Resources Alaska, LLC ("Flint Hills") filed a complaint alleging that the VGO cut valuation methodology was unjust and unreasonable and, as stipulated in the October 3, 2002 Stipulation, "should be changed to use the Oil Price Information Service (OPIS)

West Coast High Sulfur VGO weekly price." R. 1228 at 3-4, JA 1315-16. Flint Hills asserted that "the OPIS West Coast Sulfur VGO weekly price should be implemented immediately," and that it was "entitled to reparations or refunds from the TAPS carriers and/or shippers, based on their use of the unjust and unreasonable Gulf Coast VGO price, with such reparations or refunds calculated from April 1, 2004," the date Flint Hills acquired Williams' refinery that receives crude oil for processing from TAPS. *Id.* at 3, 5-6, JA 1315, 1317-18.

The parties named in the complaint opposed it, "contend[ing] that since the ALJ held that the new reference price for the West Coast VGO was to be implemented on a prospective basis there is no basis to grant the requested relief." *Flint Hills Resources Alaska, LLC v. ConocoPhillips Alaska, Inc.*, 113 FERC ¶ 61,061 (2005) ("Complaint Order") at P 10, JA 2025, *order on reh'g*, 114 FERC ¶ 61,322 (2006) ("Complaint Rehearing Order"), JA 2042-47.

II. The Challenged Orders

A. Resid Cut Issues

1. Resid Cut Valuation Methodology

The Commission affirmed the ALJ's findings regarding Resid's Before-Cost Value and Coker Products, with only one modification to the ruling on automatic heading equipment which is not at issue here. Opinion 481 at PP 15-49, JA 1331-

43; Opinion 481-A at PP 24-45, JA 1455-63. In addition, the Commission "affirm[ed] that the ALJ's Resid value was based on a just and reasonable methodology, and the resulting Resid value is just and reasonable." Opinion 481 at P 49, JA 1343; *see also* Opinion 481-A at P 28, JA 1456 ("the Commission agreed with the ALJ's finding that the Resid value that would result from using Mr. O'Brien's modified cost-curve approach would be just and reasonable.").

2. Effective Date of Resid Cut Valuation Methodology

The Commission "affirm[ed] the ALJ's ruling that the Resid cut valuation must be applied on a retroactive basis." Opinion 481 at P 234, JA 1395. "[S]ince the valuation of the Resid cut under the Distillate methodology was challenged from the outset, and the Court upheld that challenge in *Oxy*, there has not been a legal rate for the Resid cut until now. Thus, retroactive application of the new valuation for the Resid cut was not barred by the filed rate doctrine." Opinion 481-A at P 88, JA 1476; *see also* Opinion 481 at P 146, JA 1370 (same).

However, because, on August 10, 2005, "Congress passed legislation limiting the period of any retroactive refunds in a pending TAPS proceeding to February 1, 2000," Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users § 4412(b)(1), Pub. L. No. 109-59, 119 Stat. 1144 (2005) ("SAFETEA-LU"), the Commission modified the effective date of the Resid cut to February 1, 2000. Opinion 481 at P 176, 235, JA 1378, 1395-96.

3. Coker VGO and Coker Naphtha Values To Be Used In Determining The Resid Cut's Valuation

On rehearing of Opinion 481, Petro Star Inc. ("Petro Star") noted that Opinion 481 "fails to specify that West Coast-based values must be used for coker VGO and coker Naphtha when the coker feedstock methodology is implemented to value West Coast Resid retroactively," at least as of October 3, 2002. R. 1265 at 16-17, 19, JA 1409-10, 1412; *see also* Opinion 481-A at PP 46-48, JA 1463-64; Opinion 481-B at P 17, JA 1495. Petro Star pointed out that, "if Gulf Coast valuations for coker VGO and coker Naphtha are used to value Resid retroactively, Resid will be undervalued and the Resid valuation will be unjust and unreasonable." *Id.* at 17, JA 1495. Moreover, Petro Star contended, "*Oxy*'s consistency standard requires the Commission to specify that the coker feedstock methodology shall employ the new West Coast VGO and West Coast Naphtha valuations to avoid undervaluing or overvaluing West Coast Resid retroactively." *Id.* (citing *Oxy*, 64 F.3d at 693).

The Commission found Petro Star's concerns had merit. Opinion 481-A at P 49, JA 1464; Opinion 481-B at PP 12-37, JA 1494-1501. First, the Resid cut's value is based, in part, on the values of Coker VGO and Coker Naphtha, which were challenged as being unjust and unreasonable and replaced with new just and reasonable values in this proceeding. Opinion 481-B at PP 21, 23, JA 1496-97.

Moreover, "[t]he purpose of retroactive application of the new Resid valuation was in recognition of the Court's ruling in *Exxon*, [182 F.3d at 49-50,] that retroactivity is favored because it 'would make the parties whole,' and prevent some parties 'divvy[ing] up a windfall at the expense of [other] parties . . . .'" Opinion 481-B at P 21, JA 1496-97. Here, the Commission concluded, the "fair result" that would "make the parties whole," would be to apply the just and reasonable replacement West Coast VGO and Naphtha values to the Resid cut's recalculation. Opinion 481-B at PP 21, 23, JA 1496-97. As "the Resid cut's value was to be recalculated for the retroactive period using the new Resid valuation because it was unfair to parties whose crude contained little Resid to use the old valuation," it would not be fair to apply the prior Coker VGO and Coker Naphtha values to the retroactive period because doing so "would result in a windfall to some parties, contrary to the very purpose of the retroactive application of the new Resid valuation that *Exxon* mandated." Opinion 481-B at P 27, JA 1498.

The Commission also found October 3, 2002 to be the appropriate date to begin applying the just and reasonable replacement VGO and Naphtha cut values to the Resid cut recalculation. Opinion 481-A at P 49, JA 1464; Opinion 481-B at PP 18, 24, JA 1495, 1497-98. As the Commission explained:

> The October 3, 2002 stipulation set the new valuation reference price for West Coast VGO, namely, "the published OPIS West Coast High Sulfur VGO weekly price." The ALJ had also ruled that the Tallett

> Methodology should be used for valuing West Coast Naphtha, because using the Gulf Coast Naphtha price was not just and reasonable. Since the evidence on this issue related to the period before October 3, 2002, and the stipulation had provided for the same effective date for the new valuation of West Coast Naphtha and VGO, the October 3, 2002 date was an appropriate and reasonable date from which to commence the new valuation.

Id. at P 24, JA 1497.

B. VGO Cut And Naphtha Cut Effective Date Issues

The Commission affirmed the ALJ's VGO cut and Naphtha cut effective date determinations. Opinion 481 at PP 145-51, 172-75, JA 1370-72, 1377-78; Opinion 481-A at PP 82-90, JA 1475-77. First, the Commission explained:

> The West Coast Naphtha cut stands on a different footing than the Resid cut. That cut was challenged when the Commission accepted the distillate method, and then until the present proceeding there has not been an approved value for the Resid cut. This is not so for the Naphtha cut. In *Tesoro* the Court did not upset the validity of the West Coast Naphtha calculation but required the Commission to determine whether the existing valuation of the West Coast Naphtha cut was still just and reasonable. However, until there was a determination, the existing rate was the filed rate, and any change can only be made on a prospective basis.

Opinion 481 at P 146, JA 1370 (footnote omitted).

Likewise, as the validity of the VGO cut rate approved by the Commission in 1994 was not challenged on appeal, "it [was] the lawful, just and reasonable rate until replaced by another rate." *Id.* at P 174, JA 1378; *see also* Opinion 481-A at P 88, JA 1476 ("The valuation of [the VGO] cut was not challenged when the

Commission adopted the Distillation methodology, which change the Court approved in *Oxy* so the valuation of the West Coast VGO cut was the legal rate. Until the Commission adopted another valuation, that valuation continued."). "While the parties stipulated as to a new [VGO cut] reference price, until the Commission issues an order adopting that price, the existing reference price continues as the lawful rate," and "could not be changed retroactively." Opinion 481 at P 174, JA 1378; Opinion 481-A at P 78, JA 1474.

C. Quality Bank Administrator's Averaging Proposal

The Commission affirmed the ALJ's approval of the Quality Bank Administrator's June 18, 2003 proposal to use the average of the two Heavy Naphtha prices to value Gulf Coast Naphtha effective August 17, 2003, the date the Commission, in *Trans Alaska Pipeline System*, 104 FERC ¶ 61,201 (2003), R. 1124, JA 270-73, accepted the proposal and set it for hearing. Opinion 481 at PP 81, 157, 158, 162-64, JA 1353, 1373, 1374-75; Opinion 481-A at PP 68, 70-71, JA 1470-72. The Commission found that:

> The evidence establishes that there are two reliable Platts price assessments for Heavy Naphtha, that both are supported by "numerous transactions," and that "[b]oth markets are therefore representative of the market for Heavy Naphtha on the Gulf Coast."[[8]] We agree that there is no factual basis in the record, therefore, for selecting one of those two price assessments over the other, and an

[8] Quoting R. 1590, Exh. TC-19 at 4, JA 1519.

> appropriate just and reasonable solution is to simply average the two Heavy Naphtha price assessment[s], as the Quality Bank proposed.

Opinion 481 at P 164, JA 1374-75 (second footnote with citation omitted); *see also* Opinion 481-A at P 70, JA 1471 (same).

D. Flint Hills' Complaint

The Commission dismissed Flint Hills' complaint. Complaint Order at P 14, JA 2026. The Commission already had granted the substantive result sought in the complaint, as Opinion 481 affirmed the ALJ's adoption of the OPIS West Coast High Sulfur VGO weekly price as the stipulated new VGO valuation methodology. Complaint Order at PP 5-6, 12, JA 2024-25, 2026. Moreover, while the complaint sought retroactive application of that new reference price, Opinion 481 affirmed the ALJ's ruling that it could apply only prospectively. Complaint Order at P 14, JA 2026; *see also* Complaint Rehearing Order at P 9, JA 2045. Thus, the Commission found, "there could be no claim for retroactive application for any period before the date of [Opinion 481], namely, October 20, 2005." *Id.* at P 18, JA 2047.

SUMMARY OF ARGUMENT

After the extensive evidentiary hearing in this case, the Commission affirmed virtually all of the ALJ's rate determinations. While Petitioners challenge certain of those rate determinations, none of the challenges has merit.

First, the Commission appropriately affirmed the ALJ's Resid cut determinations. As the ALJ found, there was no legitimate basis on which to exclude the two challenged assays from the Before-Cost Value of Coker Products analysis. In addition, the Commission reasonably concluded that, while most Coker product prices were not adjusted for shipping and handling, because coke was unique, shipping and handling costs must be included to determine coke's true value.

Also, contrary to Resid Cut Petitioners' contention, the Commission fully explained why it was necessary to add the four items inappropriately omitted from Mr. O'Brien's cost-curve methodology. Likewise, the Commission properly found both the methodology's components and the resulting Resid value just and reasonable. Furthermore, the Commission's reliance on the Coker cost estimates in Exhibit PAI-10, an admitted item of evidence, was proper.

There also was no merit to Resid Cut Petitioners' double counting claims. The evidence established that Mr. O'Brien's cost curve did not already include the items the ALJ determined should be added to it and that Outside Battery Limits costs should be calculated as 35 percent of Inside Battery Limits costs.

The Commission's effective date determinations also were appropriate. As the Commission explained, the new Resid cut valuation must apply retroactively because there had never been a finally approved just and reasonable valuation for

the Resid cut. By contrast, because there had been finally approved just and reasonable valuations for the VGO and Naphtha cuts, the new valuations for those cuts could be applied only prospectively.

Moreover, the Commission appropriately affirmed the ALJ's adoption of the Quality Bank Administrator's averaging proposal. Platts had split barge and cargo sized Naphtha transactions into two price assessments rather than one, radically altering the assessment on which Naphtha's price had been based. Averaging the two Platts Naphtha prices most accurately reflected the Naphtha market at issue, which included both barge and cargo sized transactions.

Finally, Congress' directive in Section 4412(b)(1) of SAFETEA-LU, providing that the Commission may not order retroactive changes in a TAPS Quality Bank proceeding pending before the Commission for any period before February 1, 2000, is constitutional. Contrary to Petitioner claims, that provision does not conflict with *United States v. Klein*. *Klein* does not limit Congress' authority over federal agencies; it concerns only the constitutional limits of Congress' authority over federal courts. Additionally, by placing a time limit on the Commission's ability to order refunds in TAPS Quality Bank proceedings, Section 4412(b)(1) changed existing law. Furthermore, this Court has held

specifically that a law was not unconstitutional under *Klein* merely because it was aimed at one pending suit involving a single controversy.

Section 4412(b)(1) satisfies rational-basis review as well. There is nothing irrational about placing time limits on retroactive changes in TAPS Quality Bank adjustments. Retroactive awards can have a highly disruptive effect on the financial interests and activities of affected shippers, particularly where, as here, the administrative proceedings that lead to them have gone on for many years.

ARGUMENT

I. Standard of Review

The Court reviews FERC orders under the Administrative Procedure Act's arbitrary and capricious standard. *Oxy*, 64 F.3d at 690. Under that standard, the Commission's decision must be reasoned and based upon substantial evidence in the record. The Court is "particularly deferential to the Commission's expertise in ratemaking cases, which involve complex industry analyses and difficult policy choices. *North Baja Pipeline, LLC v. FERC*, 2007 U.S. App. LEXIS 5520 at *6 (D.C. Cir., March 9, 2007) (quoting *Exxon Mobil Corp. v. FERC*, 430 F.3d 1166, 1172 (D.C. Cir. 2005)); *Oxy*, 64 F.3d at 690.

II. THE COMMISSION APPROPRIATELY AFFIRMED THE ALJ'S RESID CUT DETERMINATIONS

A. The Before-Cost Value of Coker Products

1. Assays

The Commission affirmed the ALJ's determination that, in addition to the three assays all the parties agreed should be used in determining the Before-Cost Value of Coker Products, two of the seven additional assays proffered by Exxon -- the April 1996 Exxon and January 2000 Exxon assays -- should be used as well. Initial Decision at PP 1154-65, JA 677-81; Opinion 481 at P 20, JA 1333. As the ALJ had found, the argument that these two Exxon assays should be excluded because the reported Resid yields are outside the range of monthly Resid volume yields compared assays taken on a single day to the Quality Bank monthly sample average, and "the small deviation of a daily sample from a monthly average should not be cause for excluding them." Initial Decision at PP 1160, 1163, JA 680.

Certain of the Resid Cut Petitioners[9] claim the Commission should not have

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[9] The Resid Cut Petitioners are: BP, Flint Hills Resources Alaska, LLC ("Flint Hills"), OXY USA Inc., Petro Star, the State of Alaska, Union Oil Company of California, and Williams. During the underlying FERC proceedings, the Resid Cut Petitioners (with the exception of Flint Hills) were referred to as the "Eight Parties." The State of Alaska does not join in the other Resid Cut Petitioners' assay challenges. Resid Cut Br. at 25 and n.27.

included the January 2000 Exxon assay because, they assert, it "is not a 'small' deviation" from the monthly average. Resid Cut Brief at 26. The ALJ and the Commission, however, reasonably found that the one percent difference between the January 2000 Exxon assay and the monthly average was small. Initial Decision at PP 1160, 1163, JA 680. The Commission's expert determination regarding this ratemaking matter, not Petitioners' contrary opinion, merits deference by the Court. *See*, *e.g.*, *Ass'n of Oil Pipelines v. FERC*, 83 F.3d 1424, 1431 (D.C. Cir. 1996) (the Court is "particularly deferential to the Commission's expertise" in ratemaking cases).

There also is no merit to the Resid Cut Petitioners' claim that the January 2000 Exxon assay should have been excluded because its Con Carbon Residue weight percent is 1.7 weight percent higher than that of the other 4 assays adopted here. Br. at 27. None of the numerous witnesses at the hearing ever suggested the notion that the January 2000 Exxon assay should have been excluded because of its Con Carbon Residue weight. And, as the ALJ and Commission found, no party had "proved, or even suggested, that there was anything incorrect in the manner in which th[is] assay[] w[as] performed." Initial Decision at P 1163, JA 680. Consequently, the ALJ and the Commission properly determined that the January 2000 Exxon assay should be averaged with the other four adopted assays in determining the Before-Cost Value of Coker Products.

The Resid Cut Petitioners also challenge use of the April 1996 Exxon assay because its Resid yield is 0.26 percent higher than the highest Quality Bank Administrator assay percentage for 1996. Resid Cut Br. at 26, 27. Before the Commission, however, only the January 2000 Exxon assay was challenged. *See*, *e.g.*, R. 1188, Brief on Exceptions at 66, JA 1255 (asserting that "instead of a five-assay average, the Eight Parties submit that the January 2000 Exxon assay be rejected and that the remaining four assays selected by the ALJ be averaged to derive . . . part of the 'before-cost' portion of the Resid valuation."). Because a challenge to the April 1996 Exxon assay was never raised to the Commission, such a challenge cannot be raised to this Court on appeal. *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36-37 (1952) (an objection made for the first time on appeal cannot be entertained by the Court). In any event, as the ALJ found, "the small deviation of a daily sample from a monthly average should not be cause for excluding" the April 1996 Exxon assay. Initial Decision at PP 1160, 1163, JA 680. Petitioners do not dispute that the April 1996 Exxon assay's 0.26 percent deviation is small.

Next, the Resid Cut Petitioners assert that the Commission "fail[ed] to address the Eight Parties' exceptions regarding use of the five-assay average, render[ing] the Commission's decision on the Resid cut valuation arbitrary and

capricious." Br. at 27. The Petitioners are wrong. Where, as here, the ALJ already had addressed the matters raised on exceptions to his decision, the Commission may summarily affirm the ALJ's findings as its own without having to address the matters anew.[10] *Cities of Bethany v. FERC*, 727 F.2d 1131, 1144 (D.C. Cir. 1984). The case Resid Cut Petitioners cite in support of this assertion, *AT&T v. FCC*, 452 F.3d 830, 837 (D.C. Cir. 2006), does not provide otherwise. It stands only for the proposition that "[u]nder the arbitrary and capricious standard [the court] look[s] to see if the agency has . . . articulated a rational explanation for its action." *AT&T*, 452 F.3d at 837 (quoting *Eagle-Picher Indus. v. EPA*, 759 F.2d 905, 921 (D.C. Cir. 1985)). Here, the Commission's rationale can be found in the portion of the ALJ's Initial Decision it summarily affirmed.

2. Coke Value

The Resid Cut Petitioners also contend that, because most other Coker product prices were not adjusted for shipping and handling, the Commission erred when it affirmed the ALJ's determination that the price of coke should be adjusted for shipping and handling. Br. at 22-24. In Petitioners' view, this "created an unlawfully discriminatory methodology by undervaluing coke – and hence Resid –

[10] The Resid Cut Petitioners appear to acknowledge this in their discussion of another issue where they state "[b]ecause the Commission did not address this [issue] its rationale must be sought in the Initial Decision." Br. at 23.

relative to all the other cuts for which no such adjustment is made" in contravention of *Oxy*, 64 F.3d at 693. Br. at 23-24. This unlawful discrimination contention is baseless.

First, as the ALJ noted, Initial Decision at P 1171, JA 682-83 (citing R. 1130, Exxon Initial Br. at 45-46, JA 275-76), and the Petitioners admit, Br. at 22, coke is not the only Coker product whose price is adjusted for shipping and handling. The price of fuel gas, like coke, is adjusted for shipping and handling. Initial Decision at P 1171, JA 682-83 (citing R. 1130, Exxon Initial Br. at 45-46, JA 275-76); Br. at 22 ("All other coker products except fuel gas . . . are valued at market prices, less only *processing* cost adjustments).

Additionally, the ALJ explained, coke is valued differently from most other Coker products because it "is unique in that . . . it is a solid, not a liquid or a gas as are all of the other products produced from crude oil, and 'can be moved only by truck, rail, or solid bulk vessel.'" Initial Decision at P 1173, JA 683 (quoting R. 2224, Exh. No. EMT-31 at 10-11, JA 1714-15). Moreover, while the Resid Cut Petitioners assert that coke's shipping and handling costs are comparable to those of the other Coker products, Br. at 24, the ALJ reasonably found otherwise. While coke "makes up only 4% of the common stream[, it] is responsible for 17.31% of the total logistics costs for all Quality Bank products." *Id.* at P 1171, JA 683

(citing R. 1321, Exh. BPX-17, JA 1507; R. 1008, Transcript at 1795-97, JA 105-07 (pointing out, in comparison, that VGO makes up 36 percent of the common stream, but bears only 31 percent of the logistics costs) (internal quotes omitted)).

Furthermore, the ALJ found, coke's "price is sometimes so low that coke is sold at a deficit when the cost of moving it to the vessel is considered." *Id.* at P 1173, JA 683 (citing R. 2224, Exh. No. EMT-31 at 11-12, JA 1715-16). Nevertheless, coke "must be removed from the refinery, even at a loss, 'because the refinery cannot store it and still continue its refining operation.'" *Id.* (quoting R. 2224, Exh. No. EMT-31 at 12, JA 1716).

In these circumstances, the ALJ appropriately concluded that, if he were "truly to determine the *value* of coke," he "must consider certain refinery cost factors, . . . and not just the market price at a delivered location." *Id.* at P 1174, JA 683. The record established "that coke is a product which is unique enough to warrant being treated differently than the other Coker products," and "that refiners must incur costs related to their sale of coke inordinate to their costs for sales of other products related to the Quality Bank process." *Id.* at P 1175, JA 683-84 (citing R. 2224, Exh. No. EMT-31 at 9-19, JA 1713-23).

Thus, the Commission's determination to adjust coke's price to account for shipping and handling costs did not conflict with (Br. at 23) but, rather, complied with, *Oxy*, 64 F.3d at 693, in which the Court explained that:

> The goal of the Quality Bank valuation methodology . . . is to assign accurate relative values to the petroleum stream that is delivered to TAPS and becomes part of the common stream. In order to achieve this goal, FERC must accurately value all cuts – not merely some or most of them – or it must overvalue or undervalue all cuts to approximately the same degree.

By adjusting coke's price to adjust for shipping and handling, the Commission ensured that all Coker products, including coke, were valued accurately.

B. The Commission Appropriately Affirmed The Methodology Adopted By The ALJ To Value Coker Costs

The Commission affirmed the ALJ's adoption of Mr. O'Brien's cost-curve methodology to value coker costs, as modified to include the costs of four items inappropriately omitted from that methodology. Initial Decision at PP 1184-1214, JA 687-700; Opinion 481 at P 33, JA 1337. Resid Cut Petitioners mistakenly claim that "the Commission failed to offer a reasonable basis for mixing these methodologies." Br. at 10; *see also* Br. at 15 (complaining that "FERC mixed two inconsistent methodologies when it grafted the [additional] [e]quipment costs onto O'Brien's coker capital cost estimate.").

To the contrary, the Commission explained that "[t]he ALJ found neither O'Brien's nor Jenkins's 'overall approach' satisfactory," but determined that he could "adjust O'Brien's estimate in ways which satisf[ied] [the ALJ] that the end result is as close as possible given the limitations of what can be accomplished in

the hypothetical world in which we are trying to determine the cost of a Delayed Coker." Opinion 481 at P 22, JA 1333-34 (quoting Initial Decision at P 1184, JA 687). "[T]he record establishe[d] that Eight Parties' coker cost estimate presented by O'Brien simply did not include or factor in certain equipment that a 'typical' coker should have. Therefore, the ALJ added the unaccounted-for equipment to O'Brien's cost estimate." Opinion 481 at P 47, JA 1342; *see also id.* at PP 33-37, JA 1337-39 ("the evidence demonstrate[d that] the four items of equipment that the ALJ added to Mr. O'Brien's coker cost estimate are necessary components of any modern coker and Mr. O'Brien did not account for them in his estimate."). Moreover, there was no showing "that the ALJ's methodology for calculating coker costs, except as to the automatic deheading equipment, was incorrect." Opinion 481 at P 47, JA 1342.

Resid Cut Petitioners' claim that the approved coker costs were "unsubstantiated by any evidence," Br. at 10, fails as well. The approved coker costs are based on "O'Brien's cost figures unless the ALJ specifically referenced otherwise, *e.g.*, adopted Jenkins's estimate for a specific cost." Opinion 481 at P 50, JA 1343; *see also* Opinion 481-A at P 45, JA 1463. All coker cost figures, therefore, are included in the record.

C. The ALJ And Commission Appropriately Found The Approved Resid Value To Be Just And Reasonable

Resid Cut Petitioners assert that the Resid value is not within the zone of reasonableness established by the record because the adopted Coker cost estimate is higher than Mr. Jenkins' proposed Coker cost estimate. Br. at 9-14, 21-22. The Commission found, however, that "Jenkins's and O'Brien's cost estimates were not the only estimates presented during the hearing," and "Jenkins's coker cost estimate did not establish the 'just and reasonable' ceiling" in this case. Opinion 481 at P 47, JA 1342-43 (citing R. 1604, Exh. PAI-10, JA 1558); *see also* Opinion 481-A at P 34, JA 1458-59.

Indeed, Exhibit PAI-10 (R. 1604, JA 1558), which was admitted into evidence, included Coker cost estimates that would have resulted in substantially higher costs than those approved here. Opinion 481 at P 47, JA 1342-43 (citing Exh. PAI-10, R. 1604, JA 1558); *see also* Opinion 481-A at P 34, JA 1458-59. Accordingly, the Commission found:

> To argue now that regardless of the fact that O'Brien admits that he did not include certain equipment, the ALJ's methodology should be result-oriented and, therefore, should be modified so that it does not result in costs that exceed Jenkins's estimate would be to ignore the evidence and testimony presented at the hearing.

Opinion 481 at P 47, JA 1342.

Moreover, the ALJ found, and the Commission "affirm[ed,] that the ALJ's Resid value [i]s based on a just and reasonable methodology, and the resulting Resid value is just and reasonable." Opinion 481 at P 49, JA 1343; *see also* Opinion 481-A at P 28, JA 1456 ("the Commission agreed with the ALJ's finding that the Resid value that would result from using Mr. O'Brien's modified cost-curve approach would be just and reasonable."); Initial Decision at n.871, JA 1206 (finding, "based on a reading of the entire record, that the Resid value established in the Initial Decision is just and reasonable").

Thus, despite Resid Cut Petitioners' claim to the contrary, Br. at 10-12, the Commission not only reviewed the methodology's components for justness and reasonableness, but also assured that the resulting Resid value was just and reasonable as well. *See Pacific Gas and Electric Co. v. FERC*, 306 F.3d 1112, 1118 (D.C. Cir. 2002) ("it is long settled that 'experience has taught that a determination of whether the result reached is just and reasonable requires an examination of the method employed in reaching that result.'") (quoting *City of Charlottesville v. FERC*, 661 F.2d 945, 950 (D.C. Cir. 1981); citing *Permian Basin Area Rate Cases*, 390 U.S. 747, 791-92 (1968)).

This did not require, as Resid Cut Petitioners posit, Br. at 11-12, 14, the Commission to calculate the precise Resid value that results from the formula rate approved here. Opinion 481 at P 48, JA 1343; Opinion 481-A at P 35, JA 1459;

see also Oxy, 64 F.3d at 699 ("the Quality Bank valuation methodology is a formula rather than an actual 'rate'"). "It can hardly be doubted at this late date that the Commission 'need not confine rates to specific, absolute numbers but may approve a tariff containing a rate 'formula' or a rate 'rule' . . . .'" *Public Utilities Comm'n of California v. FERC*, 254 F.3d 250, 254 (D.C. Cir. 2001) (quoting *Transwestern Pipeline Co. v. FERC*, 897 F.2d 570, 578 (D.C. Cir. 1990)); *see also ChevronTexaco Exploration & Production Co. v. FERC*, 387 F.3d 892, 895 (D.C. Cir. 2004) (same).

D. The Commission Appropriately Relied On Exhibit PAI-10's Coker Cost Estimates

Resid Cut Petitioners next assert that the Commission cannot appropriately rely on the Coker cost estimates presented by their witness, Mr. O'Brien, in Exhibit PAI-10 because "[t]hose estimates were presented only for comparison purposes, *i.e.*, to show that O'Brien's estimate was within the range of published estimates." Br. at 13. The Commission reasonably found otherwise. Opinion 481-A at PP 42-43, JA 1461-62.

> PAI-10 was presented by Eight Parties as part of O'Brien's direct testimony during the hearing, and was subject to approximately eight days of cross-examination. Based on these circumstances, the ALJ decided to admit the exhibit into evidence on his own motion even though the Eight Parties did not move to have it admitted after the

> initial proffer.[[11]] The Eight Parties did not object to the Exhibit being in the record.[[12]]
>
> Simply because the Eight Parties had the opportunity to choose whether to present a document to the ALJ does not give the Eight Parties the right to decide, once it has been presented, whether that particular document should be considered as evidence. Having chosen to submit the document at the hearing, how it will be treated is the role reserved for the ALJ.[[13]]

Opinion 481-A at PP 42-43, JA 1461-62.

Also, for the first time on appeal, Resid Cut Petitioners claim that "the record evidence does not support the[] accuracy" of the Exhibit PAI-10 estimates, Br. at 13; *see also* Br. at 15, 17 (same), and that "O'Brien acknowledged during the hearing that PAI-10 was flawed," Br. at 14 (citing R. 998, Transcript at 321-25, JA 63-67; R. 1003, Transcript at 1084-86, JA 89-91; R. 1006, Transcript at 1411-13, JA 102-04). Because these claims were never raised to the Commission, they cannot be raised to this Court on appeal. *L.A. Tucker Truck Lines*, 344 U.S. at 36-37.

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[11] Citing R. 1006, Transcript at 1412-13, JA 103-04.

[12] Citing R. 1006, Transcript at 1412, JA 103.

[13] Citing 18 C.F.R. § 385.504(b)(4), which provides that "the presiding officer may . . . [r]ule on and receive evidence."

These claims do not, in any event, have merit. First, as Resid Cut Petitioners acknowledge, they proffered Exhibit PAI-10 to show that their estimate was within the range of other, published estimates. Br. at 13. That showing would mean something only if Resid Cut Petitioners believed Exhibit PAI-10's estimates were accurate.

Moreover, Mr. O'Brien's purported acknowledgment that Exhibit PAI-10 was "flawed" was not due to a concern that the Exhibit's Coker cost estimates were inaccurate. Rather, the "mistake that O'Brien admittedly made in his prefiled testimony about PAI-10 [was] deduct[ing] . . . equipment from [the] published cost curves." Br. at 15; *see also*, *e.g.*, R. 998, Transcript at 321-23, JA 63-65. As Exhibit PAI-10 included the specific deductions Mr. O'Brien made from the published estimates contained in the Exhibit, there is no concern that his "mistake" affected the accuracy of the Exhibit's estimates.

E. The Adopted Resid Cut Methodology Does Not Double Count Coking Costs

Resid Cut Petitioners raise a number of arguments supporting their claim that the adopted Resid cut methodology double counts coking costs. None of the arguments has merit.

First, Resid Cut Petitioners assert that Mr. O'Brien's cost curve already included the equipment added to it. Br. at 15. As the ALJ and Commission found,

however, the evidence established that "Mr. O'Brien did not account for [the added equipment] in his estimate." Opinion 481 at P 33, JA 1337; *see also id.* at PP 34-37, JA 1337-39; Opinion 481-A at PP 36-37, JA 1459-60; Initial Decision at PP 1187-1208, JA 688-99.

Specifically, O'Brien's estimate: (1) assumed that a 2-drum, rather than a 4-drum Coker would be used, Initial Decision at P 1187, JA 688 (citing, *e.g.*, Mr. O'Brien's testimony, R. 1652, Exh. PAI-58 at 13-15, JA 1586-88); (2) did not include any automatic deheading equipment, *id.* at P 1195, JA 692 (citing, *e.g.*, Mr. O'Brien's testimony, R. 998, Transcript at 373, JA 72); (3) did not include coke pit and crane costs, *id.* at PP 1201, 1204 and n.454, JA 695, 696 (citing, *e.g.*, R. 1604, Exh. PAI-10, JA 1558; Mr. O'Brien's testimony, R. 1652, Exh. PAI-58 at 15, JA 1588); and (4) did not include Coker gas plant costs, *id.* at PP 1205 and nn.455, 457, 1208 and n. 459, JA 697, 698 (citing, *e.g.*, R. 2338, Exh. EMT-146 at 36-37, JA 1765-66; R. 2359, Exh. EMT-167 at 24-26, JA 1806-08; Exh. R. 2383, EMT-191 at 5-6, JA 1904-05; R. 998, Transcript at 422-23, JA 80-81; R. 1006, Transcript at 1327-28, JA 99-100; R. 1018, Transcript at 3493, JA 242; R. 1029, Transcript at 4048, 4093, JA 250, 251).

Next, Resid Cut Petitioners contend that double counting occurs because "equipment in the cost curve (such as pads and front-end loaders) that FERC intended to replace with alternative equipment (such as pits and cranes) would still

be included in the final costs estimate, *along with* the replacement equipment." Br. at 15 (citing R. 998, Transcript at 441 lines 6-10, JA 84 ("If you consider the pad or the crane and pit and things of that nature, if you consider those to be coke handling, those we include normally in [Inside Battery Limits]. Anything else that takes it from the battery limits on is [Outside Battery Limits])).

The premise of this contention -- that FERC intended to replace pads and front-end loaders with pits and cranes -- is mistaken. The Commission found that, although Mr. O'Brien "only included in his cost estimate a 'coke pad' and a 'front end loader,'" the evidence "demonstrated that a typical coker, and particularly one on the West Coast, would include many more items such as coke handling equipment consisting of a coke pit and crane . . . ." Opinion 481-A at P 36, JA 1459; *see also* Initial Decision at P 1204, JA 696 ("[t]he evidence clearly indicates that much more than a coke pad and front end loader is required, particularly on the West Coast. It is clear to me that, in the 21st century, all of the equipment discussed by Jenkins would be required were a Coker added to an existing refinery. Therefore, I hold that O'Brien's [Inside Battery Limits] estimate should be supplemented with the cost of this equipment.") (footnote omitted). Thus, the Commission intended to supplement, rather than replace, the coke handling equipment included in Mr. O'Brien's cost curve.

Resid Cut Petitioners also assert that "the coke handling costs that were not included as [Inside Battery Limits] in the cost curve were included in O'Brien's [Outside Battery Limits] costs . . . ." Br. at 16. "For example," Resid Cut Petitioners argue, "covered storage would be included in the [Outside Battery Limits] number." *Id.* The evidence established otherwise.

Mr. "O'Brien specifically adjusted the coker cost estimates derived from treatises by removing such costs from those estimates in order to make those estimates comparable to his own coker cost estimate." Opinion 481-A at P 36, JA 1459 (citing R. 1604, Exh. PAI-10, JA 1558; R. 998, Transcipt at 408, JA 74). Moreover, while "the Eight Parties claim[ed] . . . [that] O'Brien limited his [Inside Battery Limits] coke handling cost and, for example, treated storage as an [Outside Battery Limits] cost," the ALJ found that "Eight Parties err[ed] in their claim regarding storage." Initial Decision at P 1200 and n. 452, JA 694. "At the hearing, O'Brien was asked whether he included the costs of storage in his [Inside Battery Limits] or [Outside Battery Limits] estimates and responded that he included it in neither." Initial Decision at n. 452, JA 694 (citing R. 1000, Transcript at 624, JA

87);[14] *see also* R. 2409, Exhibit EMT-220 at 2-3, JA 1945-46, and R. 998, Transcript at 440, JA 83 (establishing that Mr. O'Brien's discovery response regarding the items he included in his estimate's Outside Battery Limits costs did not include any coke handling equipment).

Resid Cut Petitioners claim that "absent from [the Commission's] ruling is any analysis demonstrating that it examined the relevant data" regarding "the dollar amount of the increase in [Outside Battery Limits] costs caused by its increase in [Inside Battery Limits] costs, or regarding the amount required to cover storage costs." Br. at 18 (citing *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29 (1983), and *Association of Oil Pipelines*, 83 F.3d at 1431 (explaining that, on review, the Court assures that the Commission has "examined the relevant data and articulated . . . a rational connection between the

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[14] The colloquy proceeded as follows:

> Q: You don't provide any costs for storage in your analysis; correct?
> A: Not in the cost of the coker, no.
> Q: You don't put it in the [Outside Battery Limits], do you?
> A: No.
> Q: So it's not in your cost analysis at all[,] right?
> A: No, it's not.

R. 1000, Transcript at 624, JA 87.

facts found and the choice made")). In fact, however, both the ALJ and the Commission carefully examined the relevant data and articulated a rational connection between the facts found and the choice made.

In response to claims that the adopted Outside Battery Limits estimate was too low, the ALJ explained that:

> as O'Brien's [Inside Battery Limits] ha[d] been increased as a result of the rulings [the ALJ] made on the [Inside Battery Limits] issues, if no change is made in the manner in which [Mr. O'Brien] calculated the [Outside Battery Limits] costs, his [Outside Battery Limits] estimate will have a concomitant increase. This is especially true as [the ALJ] held that the Coker gas plant costs should be treated as an [Inside Battery Limits] cost and not included in the [Outside Battery Limits] estimate.

Initial Decision at P 1211, JA 700. Moreover, the ALJ specifically found that calculating Outside Battery Limits costs as 35 percent of Inside Battery Limits costs would be adequate to cover the costs of storage, steam generation and cooling water facilities, and certain miscellaneous items "when the modifications [he] made in [Mr. O'Brien's] [Inside Battery Limits] estimate are taken into consideration." *Id.* at P 1214, JA 700.

Likewise, the Commission found, "the evidence demonstrated that if [the gas plant] were included, the [Outside Battery Limits] cost estimate was not adequate to cover both the coker gas plant and the other [Outside Battery Limits] cost items." Opinion 481 at P 37, JA 1339 (citing Initial Decision at P 1208 and

n.459, JA 698 (finding that, if the gas plant were included in Mr. O'Brien's $37 million Outside Battery Limits estimate, his estimate would not be adequate to cover all costs)). In addition, the Commission found "that the increase in percentage of [Inside Battery Limits costs] to estimate the [Outside Battery Limits] costs, *i.e.*, 35 percent of [Inside Battery Limits] instead of 20-25 percent of [Inside Battery Limits], coupled with the ALJ's decision to increase the [Inside Battery Limits] costs, adequately provides for storage costs." Opinion 481 at P 38, JA 1339; *see also* Opinion 481-A at P 39, JA 1461 (same). On rehearing, the Commission added that it:

> reject[ed] the argument that the [Outside Battery Limits] multiplier of 35 percent should be reduced to 25 percent. O'Brien testified that he used a higher 35 percent [Outside Battery Limits] factor because, unlike Gary & Hendwerk, which Union Oil [one of the Resid Cut Petitioners] and Oxy consider to be the standard, he did not include separate cost estimates for the steam and cooling water facilities that would be required for the coker in his [Inside Battery Limits] costs, but chose instead to include those costs in his 35 percent [Outside Battery Limits] factor. We recognize, as did the ALJ and Opinion No. 481, that increasing the [Inside Battery Limits] causes a concomitant increase to [Outside Battery Limits]. However, this increase in [Outside Battery Limits] accounts for appropriate storage costs for storing the Resid as a coker feedstock and for the storage associated with downstream units, which O'Brien did not account for in his [Outside Battery Limits] estimate.

Opinion 481-A at P 38, JA 1460 (footnote omitted).

Resid Cut Petitioners further complain that Opinion 481-A "cited [Mr. Jenkins'] evidence addressing storage tank costs" which, they assert, "was characterized by the ALJ as not accurate or fair." Br. at 20-21 (citing Opinion 481 at P 39 nn.53 and 54, JA 1460-61). The Commission's reference to Mr. Jenkins' testimony in Opinion 481-A at P 39 did not, however, relate to storage costs. Rather, the Commission's reference was in response to the contention "that additional storage tanks would not be needed if a coker was added to an existing refinery." Opinion 481-A at P 39, JA 1460-61.

III. THE COMMISSION'S EFFECTIVE DATE DETERMINATIONS WERE APPROPRIATE

A. The Commission Appropriately Determined That The Resid Cut Valuation Should Be Effective As Of February 1, 2000

The Commission appropriately "affirm[ed] the ALJ's ruling that the Resid cut valuation must be applied on a retroactive basis." Opinion 481 at P 234, JA 1395. "[S]ince the valuation of the Resid cut under the Distillate methodology was challenged from the outset, and the Court upheld that challenge in *Oxy*, there has not been a legal rate for the Resid cut until now. Thus, retroactive application of the new valuation for the Resid cut was not barred by the filed rate doctrine." Opinion 481-A at P 88, JA 1476; *see also* Opinion 481 at P 146, JA 1370 (same). No Petitioners challenge this finding.

Some of the Resid Cut Petitioners,[15] however, contend that the Commission erred in ordering the Resid cut valuation effective before January 1, 2004, because, they believe, "no rational refiner would have installed a delayed coker that cost as much as the Opinion 481 delayed coker prior to 2004." Br. at 28. The facts established, however, that "the equipment included in the cost of the delayed coker [was] representative of equipment installed in modern cokers during the period of retroactivity." Opinion 481-A at P 127, JA 1487. "All of the 4-drum cokers located on the West Coast, for instance, were constructed prior to 1995." *Id.* (citing R. 2380, Exh. EMT-188, JA 1897-99, and R. 995, Transcript at 270-01, JA 55-56). "In addition, it was demonstrated that all cokers built in the last ten years ha[d] been built with automatic deheading equipment." *Id.* (citing R. 2400, Exh. EMT-211, JA 1906-40; Transcript at 3894, JA 247; Transcript at 4110, JA 252).

B. The Commission Appropriately Determined That The New Coker VGO And Naphtha Values Should Be Applied To The Resid Cut's Valuation As Of October 3, 2002

The distillation method values the commingled TAPS crude by separating it into its nine component parts, including the Naphtha cut, the VGO cut, and the Resid cut. Opinion 481 at P 4, JA 1327. The Resid cut's value is determined, in

[15] BP, Flint Hills and the State of Alaska did not join in this claim. Resid Cut Petitioners Br. at 28 and n.28.

part, by valuing the products produced after Resid is run through a Coker. R. 989, October 3, 2002 Stipulation at 1-2, JA 38-39; Initial Decision at P 1135, JA 670; Opinion 481 at P 18, JA 1332. The values for two of those products, Coker VGO and Coker Naphtha, were challenged as unjust and unreasonable and replaced with new just and reasonable values in this proceeding. Opinion 481-B at PP 13, 21, 23, JA 1494, 1496-97.

As the Commission explained, its determination that the adopted Resid cut value should be retroactively applied complied with "the Court's ruling in *Exxon*, [182 F.3d at 49-50,] that retroactivity is favored because it 'would make the parties whole,' and prevent some parties 'divvy[ing] up a windfall at the expense of [other] parties' . . . ." Opinion 481-B at P 21, JA 1496-97. The Commission found that, as to the Resid cut, parties could be made whole only if the just and reasonable replacement Coker VGO and Coker Naphtha values were used in recalculating the Resid cut. Opinion 481-B at PP 21, 23, JA 1496-97; *see also* Opinion 481-B at P 27, JA 1498.

The Commission further found that October 3, 2002 was the appropriate date to begin applying the new Coker VGO and Coker Naphtha values to the Resid cut valuation. Opinion 481-A at P 49, JA 1464; Opinion 481-B at PP 18, 24, JA 1495, 1497-98. As the Commission explained, that was the date on which the parties stipulated that the new VGO value would be "the published OPIS West

Coast High Sulfur VGO weekly price." *Id.* at P 24, JA 1497. Moreover, the evidence upon which the ALJ ruled that the existing Naphtha price was not just and reasonable and should be replaced with a Naphtha price determined under the Tallett Methodology related to the period before October 3, 2002. *Id.* Additionally, the October 3, 2002 stipulation had provided for the same effective date for the new valuation of Naphtha and VGO. *Id.*

1. The Commission's Determinations Comport With The Filed Rate Doctrine

Petitioner Exxon Mobil Corporation ("Exxon Mobil") and Intervenor ConocoPhillips Alaska, Inc. ("ConocoPhillips") challenge these determinations, first arguing that they violate the filed rate doctrine. Br. at 34-37. In their view, because the Commission determined that the filed rate doctrine required the newly adopted VGO and Naphtha cut values adopted in the instant case to be applied only prospectively, that means the new Coker VGO and Coker Naphtha values can be applied only prospectively to the Resid cut. Br. at 34-35.

The Commission reasonably found, however, contrary to Exxon Mobil and ConocoPhillips claim, Br. at 35-36, that **Coker** VGO and **Coker** Naphtha and the VGO and Naphtha **cuts** are not the same. Opinion 481-B at P 36, JA 1501. The VGO and Naphtha cuts are two of the components that make up TAPS crude oil. Opinion No. 481 at P 4, JA 1327. Coker VGO and Coker Naphtha, by contrast, are

parts of another TAPS crude component, the Resid cut, and exist only after the Resid cut is run through a Coker. Opinion 481-B at P 36, JA 1501. Thus, the Commission appropriately determined that the filed rate doctrine's prohibition against retroactive application of the new values for the VGO and Naphtha cuts does not govern retroactive application of new values for the Resid cut's Coker VGO and Coker Naphtha components. Opinion 481-A at PP 47-49, JA 1464; Opinion 481-B at PP 36-37, JA 1501.

Exxon Mobil and ConocoPhillips next assert that a "filed tariff rate is the only lawful rate 'for all purposes' . . . ." Br. at 36 (quoting *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 126 (1990)). A just and reasonable tariff rate, however, had never been approved for the Resid cut. Opinion 481-B at PP 21, 23, 36-37, JA 1497, 1501; *see also* Opinion 481-A at PP 88 and 126, JA 1476, 1487 ("there has not been a legal rate for the Resid cut until now. Thus, retroactive application of the new valuation for the Resid cut was not barred by the filed rate doctrine.").

2. The Commission's Determination Satisfied Equity Principles

Exxon Mobil and ConocoPhillips also assert that applying the newly adopted Coker VGO and Coker Naphtha valuations to the Resid cut violates equity principles because doing so purportedly does not put the parties in the position they

would have been in if the Commission had not previously erred in valuing the Resid cut. Br. at 37-39. Petitioners assert, instead, that equity required the Commission to determine the Resid cut by applying the previously existing Gulf Coast VGO and Naphtha values. Br. at 38.

The Commission correctly found, however, that doing so would not make the parties whole. Opinion 481-B at PP 21, 23, 27, JA 1496-97, 1498. Rather, parties are made whole when the Commission retroactively applies the corrected, just and reasonable rate. *See*, *e.g.*, *Transwestern*, 897 F.2d at 578 n.5.

3. The Commission's Determinations Were Reasonable, Not Arbitrary And Capricious

Exxon Mobil and ConocoPhillips further contend that, "[s]ince the Commission's methodology is designed to use the *same* price for Naphtha and VGO in both [the straight-run and Coker Naphtha and VGO] valuations, the Commission's decision to use *different* Naphtha and VGO prices for the October 3, 2002 to November 1, 2005 period is arbitrary and capricious." Br. at 39-40; *see also* Br. at 41 (asserting that "the stipulation expressly required that the same Quality Bank values for the Naphtha and VGO cuts also be used in valuing the products of coking the Resid"). As the Commission found, however, this contention "ignores that appended to the stipulation was a footnote which stated: 'There are disputes among the parties as to the Quality Bank values to be used for

certain of the cuts, but the parties agree that once these disputes are resolved, *the resulting value should be used for valuing Resid*.'" Opinion 481-B at P 27, JA 1498 (quoting R. 989, October 3, 2002 Stipulation at 2 n.2, JA 39) (emphasis added by Commission). Thus, applying the new Coker VGO and Coker Naphtha values to determine the Resid cut as of October 3, 2002 was consistent with the stipulation entered into on that date.

Exxon Mobil and ConocoPhillips proffer a different interpretation. In their view, the stipulation's footnote mandates that, if new values apply only prospectively to the VGO and Naphtha cuts, new values also can apply only prospectively to the Coker VGO and Naphtha components of the Resid cut. Br. at 43. This interpretation again ignores that VGO and Naphtha **cuts** are different from **Coker** VGO and Naphtha, and that, while the filed rate doctrine requires new valuations to be applied only prospectively to VGO and Naphtha **cuts**, no such restriction applies to the Resid cut and its **Coker** VGO and Naphtha components. Opinion 481-A at PP 47-49, JA 1464; Opinion 481-B at PP 36-37, JA 1501. In any event, deference is due to the Commission's reasonable interpretation of the stipulation, not to Petitioners' alternate interpretation. *See Williams Natural Gas Co. v. FERC*, 3 F.3d 1544, 1550 (D.C. Cir. 1993); *Tennessee Gas Transmission Co. v. FERC*, 789 F.2d 61, 62-63 (D.C. Cir. 1986).

Next, Exxon Mobil and ConocoPhillips argue that "the Commission's ruling that the new West Coast Naphtha and VGO valuation methodologies should be applied retroactively in valuing the Naphtha and VGO produced by coking the Resid conflicts with the Commission's own findings in this case." Br. at 40. In support, Exxon Mobil and ConocoPhillips cite to ALJ and Commission statements that substantial evidence did not support retroactively applying new values to the VGO and Naphtha **cuts**. Br. at 40. None of the cited statements concerns either the Resid cut or its Coker VGO and Naphtha components and, therefore, none conflicts with Commission Resid cut findings.

Exxon Mobil and ConocoPhillips also cite as inconsistent the Commission's statement that "there has been no finding that the prior reference price was no longer just and reasonable." Opinion 481 at P 174, JA 1378, quoted Br. at 40. This statement, contained in the section of the order addressing "the effective date of any change to the West Coast [VGO] cut," Opinion 481 at p. 51, Issue No. 4 Heading, JA 1375 (capitalization in heading altered; emphasis omitted), was made in support of the Commission's determination that the filed rate doctrine prohibited retroactive application of new values to the VGO **cut**. Thus, the cited statement is irrelevant to and does not, as Exxon Mobil and ConocoPhillips contend, "refute[] the Commission's subsequent assertion that 'using the new valuations more

accurately reflect[s] the value of the Resid.'" Br. at 40-41 (quoting Opinion 481-A at P 49, JA 1464). As the Commission explained, "the question of what valuations for West Coast coker VGO and coker Naphtha would yield the most empirically accurate West Coast Resid value" is "a question different from whether there was any basis on which the new values for those cuts, as one of the cuts under the distillation methodology, could be applied retroactively in light of the status of the existing Quality Bank values for those cuts as the legal rate." Opinion 481-B at P 30, JA 1499.

In addition, Exxon Mobil and ConocoPhillips challenge the Commission's statement that "'the parties stipulated the value of the [Naphtha and VGO] cuts' as of October 3, 2002," because the parties actually stipulated only to the value of the VGO cut. Br. at 41-42 (quoting Opinion 481-A at P 49, JA 1464). On rehearing, however, as Exxon Mobil and ConocoPhillips recognize, Br. at 41, 42, the Commission corrected this statement, acknowledging that "the October 3, 2002 stipulation did not establish an agreed-upon Naphtha price." Opinion 481-B at P 23, JA 1497.

Finally, on this point, Exxon Mobil and ConocoPhillips note that "the parties *did not* stipulate that *any* effective date for *any* cut would be October 3, 2002." Br. at 42. The Commission did not find that the parties stipulated that any cut would

be effective on October 3, 2002. Nor did the challenged orders make any cut effective on that date.

Rather, the orders determined that new values for the Coker VGO and Naphtha components of the Resid cut would be effective as of October 3, 2002. Opinion 481-A at P 49, JA 1464; Opinion 481-B at PP 18, 24, JA 1495, 1497-98. This determination had three bases: (1) October 3, 2002, was the date on which the parties stipulated as to the new VGO value; (2) the evidence upon which the ALJ ruled that the existing Naphtha price was not just and reasonable and should be replaced with a Naphtha price determined under the Tallett Methodology related to the period before October 3, 2002; and (3) the October 3, 2002 stipulation provided that the new Naphtha and VGO values would be effective on the same date. Opinion 481 at P 24, JA 1334. Exxon Mobil and ConocoPhillips do not challenge any of these bases.

C. The Commission Appropriately Determined That The New Values Should Be Applied Only Prospectively To The VGO And Naphtha Cuts

The Commission also reasonably affirmed the ALJ's holding that the newly adopted values could be applied only prospectively (*i.e.*, from November 1, 2005) to the VGO and Naphtha cuts. Opinion 481 at PP 145-51, 172-75, JA 1370-72, 1377-78; Opinion 481-A at PP 14-23, 82-90, JA 1452-54, 1475-77. Unlike with

the Resid cut, the existing tariff values for the VGO and Naphtha cuts had been finally approved as just and reasonable. Opinion 481 at PP 146, 174, JA 1370, 1377-78; Opinion 481-A at P 88, JA 1476. In accordance with the filed rate doctrine, therefore, the previously existing tariff values continued as the lawful VGO and Naphtha cut values until the Commission adopted different values for those cuts. Opinion 481 at PP 146, 174, JA 1370, 1377-78; Opinion 481-A at PP 78, 88, JA 1474, 1476.

1. The Commission Reasonably Rejected The Claim For Retroactive Application Based On The Dismissal Of Tesoro's Complaint

Relying on *Tennessee Valley Municipal Gas Association v. FPC*, 470 F.2d 446, 452 (D.C. Cir. 1972), Flint Hills and Petro Star claim that "the Commission should have made the new West Coast VGO and Naphtha values effective as of April 12, 2003 to correct for the delay resulting from its erroneous dismissal of the Tesoro complaint." Br. at 8 (capitalization in heading altered); *see also* Br. at 9-15. This claim cannot stand.

a. Flint Hills And Petro Star Are Equitably Estopped From Claiming Retroactive Application Based On The Dismissal Of Tesoro's Complaint

First, Flint Hills and Petro Star are equitably estopped from making this claim. *See*, *e.g.*, *United States National Bank v. Chase National Bank*, 331 U.S. 28, 38 (1947); *Consolidated Rail Corp. v. Interstate Commerce Comm'n*, 29 F.3d

706, 714 (D.C. Cir. 1994); *Tennessee Valley*, 470 F.2d at 453.

When the Tesoro complaint was pending before the Commission, Flint Hills (by its predecessor, Williams/MAPCO Alaska Petroleum Inc.)[16] argued that it should be dismissed. *See Tesoro*, 87 FERC at 61,516. Additionally, in the Commission proceedings underlying the instant orders, Petro Star, as one of the "Eight Parties," specifically "oppose[d] [ExxonMobil and Tesoro's] assertion that [t]he ALJ erred in failing to provide for retroactive application of the revised West Coast Naphtha and VGO value adopted in this proceeding to compensate ExxonMobil and Tesoro for the FERC's prior erroneous dismissal of their complaints." R. 1201, Eight Parties' Brief Opposing Exceptions at 1-2, 3, JA 1291-93 (internal quotation omitted); *see also id.* at 73, JA 1307 (asserting that "no retroactive relief should be ordered on the grounds that the Commission committed legal error in dismissing the complaint[]"). Petro Star also argued that *Tennessee Valley* was inapplicable here. *Id.* at 71-73, JA 1305-07.

Petro Star and Flint Hills cannot now be permitted to argue that the Commission was wrong to rely on arguments they made to the Commission. *Consolidated Rail*, 29 F.3d at 714 (citing *ATC Petroleum, Inc. v. Sanders*, 860 F.2d

[16] On April 1, 2004, Flint Hills acquired Williams' Alaskan refinery. R. 1165, Flint Hills' Motion To Intervene at 1, JA 297.

1104, 1111 (D.C. Cir. 1988) (noting that doctrine of estoppel "precludes a litigant from asserting an otherwise available claim . . . against a party who has detrimentally relied on that litigant's conduct")); *see also Southern Pacific Transportation Co. v. ICC*, 69 F.3d 583, 588 (D.C. Cir. 1995) (holding that a petitioner may not "take a position in . . . court opposite from that which it took below, particularly when its position has prevailed before the agency"); *South Coast Air Quality Management Dist. v. EPA*, 472 F.3d 882, 891 (D.C. Cir. 2006) (same).

b. The Claim For Retroactive Application Based On The Dismissal Of Tesoro's Complaint Fails On Its Merits

Even if Flint Hills and Petro Star were not equitably estopped from raising this claim, it would fail on its merits. Responding to ExxonMobil and Tesoro's exception raising this claim, the Commission explained that, since the Court remanded Tesoro's complaint for consideration by the Commission, "there has been no merits order on" the VGO cut. Opinion 481 at P 174, JA 1377-78; *see also* Opinion 481-A at PP 77, 78, 85, JA 1473-76. "The parties have stipulated on the appropriate price, but there has been no finding that the prior reference price was no longer just and reasonable." Opinion 481 at P 174, JA 1378; *see also id.* at 172, JA 1377. In the instant case, unlike in *Tennessee Valley*, the Commission has not issued an order reversing itself and finding merit in the Tesoro complaint as to

the VGO cut and, therefore, there is no basis on which to conclude that the Commission erred in its dismissal of that portion of the Tesoro complaint. Opinion 481 at PP 173, 174, JA 1377-78. Thus, the Commission could not rely on *Tennessee Valley*'s limited filed rate doctrine exception to make the new VGO cut value effective earlier than the Commission's October 20, 2005 order adopting that value. *Id.* at P 174, JA 1377-78.

Furthermore, the Commission explained, since *Tesoro*, the parties also stipulated that, if a new Naphtha cut price were established, the effective date of the VGO cut's and Naphtha cut's new prices would be the same. Opinion 481 at P 172, JA 1377; *see also* Opinion 481-A at P 77, JA 1473-74. The Commission would have violated that stipulation if it ordered the Naphtha cut's new value to be effective retroactively when it could order the VGO cut's new value effective only prospectively. The Commission's affirmance of the ALJ's prospective application of both the VGO and Naphtha cuts appropriately honored the parties' stipulation. Opinion 481 at P 172, JA 1377.

In addition, despite Flint Hills and Petro Star's claim to the contrary, Br. at 10, the Commission did not distinguish *Tennessee Valley* on the basis that the Commission reconsidered the Tesoro complaint after judicial review rather than on its own initiative. Rather, the Commission noted that the "Court directed the

Commission to consider the [Tesoro] complaint" only as part of its explanation that, in the instant case, unlike in *Tennessee Valley*, the Commission "did not reverse itself," as "there ha[d] been no merits order on" the VGO cut's value. Opinion 481 at PP 173, 174, JA 1377-78.

Nor did the Commission "disregard[] the *Tennessee Valley* principle" because *Northwest Pipeline Corporation v. FERC*, 863 F.3d 73, 78 (D.C. Cir. 1988), "purportedly expressed doubt about its compatibility with the filed rate doctrine," as Flint Hills and Petro Star posit. Br. at 11 (citing Opinion 481 at P 174, JA 1377-78). Indeed, the Commission did not disregard the *Tennessee Valley* principle; the Commission found *Tennessee Valley*'s exception to the filed rate doctrine inapplicable because there had never been a merits finding that the existing VGO cut tariff value was no longer just and reasonable. Opinion 481 at P 174, JA 1377-78.

Flint Hills and Petro Star also assert that *Arizona Grocery Co. v. Atchison, T. & SF. Ry Co.*, 284 U.S. 370 (1932), does not support the Commission's decision. Br.at 12-14. To the contrary, *Arizona Grocery* does support the decision here, as it "bars reparations that retroactively change a final Commission-approved rate." *BP West Coast Products, LLC v. FERC*, 374 F.3d 1263, 1304 (D.C. Cir. 2004). As this Court explained, "*Arizona Grocery* has been and should be understood in the terms in which it was decided, as a proscription against the retroactive revision of

established rates through ex post reparations." *Verizon Telephone Companies v. FCC*, 269 F.3d 1098, 1107 (D.C. Cir. 2001).

Flint Hills and Petro Star next complain that prospective application of the new VGO and Naphtha cuts "had serious financial consequences." Br. at 14-15. As the Commission found, however, "[t]he fact that the existing valuation resulted in some shippers being impacted negatively is not a basis for applying the new valuation on a retroactive basis." Opinion 481-A at P 89, JA 1477. The new values did not become the lawful rate until ordered so by the Commission. Opinion 481-A at P 88, JA 1476.

2. The Commission Reasonably Rejected Claims For Retroactive Application Based On The October 3, 2002 Stipulation

Alternatively, Flint Hills and Petro Star contend that the Commission should have made the new VGO and Naphtha cut values effective as of October 3, 2002, "to take account of the stipulation of the parties." Br. at 16 (capitalization in heading altered). The Commission reasonably found otherwise.

Petitioners' "argument ignore[d] the fact that[,] while the parties stipulated what the new [VGO cut] valuation should be, there was no agreement [as to] when the new valuation would be implemented, one of the signatories to the stipulation arguing it should be on a prospective basis." Opinion 481-A at P 83, JA 1475; *see*

also Opinion 481 at P 172, JA 1377; Opinion 481-A at P 89, JA 1476-77. In accordance with the filed rate doctrine, the previously existing tariff values continued as the lawful VGO and Naphtha cut values until the Commission adopted different values for those cuts. Opinion 481 at PP 146, 174, JA 1370, 1377-78; Opinion 481-A at PP 78, 84, 85, 88, JA 1474-76.

Flint Hills and Petro Star cite several cases for the proposition that "[t]his Court has recognized that, despite the usual rules against retroactive relief, an agency may make a new rate effective prior to the date of its approval, provided that all the affected parties have agreed on both the rate and the effective date." Br. at 16. As the parties here agreed only as to the rate, and not to its effective date, the proviso is not satisfied and the cited cases are inapposite.

Apparently recognizing this, Flint Hills and Petro Star also argue instead that the Commission did not insist on both factors "when it relied on the parties' agreement in the same stipulation to adopt a pre-order effective date for the heavy distillate cut, even though the parties had agreed only on the date, not the rate." Br. at 18. The Commission explained, however, that "there was good reason for the February 1, 2000 effective date" for the new Heavy Distillate cut price. Opinion 481 at P 78, JA 1355.

Not only had all the parties stipulated to a February 1, 2000, effective date, Opinion 481 at P 77, JA 1351-52, but on February 9, 2000, in *Trans Alaska*

Pipeline System, 90 FERC ¶ 61,123 (2000), the Commission "accepted the parties' agreed-upon replacement product, less the necessary sulfur processing cost. Because the parties could not agree on th[e sulfur processing cost] adjustment, the Commission allowed the prior proxy price to continue to be used pending a final decision on the sulfur processing cost adjustment." Opinion 481 at P 78, JA 1352. The order also stated that the new Heavy Distillate cut price might be applied retroactively once the adjustment was finally decided. *Id.* at P 78, JA 1352 (citing *TAPS*, 90 FERC at 61,372). Thus, the Commission reasonably concluded, "all parties were on notice that the new valuation might be applied on a retroactive basis, and the filed rate doctrine has no application." *Id.*; *see also NSTAR Electric & Gas Corp. v. FERC*, 481 F.3d 794, 801 (D.C. Cir. 2007) (holding that "the filed rate doctrine and the bar on retroactive ratemaking are satisfied" when the parties "have agreed to make a rate effective retroactively") (quoting *Consolidated Edison Co. of New York v. FERC*, 347 F.3d 964, 969 (D.C. Cir. 2003)).

Petitioners Petro Star and Williams contend that "averaging of the Naphtha cut . . . represents a change in methodology for valuing the Naphtha cut" and, "[t]hus, consistent with the October 3, 2002 Joint Stipulation of the Parties, the new stipulated West Coast VGO price must be made effective August 1, 2003. Br.

at 8 (citing R. 989, October 3, 2002 Stipulation at 4, JA 41). There is no merit to this contention.

The parties' October 3, 2002, stipulation "that if a different West Coast Naphtha valuation methodology is adopted in this proceeding, it and the new West Coast VGO value should have the same effective date," related only to the then-existing remanded hearing issue, which concerned whether it was just and reasonable to continue to value West Coast Naphtha on the basis of a Gulf Coast assessment. *See Tesoro*, 234 F.3d at 1292 ("Tesoro argues that the Commission's use of the published Gulf Coast price, rather than a formula based on West Coast gasoline prices, significantly undervalues West Coast naphtha"). The October 3, 2002 Stipulation did not cover the Quality Bank Administrator's subsequent proposal to average two Platts price assessments so that Naphtha could continue to be valued both on barge and cargo transactions. Opinion 481-A at PP 79, 82, JA 1474-75. As the Commission explained, the ALJ and Commission ruled that the "Naphtha valuation referred to in the stipulation" would be "implemented on a prospective basis. Thus, implementing the new valuation for the West Coast VGO cut prospectively is consistent with the October 3, 2002 stipulation. Implementation of the new valuation on a retroactive basis would be contrary to the October 3, 2002 Joint Stipulation." *Id.* at P 82, JA 1475.

Even if Petro Star and Williams were correct that the October 3, 2002 Stipulation covers the Quality Bank Administrator's proposed change, as the Commission repeatedly explained, the filed rate doctrine prevented newly adopted values from being applied retroactively to the VGO cut. *See*, *e.g.*, Opinion 481 at PP 145-51, 172-75, JA 1370-72, 1377-78; Opinion 481-A at PP 82-90, JA 1475-77.

IV. THE COMMISSION APPROPRIATELY AFFIRMED THE ALJ'S ADOPTION OF THE QUALITY BANK ADMINISTRATOR'S AVERAGING PROPOSAL

A. Platts Radically Altered Its Heavy Naphtha Price Assessment

Petro Star and Williams challenge the Commission's affirmance of the ALJ's adoption of the Quality Bank Administrator's averaging proposal on several grounds. First, they assert that Platt's division of its Heavy Naphtha assessment into two assessments, *i.e.*, Heavy Naphtha and Heavy Naphtha Barge, was not a "radical alteration." Br. at 6. The Quality Bank Administrator, ALJ, and Commission reasonably determined otherwise. R. 1114, Quality Bank Administrator Notice at 3-4, JA 266-67; Initial Decision at PP 2741-2744 and n.822, JA 1144-45; Opinion 481 at P 162, JA 1374.

The Quality Bank Administrator explained that:

> In February, 2003, when the [Quality Bank Administrator] chose Platts' Waterborne Heavy Naphtha price assessment to value the

> Naphtha component, the Heavy Naphtha assessment included both barge and cargo transactions. Platts has now elected to report the barge and cargo transactions separately. Thus, although Platts continues to report a price assessment for "Heavy Naphtha," "the specification or other basis" for that quotation has been "radically altered," since it now covers only transactions in cargos.

R. 1114, Quality Bank Administrator Notice at 3-4, JA 266-67.

The ALJ found that "Platts ha[d] split what previously was the Heavy Naphtha assessment into a Heavy Naphtha assessment that related to cargo sized transactions and a Heavy Naphtha Barge assessment that only relates to barge-sized transactions. . . . [A]fter the change, it simply was not the same as before." Initial Decision at P 2741, JA 1144.

The Commission affirmed the ALJ, holding that "[i]t is a matter of record that as of May 1, 2003, Platts began publishing two waterborne Heavy Naphtha prices. Since May 1, 2003, Platts' Heavy Naphtha price is an assessment of cargo transactions only, and it is not an overall assessment of the market as it was originally." Opinion 481-A at P 70, JA 1471.

Petro Star and Williams point to certain statements by Mr. Sharp of Platts as supporting their assertion. Br. at 6. The ALJ found and the Commission affirmed, however, that other statements by Mr. Sharp established that the "claim that the manner in which Platts assessed Gulf Coast Naphtha was not radically changed by its decision to report barge and cargo transactions separately ha[d] no basis in

fact." Initial Decision P 2744, JA 1145.

For example, the ALJ noted, Mr. Sharp stated that the original Platts Heavy Naphtha assessment "was weighted toward cargo but was not exclusively a cargo assessment," and "was not exclusively" barge or cargo. Initial Decision at P 2743, JA 1145 (quoting R. 1593, Exh. TC-22 at 1, JA 1524). In addition, Mr. Sharp explained that the previous "Heavy Naphtha assessment was a general market assessment; it was neither solely cargo nor barge but was influenced by both although cargo transactions predominated," and that he had "sometimes used barge transactions for the high for the day and cargo transactions for the low." Initial Decision at P 2743, JA 1145 (quoting R. 1593, Exh. TC-22 at 1-2, JA 1524-25) (internal quotation omitted).

B. Averaging The Two Platt Prices Most Accurately Reflected The Market At Issue

Next, Petro Star and Williams attempt to undercut the Quality Bank Administrator's, ALJ's, and Commission's reasonable determination that the replacement price should be calculated by averaging the average monthly prices for Heavy Naphtha and Heavy Naphtha Barge. Br. at 6-7. First, they claim that "wherever possible," the Commission uses only one price quote, "either without modification, or if necessary, with an adjustment for processing necessary to meet the specifications of the quoted product." Br. at 6.

The Commission pointed out, however, that "the only principle that has been applied is the selection of a reference price which most accurately reflects the *market value* of the particular cut, and that is the only standard that has been applied by the [Quality Bank Administrator]."[17] Opinion 481 at P 163, JA 1374; *see also* Initial Decision at PP 2745, 2747, JA 1145-46 (finding the Commission has not adopted a policy against using an average of two price assessments).

In the circumstances here, the Commission found, it was not possible to use one (adjusted or unadjusted) price quote. Opinion 481 at P 164, JA 1374-75. "The evidence establishe[d] that there are two reliable Platts price assessments for Heavy Naphtha, that both are supported by 'numerous transactions,' and that '[b]oth markets are therefore representative of the market for Heavy Naphtha on the Gulf Coast.'" Opinion 481 at P 164, JA 1374-75 (quoting R. 1114, Quality Bank Administrator Notice at 4, JA 267). The evidence also established that "there is no data available that would allow either a volume-weighted or a transaction-weighted average of the assessments to be calculated." R. 1114, Quality Bank

[17] Accordingly, Petro Star and Williams' purported concern that the Commission's decision here "would introduce a dangerous precedent, opening the door for opportunistic attempts to manipulate a cut's valuation by advocating averaging two or more published price quotations for the same product," Br. at 7, is baseless. The Commission will approve a multi-price averaging proposal only if it most accurately reflects market value. Opinion 481 at P 163, JA 1374.

Administrator Notice at 4, JA 267. "[T]here [was] no factual basis in the record, therefore, for selecting one of those two price assessments over the other, and an appropriate just and reasonable solution [was] to simply average the two Heavy Naphtha price assessment[s], as the Quality Bank proposed." Opinion 481 at P 164, JA 1375; *see also* Opinion 481-A at P 70, JA 1471 ("Since both cargo and barge transactions are more representative of how the market actually flows, it is more appropriate to use the two assessments, namely Heavy Naphtha and Heavy Naphtha Barge").

Petro Star and Williams further claim that "averaging the barge quotations with the cargo quotations results in a discriminatorily higher Naphtha value." Br. at 8 (capitalization in heading altered). This claim ignores that the adopted Quality Bank Administrator's proposal simply replaced the previously existing single price for the Naphtha cut's cargo-sized and barge-sized transactions (Platts' previous Heavy Naphtha assessment) with a new single price for the Naphtha cut's cargo-sized and barge-sized transactions (Platts' new Heavy Naphtha and Heavy Naphtha Barge assessments).

Petro Star and Williams also mistakenly assert that "[n]o other Quality Bank cut is valued by averaging price quotations." Br. at 6. The Resid cut valuation adopted in the instant case, which was supported by all the parties, "use[s] a

weighted average of *nine* reported price assessments." Initial Decision at PP 2745, 2747, JA 1146 (quoting R. 1158, TAPS Carriers' Reply Br. at 13, JA 296).

C. The Quality Bank Administrator's 1998 and 2003 Recommendations Were Reasonably Distinguished

Petro Star and Williams contend that the "[Quality Bank Administrator]'s averaging recommendation is inconsistent with his recommendation in 1998 concerning valuing the Gulf Coast VGO component." Br. at 7. This contention is incorrect.

The Quality Bank Administrator reasonably explained why he recommended averaging the Platts' barge and cargo Naphtha prices, while, when Platts separated its VGO price reporting into barge and cargo transactions in 1998, he had recommended using only the Platts' barge VGO price. R. 1114, Quality Bank Administrator Notice at 4-5, JA 267-68.

> In [the 1998 VGO] case, the Quality Bank Administrator recommended that the barge price be used, as OPIS confirmed that cargo transactions were infrequent and that barge transactions were more representative of High Sulfur VGO market value. In the case of Heavy Naphtha, both the barge and cargo markets appear to be active, and neither appears to be more representative of the Gulf Coast market for Heavy Naphtha.

Id. As the ALJ found and the Commission affirmed, "just because the Quality Bank Administrator made [one] decision in 1998, under the facts involved in those circumstances, does not bar him from making a different determination in 2003

(or, in fact, anytime) under different circumstances." Initial Decision at n.821, JA 1144. [A] factual determination does not establish any precedent prohibiting a different decision with a different fact situation." *Id.*

V. SECTION 4412(b)(1) OF SAFETEA-LU IS CONSTITUTIONAL[18]

Section 4412 of SAFETEA-LU places statutory time limits on "retroactive changes in TAPS quality bank adjustments." In a proceeding pending at the time of SAFETEA-LU's enactment, the Commission may not order such changes "for any period before February 1, 2000." *Id.* § 4412(b)(1), 119 Stat. 1778. In proceedings commenced after the enactment of SAFETEA-LU, the Commission may not order such changes "that exceed[] the 15-month period immediately preceding the earliest date of the first order of the [Commission] imposing quality bank adjustments in the proceeding." *Id.* § 4412(b)(2), 119 Stat. 1778-79.

Petitioner Exxon Mobil and intervenor ConocoPhillips challenge the constitutionality of Section 4412(b)(1), the provision that prohibits the Commission from making changes in TAPS quality bank adjustments in a pending proceeding effective prior to February 1, 2000. Exxon Mobil and ConocoPhillips argue that Section 4412(b)(1) violates the constitutional principles established in

[18] This section of the brief was prepared by the U.S. Department of Justice.

United States v. *Klein*, 80 U.S. (13 Wall.) 128 (1871). They further argue that Section 4412(b)(1) does not bear a rational relationship to any legitimate governmental interest and therefore violates the substantive due process and equal protection requirements of the Fifth Amendment. For the reasons that follow, both of these constitutional objections to Section 4412(b)(1) are misconceived.

A. Section 4412(b)(1) Does Not Conflict with *United States* v. *Klein*

1. The *Klein* Decision

The Supreme Court's decision in *Klein* arose out of efforts to recover property seized by Union military authorities during the Civil War. Under the Abandoned Property Collection Act, 12 Stat. 820 (1863), a person whose property had been seized by the military could recover its value in the Court of Claims upon a showing that, *inter alia*, the claimant "ha[d] never given any aid or comfort to the present rebellion." *Id.* § 3, 12 Stat. 821. In *United States* v. *Padelford*, 76 U.S. (9 Wall.) 531, 542-543 (1870), the Supreme Court held that receipt of a Presidential pardon established conclusive proof of loyalty and entitled the recipient to return of his property. In response, Congress enacted a statute providing that no Presidential pardon should be admissible as proof of loyalty; that acceptance of a pardon reciting that the claimant took part in or supported the rebellion, without written protest or disclaimer, should be treated by the courts as conclusive evidence of the claimant's disloyalty; and that the Court of Claims and the Supreme

Court must dismiss for want of jurisdiction any pending claims for recovery of property based on a Presidential pardon. Act of July 12, 1870, 16 Stat. 235; see *Klein*, 80 U.S. at 132-134, 143-144.

At the time that this legislation was enacted, the claimant in *Klein* had already obtained a judgment in his favor from the Court of Claims on the basis of a Presidential pardon, and an appeal from that judgment was pending before the Supreme Court. Acting on the basis of the intervening legislation, the United States moved for the Supreme Court to dismiss the appeal and to direct the Court of Claims to dismiss the underlying suit. The Supreme Court denied the motion on the ground that the legislation was unconstitutional and proceeded to affirm the lower court's judgment on the merits. 80 U.S. at 142-48.

The Court held that the legislation impermissibly "impair[s] the effect of a pardon, and thus infring[es] the constitutional power of the Executive." *Id.* at 147. In addition, the Court concluded that "Congress has inadvertently passed the limit which separates the legislative from the judicial power." *Id.* The Court observed that the legislation in question "prescribe[d] a rule for the decision of a cause in a particular way" and could not be sustained "without allowing one party to the controversy to decide it in its own favor." *Id.* at 146. The Court acknowledged that Congress has the authority under Article III to make exceptions to the

appellate jurisdiction otherwise conferred on the Court, but asked: "Can [Congress] prescribe a rule in conformity with which the court must deny to itself the [appellate] jurisdiction thus conferred, because and only because its decision, in accordance with settled law, must be adverse to the government and favorable to the suitor? This question seems to us to answer itself." *Id.* at 146, 147.

2. *Klein* Does Not Limit Congress's Authority Over Federal Agencies

As this Court has recognized, "*Klein*'s exact meaning is far from clear." *National Coalition to Save Our Mall* v. *Norton*, 269 F.3d 1092, 1096 (D.C. Cir. 2001), *cert. denied*, 537 U.S. 813 (2002); see *National Juvenile Law Center* v. *Regnery*, 738 F.2d 455, 465-66 (D.C. Cir. 1984) (*per curiam*). But whatever the precise contours of *Klein* may be, this much at least is clear from the outset: *Klein* concerns the constitutional limits of Congress's authority over *the federal courts*. See, *e.g.*, 80 U.S. at 147 ("Congress has inadvertently passed the limit which separates the legislative from the judicial power").[19] It says nothing whatsoever about the authority of Congress to regulate the functions and powers of federal agencies. Exxon Mobil and ConocoPhillips have cited no case, and we know of none, in which *Klein* has been held to limit Congress's powers vis-a-vis

[19] *Klein* also rests, of course, on the President's pardon power under Article II, a consideration that has no bearing here.

administrative agencies.

The petitioners try to bridge this gap by arguing that the Commission's decision whether to award refunds in this proceeding is "judicial" in nature, and therefore implicates the same constitutional concerns that underlie *Klein*. That effort is misconceived in two basic respects, each of which is dispositive.

First, it has long been settled that "[r]atemaking is an essentially legislative act," not a judicial one. *New Orleans Public Service, Inc.* v. *Council of City of New Orleans*, 491 U.S. 350, 371 (1989); *Colorado Interstate Gas Co.* v. *FPC*, 324 U.S. 581, 589 (1945). Exxon Mobil and ConocoPhillips acknowledge this principle insofar as ratemaking decisions operate prospectively, but they argue that decisions to award refunds are retroactive rather than prospective and hence judicial rather than legislative. Br. 22 n. 5. That reasoning, however, cannot be squared with this Court's decision in *Exxon* and the cases on which it relies.

One of this Court's justifications for why the Commission can order refunds in cases like this one is that, when shippers have been put on notice that rates are being contested, the notice "'changes what would be purely retroactive ratemaking into a functionally *prospective* process.'" *Natural Gas Clearinghouse* v. *FERC*, 965 F.2d 1066, 1075 (D.C. Cir. 1992) (emphasis added) (quoting *Columbia Gas Transmission Corp.* v. *FERC*, 895 F.2d 791, 797 (D.C. Cir. 1990), *cert. denied*,

498 U.S. 907 (1990)); see *Exxon*, 182 F.3d at 49 (relying on *Natural Gas Clearinghouse*). Indeed, Exxon itself made precisely that point in an earlier round of this litigation to justify the refunds that it is now seeking. See *Exxon*, 182 F.3d at 47 (summarizing Exxon's arguments). To the extent that the refunds at issue here are properly characterized as "functionally prospective" rather than retrospective, as Exxon itself has previously (and successfully) argued in this case, the decision to require refunds *vel non* remains legislative rather than judicial.

Second, even if the Commission's refund decision were regarded as judicial rather than legislative in character, there is a critical difference for separation of powers purposes between adjudication by federal agencies and adjudication by federal courts. Federal courts are vested with "the judicial Power of the United States" by Article III, and separation of powers principles limit the ability of Congress to enact legislation that interferes with the courts' exercise of that constitutionally assigned power. See, *e.g.*, *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995); *Mistretta* v. *United States*, 488 U.S. 361 (1989); *Hayburn's Case*, 2 Dall. 409 (1792). Federal administrative agencies, in contrast, have no inherent or constitutionally prescribed adjudicatory function. Their adjudicatory powers are wholly a creature of statute, and therefore are necessarily subject to the control of Congress in ways that the judicial power of the federal courts is not.

The Supreme Court has made clear in related contexts that the constitutional principles that insulate Article III adjudication from legislative authority do not apply to federal agencies. For example, separation of power principles prevent Congress from reopening final judgments of Article III courts, but Congress is free to reopen final adjudications of federal agencies. In *Paramino Lumber Co.* v. *Marshall*, 309 U.S. 370 (1940), the Supreme Court held that a private Act of Congress requiring a federal agency to reopen a final worker's compensation decision did not violate separation of powers principles because the decision was issued by an agency rather than by a court. 309 U.S. at 381 & n.25. In *Plaut*, in contrast, the Supreme Court held that a law requiring federal courts to reopen final judgments under the Securities Exchange Act violated the separation of powers. In so holding, the Court distinguished *Paramino Lumber* and related decisions involving non-Article III adjudicatory bodies and added that "nothing in our holding today calls them into question." 514 U.S. at 232.

The Court has drawn a similar distinction between the power of Congress to require Article III courts to issue advisory opinions and the power of Congress to make orders of federal agencies advisory. Thus, for example, in *Chicago & Southern Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103 (1948), the Supreme Court allowed Congress to subject an international route decision by the Civil

Aeronautics Board to "positive and detailed control" by the President of a sort "unparalleled in the history of American administrative bodies," despite the Board's status as an independent agency, but held that a decision by a federal court regarding the validity of the Board's order could not itself be constitutionally subjected to presidential review, for "[j]udgments, within the powers vested in courts by the Judiciary Act of the Constitution, may not lawfully be revised, overturned or refused faith and credit by another Department of Government." *Id.* at 108-109, 113.

As these cases illustrate, Congress's authority over the adjudicatory functions of federal agencies is not subject to the same constitutional limitations as Congress's power over the judicial functions of Article III courts. In *Klein* itself, the Supreme Court's constitutional concerns rested squarely on the fact that Congress had "passed the limit which separates the legislative from the judicial power." 80 U.S. at 147. As Justice Harlan observed in *Glidden Co.* v. *Zdanok*, 370 U.S. 530 (1962), "[s]urely no such concern would have been manifested [in *Klein*] if it had not been thought that the Court of Claims was invested with judicial power" under Article III. *Id.* at 568 (plurality opinion).[20] Because federal agencies

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[20] *Klein* regarded the Court of Claims as one of the "inferior courts" that Congress was empowered to "ordain and establish" under Article III. See 80 U.S. at 144-45 ("the Court of Claims has exercised all the functions of a court" and "is thus

like the Commission are not "invested with judicial power" in the Article III sense, that concern has no applicability here.

3. Section 4412(b)(1) Changes the Law Governing Retrospective Changes in TAPS Quality Bank Adjustments

Even if the refund decisions governed by Section 4412 were judicial rather than legislative in nature, and even if they were made by an Article III court rather than a federal agency, Section 4412(b)(1) still would not run afoul of *Klein*.

Exxon Mobil and ConocoPhillips argue that *Klein* should be read for the broad proposition that Congress cannot "direct[] results in a pending adjudication" without changing the governing law. Br. 22. The Supreme Court and this Court have thus far found it unnecessary to decide whether *Klein* supports that proposition. See *Robertson* v. *Seattle Audubon Society*, 503 U.S. 429, 441 (1992) ("we need not consider whether this reading of *Klein* is correct"); *Save Our Mall*,

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constituted one of those inferior courts which Congress authorizes"). The Court adhered to that understanding until the 1930s. See *Glidden*, 370 U.S. at 553-56 (plurality opinion) (discussing subsequent precedents). In *United States* v. *Williams*, 289 U.S. 553 (1932), the Supreme Court held for the first time that the Court of Claims was actually an Article I legislative court. The Court overruled *Williams* thirty years later in *Glidden*, although the members of the majority were divided over whether the Court of Claims had been an Article III court at the time that *Williams* was decided. Compare 370 U.S. at 552-58, 562-74, 582-84 (*Williams* wrongly decided), with *id.* at 586-88 (Clark, J., and Warren, C.J., concurring in result) (*Williams* superseded by subsequent legislative changes).

269 F.3d at 1097 (whether *Klein* "can be read as saying that Congress may not direct the outcome in a pending case without amending the substantive law" is "a proposition on which we express no view"). It is likewise unnecessary to decide that question here. For even if *Klein* does prohibit Congress from directing the outcome of pending adjudications without changing the governing law – and there are good reasons not to read *Klein* that broadly – Congress did not trench on that principle when it enacted Section 4412.[21]

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[21] The Supreme Court gave a considerably narrower reading to *Klein* in *United States* v. *Sioux Nation of Indians*, 448 U.S. 371 (1980). The Supreme Court stated in *Sioux Nation* that *Klein* had held the 1870 statute unconstitutional "in two respects." 448 U.S. at 404. "First, [the statute] prescribed a rule of decision in a case pending before the courts, and did so in a manner that required the courts to decide a controversy in the Government's favor." *Id.* at 404. "Second, the rule prescribed by the proviso '[was] also liable to just exception as impairing the effect of a pardon, and thus infringing the constitutional power of the Executive.'" *Id.* at 404-405. The Supreme Court stated that "the fact that Congress was attempting to decide the controversy at issue in the Government's own favor" was "of obvious importance to the *Klein* holding." *Id.* at 405. And this Court has suggested that even that factor is not sufficient to render a statute unconstitutional under *Klein*. See *Save Our Mall*, 269 F.3d at 1096 (*Klein* "cannot be read as a prohibition against Congress's changing the rule of decision in a pending case, or (more narrowly) changing the rule to assure a pro-government outcome"); see also *American International Group, Inc.* v. *Islamic Republic of Iran*, 657 F.2d 430, 442 (D.C. Cir. 1981) ("language in *Klein* casting doubt upon congressional power to prescribe the rules of decision to the Judicial Department in pending cases * * * should surely not be read as casting doubt on the ancient principle * * *that the courts are obligated to apply law (otherwise valid) as they find it at the time of final judgment") (internal quotation marks and citations omitted).

Simply stated, Section 4412 changed existing law by creating new statutory time limits on TAPS quality bank adjustment refunds. Federal law gives the Commission "a measure of discretion in determining when and if a rate should apply retroactively." *Exxon*, 182 F.3d at 49. Prior to the enactment of Section 4412, the Commission's exercise of that discretion was not subject to any fixed time limit, and if the Commission had sought to devise time limits of its own, it would have had to contend with the "strong equitable presumption in favor of retroactivity that would make the parties whole." *Id.* Section 4412 changes the law by creating fixed time limits – one for pending proceedings (February 1, 2000) and another for proceedings commenced after SAFETEA-LU's enactment (fifteen months prior to the Commission's first order imposing quality bank adjustments). Exxon Mobil and ConocoPhillips are understandably unhappy that Congress has changed the law in this fashion. But the fact that Congress *has* changed the law is hardly open to dispute.

Exxon Mobil and ConocoPhillips appear to suggest that even if Section 4412 constitutes a change in the law, Section 4412(b)(1) is unconstitutional under *Klein* because it is aimed at, and its effect confined to, a specific legal controversy. But the Supreme Court and other courts, including this one, have repeatedly sustained the constitutionality of such case-specific laws under *Klein*. See, *e.g., Robertson*,

503 U.S. at 434-41 (rejecting *Klein* challenge to statutory provision confined to two pending environmental suits against Department of Interior); *Save Our Mall*, 269 F.3d at 1094-97; *Apache Survival Coalition* v. *United States*, 21 F.3d 895, 901-904 (9th Cir. 1994). Indeed, this Court's decision in *Save Our Mall* expressly rejects the argument now being proffered by Exxon Mobil and ConocoPhillips.

The plaintiffs in *Save Our Mall* brought suit against various federal agencies to enjoin the construction of the then-proposed World War Two memorial on the National Mall. The plaintiffs claimed that the agencies had violated the National Environmental Policy Act and other federal statutes. While the suit was pending, Congress enacted a statute that exempted construction of the memorial from all of the statutes invoked by the plaintiffs and also barred judicial review of the agency decisions underlying the construction. 269 F.3d at 1093-94.

This Court rejected the plaintiffs' challenge to the constitutionality of the legislation under *Klein*. *Id.* at 1095-97. In so doing, the Court held specifically that the law was not unconstitutional under *Klein* merely because it was aimed at one pending suit involving a single legal controversy. The Court explained that where a statute's specificity does not "violate[] some substantive constitutional provision limiting Congress's power to address a specific problem, such as the ban on Bills of Attainder or (in some instances) the Equal Protection clause, * * * we see no reason why the specificity should suddenly become fatal merely because

there happened to be a pending lawsuit." *Id.* at 1097.

Here, of course, Exxon Mobil and ConocoPhillips argue that Section 4412(b)(1) *does* offend equal protection principles. As we show presently, that argument is incorrect. But right or wrong, it is an equal protection argument, not a separation of powers argument. As *Save Our Mall* makes clear, *Klein* does not impose any additional limit on legislative specificity beyond the constraints imposed by the "substantive constitutional provision[s] limiting Congress's power to address a specific problem."

B. Section 4412(b)(1) Satisfies Rational-Basis Review

Exxon Mobil and ConocoPhillips argue that Section 4412(b)(1) violates their rights to substantive due process and equal protection under the Fifth Amendment. They concede that the statute survives this challenge as long as it bears a rational relationship to a legitimate government interest. In arguing that Section 4412(b)(1) does not meet that standard, the plaintiffs are facing nearly insurmountable obstacles.

Rational basis review "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *FCC* v. *Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). A law that is subject to rational basis review "must be upheld * * * if there is any reasonably conceivable state of facts that could provide

a rational basis" for the law. *Id.* "The burden is on the one attacking the legislative enactment to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record." *Heller* v. *Doe*, 509 U.S. 312, 320-21 (1993) (internal quotation marks and citation omitted). The "legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." *Beach Communications*, 508 U.S. at 315. Moreover, "[i]f there are plausible reasons for Congress' action, [the court's] inquiry is at an end, even if Congress did not expressly state those reasons or act on them." *American Fed. of Gov't Employees* v. *United States*, 330 F.3d 513, 522 (D.C. Cir.), *cert. denied*, 540 U.S. 1088 (2003) (internal quotation marks omitted); *Women Involved in Farm Economics* v. *USDA*, 876 F.2d 994, 1005 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990) ("the legislature's subjective motivation does not undermine a classification's validity provided legitimate motivations are conceivable"). When judged under these highly deferential standards, Section 4412(b)(1) readily passes constitutional muster.

As noted above, the general purpose of Section 4412 is to place time limits on "retroactive changes in TAPS quality bank adjustments." 119 Stat. 1778. There is nothing even arguably irrational about that general undertaking. Retroactive awards can have a highly disruptive effect on the financial interests

and activities of affected shippers, particularly when the administrative proceedings that lead to them have gone on for many years. Congress can legitimately choose to minimize the potential for economic dislocation by placing time limits on the length of such awards. And while Section 4412 addresses only the operation of the TAPS quality bank, rather than the subject of quality banks more generally, Congress could rationally have concluded that the importance of North Slope oil production and the Trans Alaska Pipeline to Alaska and the nation make the need for clarity and predictability regarding TAPS quality bank adjustments particularly great. As the Supreme Court explained in *Williamson* v. *Lee Optical, Inc.*, 348 U.S. 483 (1955):

> Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others.

348 U.S. at 489 (emphasis added); *Beach Communications*, 508 U.S. at 316; *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981); *City of New Orleans* v. *Dukes*, 427 U.S. 297, 303 (1976).

Exxon Mobil and ConocoPhillips argue that the awarding of retrospective monetary relief among shippers has no consequences for the public, and hence there is “no conceivable rational basis” for “legislative interference” in that

process. Br. 28. That argument is misconceived at two levels. First, purely as a practical matter, the imposition of retrospective relief on shippers has an obvious potential to affect their ongoing business operations, and the public has a manifest interest in rules that protect those operations from the potential burdens caused by substantial retrospective adjustments. Second, the only reason that the Commission can make retrospective awards at all is that Congress has given it the statutory authority to do so, rather than confining the Commission to relief that is both practically and formally prospective. Having given the Commission the authority to make retrospective adjustments, authority that could have been withheld altogether, Congress can hardly be charged with impermissible "legislative interference" simply because it chooses to place limits on its own grant of authority.

Exxon Mobil and ConocoPhillips also argue that, even if Congress could rationally establish general time limits for TAPS quality bank adjustments, it had no legitimate basis for establishing a special time limit for this pending proceeding. In particular, they argue that "no party can claim reasonable detrimental reliance on the challenged tariffed valuations" in this proceeding because, as this Court noted in *Exxon*, all parties have been on notice since 1993 that the valuations were contested and might change. Br. 28. That argument is likewise misconceived.

While shippers were of course aware that the quality bank valuations adopted by the Commission in 1993 were being contested, the Alaska refiners and other shippers may have anticipated that those challenges would fail. Moreover, they may well have anticipated that, even if the challenges were to succeed, any revised valuations would be given only prospective effect – as the Commission itself ordered in 1997, and as had been the case with all TAPS settlements. See *Exxon*, 182 F.3d at 48-49. Shippers may well have conducted their business operations in reliance on those expectations – or so Congress could have assumed. *See* R. 1209, Letter from Alaska Congressional delegation to Chairman Wood at 1-2 (discussing reliance interests), JA 1311-12; *Beach Communications*, 508 U.S. at 315 (legislation "may be based on rational speculation unsupported by evidence or empirical data").

Although this Court in *Exxon* characterized any such reliance as unreasonable, whether particular reliance interests are worth protecting is ultimately a policy question, and Congress is free to make its own judgment about that question. Here, Congress could legitimately have made a policy judgment that the reliance interests in the Commission's original valuations were too substantial to justify saddling the affected shippers with refund obligations reaching all the way back to 1993. By making February 1, 2000, the refund cutoff point, Congress

struck a balance among the competing interests of the various parties to this proceeding. The particular line that Congress drew may be a rough one, but "[t]he problems of government are practical ones and may justify, if they do not require, rough accommodations * * *." *Heller*, 509 U.S. at 312 (quoting *Metropolis Theatre Co.* v. *Chicago*, 228 U.S. 61, 69-70 (1913)); see also *Plaut*, 514 U.S. at 239 n.9 ("Even laws that impose a duty or liability upon a single individual or firm are not on that account invalid * * * ").[22]

Exxon Mobil and ConocoPhillips suggest that by placing a time limit on refunds, Section 4412(b)(1) "undermines the general statutory scheme" created by the Interstate Commerce Act. Br. 28. The same thing could be said, of course, any

[22] Exxon Mobil and ConocoPhillips assert that making changes in the resid methodology effective back to 1993 would have no effect on the present and future operation of Alaska refineries and the availability of reasonably priced aviation fuel in the Alaska market. Br. 30. But Congress was free to legislate on different factual assumptions. To take but one of many possible examples, Congress could have assumed that subjecting Petro Star to more than $25 million in liabilities (see Br. 6 n.2) might have had a detrimental effect on its financial position and investment decisions, which in turn might have affected its refining operations. As long as such outcomes are theoretically possible, Congress is free to take steps to prevent them, regardless of how likely – or unlikely – they may be. *Cf. United Transportation Union* v. *ICC*, 891 F.2d 908, 916 (D.C. Cir. 1989), *cert. denied*, 497 U.S. 1024 (1990) ("Even if there is only one chance in 1000 that a problem Congress is addressing can be traced to a particular cause, Congress, as an exercise of legislative judgment, may decide to pass a law that is based on that possibility"; "[e]ven if a proposed bill has but one chance in 1000 of solving or even mitigating a certain problem, Congress is free to enact it. ").

time that Congress chooses to make an exception to a general statutory principle. It hardly follows that departures from a "general statutory scheme" are constitutionally suspect. As the Supreme Court has observed , "no legislation pursues its purposes at all costs," and "[d]eciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice * * * ." *Rodriguez* v. *United States*, 480 U.S. 522, 525-26 (1987). To hold that Section 4412(b)(1) is unconstitutional because it does not accord with what Exxon Mobil and ConocoPhillips believe to be "the general statutory scheme" would be to disable Congress from exercising that quintessential legislative function.

In any event, the parties' characterization of "the general statutory scheme" is a distorted one. Exxon Mobil and ConocoPhillips suggest that refunds are "the mechanism to ensure that interim shipments are carried at the just-and reasonable rates that the Commission ultimately declares." Br. 28. But one of the central tenets of the Interstate Commerce Act is the filed rate doctrine, and "[t]he doctrine's corollary * * * is the rule that agencies may *not* alter rates retroactively." *OXY*, 64 F.3d at 699 (emphasis added). To be sure, there are exceptions to that rule, and this Court found in *Exxon* that the Commission's adjustment of the quality bank valuations for resid and light and heavy distillates might come within

the scope of those exceptions. But it remains the case that retroactive adjustment of rates is itself the exception to the general statutory rule. Thus, to the extent that Congress has placed a limit on such retroactive adjustments in Section 4412(b)(1), it can hardly be attacked for flouting "the general statutory scheme" of the Act – much less be held to have crossed a constitutional line in doing so.

Exxon Mobil and ConocoPhillips argue that Section 4412(b)(1) is subject to additional constitutional scrutiny because it is retroactive. Retroactive laws raise concerns about reliance and repose that are not presented by prospective legislation. See, *e.g.*, *General Motors Corp.* v. *Romein*, 503 U.S. 181, 191 (1992). Here, however, as the foregoing discussion shows, Section 4412(b)(1) can be understood as a rational effort to protect rather than upset reliance interests, and therefore as ameliorating, rather than contributing to, the concerns that inform judicial review of retroactive legislation. In any event, substantive due process principles do not subject retroactive legislation to stricter scrutiny than prospective legislation; they simply require that the retroactivity itself be rationally related to a legitimate governmental interest. See, *e.g.*, *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 730 (1984). For the reasons given above, Section 4412(b)(1) readily meets that test.

CONCLUSION

For the foregoing reasons, the petitions should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I certify that the Brief of Respondents Federal Energy Regulatory Commission and the United States of America contains 21,518 words, not including the tables of contents and authorities, the certificates of counsel, or the addenda.

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