ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

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

No. 08-1110

SFPP, L.P.,
PETITIONER,

v.

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

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

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

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FEBRUARY 25, 2009
FINAL BRIEF: April 13, 2009

CIRCUIT RULE 28(A)(1) CERTIFICATE

A. Parties and Amici

All parties, intervenors and amici appearing below and in this Court are listed in Petitioner's brief.

B. Rulings Under Review

Order on Initial Decision, *SFPP, L.P.*, 122 FERC ¶ 61,126 (Feb. 12, 2008) ("Commission Order"), R.140, JA 614.

C. Related Cases

The order of the Federal Energy Regulatory Commission ("Commission") under review in this appeal concerns contract rates for service from SFPP's Watson Station facility that were never filed with the Commission. The Commission's prior rulings on these same contract rates, but on a different issue, were addressed and vacated by this Court in *BP West Coast Products, LLC v. FERC*, 374 F.3d 1263, 1273-74 (D.C. Cir. 2004) (Nos. 99-1020 *et al.*).

There are several cases with the same parties and similar issues currently pending in this Court. *BP West Coast Products, LLC v. FERC*, No. 08-1237, *ExxonMobil Oil Corp. v. FERC*, Nos. 07-1163 *et al*. (consolidated), *Chevron Products Co. v. FERC*, No. 03-1183, *ExxonMobil Oil Corp. v. FERC*, Nos. 06-1008 *et al*. (consolidated), *Navajo Refining Co., L.P., v. FERC*, Nos. 06-1116 *et al*. (consolidated), and *SFPP L.P. v. FERC*, Nos. 02-1112, *et al*. (consolidated) are

related to this proceeding as they concern SFPP's rates and the latter three appeals arise from the same FERC Docket No. OR92-8.

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TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

COURT CASES: **PAGE**

---

* Cases chiefly relied upon are marked with an asterisk.

TABLE OF AUTHORITIES

COURT CASES (continued): **PAGE**

TABLE OF AUTHORITIES

COURT CASES (continued): **PAGE**

ADMINISTRATIVE CASES:

TABLE OF AUTHORITIES

ADMINISTRATIVE CASES (continued): **PAGE**

STATUTES:

TABLE OF AUTHORITIES

STATUTES (continued): **PAGE**

REGULATIONS:

MISCELLANEOUS:

GLOSSARY

Br.	Petitioners' Brief
Chevron	Complainant Shipper Chevron U.S.A. Products Company
Commission or FERC	Federal Energy Regulatory Commission
Commission Order	*SFPP, L.P.*, 122 FERC ¶ 61,126 (Feb. 12, 2008), R.140, JA 614
Complainant Shippers	Chevron U.S.A. Products Co., BP West Coast Products LLC, ExxonMobil Oil Corp., ConocoPhillips Co., Tosco Corp., Ultramar Inc., Valero Marketing and Supply Co., America West Airlines, Inc., Continental Airlines, Inc., Southwest Airlines Co., Northwest Airlines Inc. and Arizona Fueling Facilities Corp.
ICA	Interstate Commerce Act
ICC	Interstate Commerce Commission
Initial Decision	*SFPP, L.P.*, 118 FERC ¶ 63,033 (Mar. 28, 2007), R.135, JA 565
Opinion No. 435	*SFPP, L.P.*, 86 FERC ¶ 61,022 (1999), JA 46, *order on reh'g*, 91 FERC ¶ 61,135 (2000), JA 120, *order on reh'g*, 96 FERC ¶ 61,281 (2001), *vacated in part sub nom. BP West Coast Prods., LLC v. FERC*, 374 F.3d 1263 (D.C. Cir. 2004)
P	Paragraph number in a FERC order
Remand Order	*SFPP, L.P.*, 111 FERC ¶ 61,334 (June 1, 2005), R.33, JA 145
SFPP	Petitioner SFPP, L. P.

IN THE UNITED STATES COURT OF APPEALS
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BRIEF FOR RESPONDENTS FEDERAL ENERGY REGULATORY COMMISSION AND UNITED STATES OF AMERICA

STATEMENT OF THE ISSUE

Whether the Federal Energy Regulatory Commission ("Commission" or "FERC"), in affirming an administrative law judge's decision, reasonably found that SFPP, L.P., violated Sections 6(1) and 6(7) of the Interstate Commerce Act, 49 U.S.C. app. §§ 6(1), 6(7) (1988), by failing to file charges for jurisdictional oil pipeline service, and whether it properly exercised its remedial discretion, in ordering reparations for charges above the stipulated just and reasonable rates.

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutes are contained in the Addendum to this brief.

INTRODUCTION

This is the latest case to come before this Court in the "long-running dispute" over the oil pipeline transportation rates of SFPP, L.P. ("SFPP"). *ExxonMobil Oil Corp. v. FERC*, 487 F.3d 945, 947 (D.C. Cir. 2007); *see also BP W. Coast Prods., LLC v. FERC*, 374 F.3d 1263, 1273-74 (D.C. Cir. 2004) (vacating and remanding FERC's determination on the Watson Station facility contracts at issue on appeal here). Unlike *BP West Coast* and *ExxonMobil*, this is not a "lengthy, complex, and convoluted" case. *BP West Coast*, 374 F.3d at 1271.

Instead, this appeal presents the Commission's resolution of a single legal issue: whether the charges in the Watson Station facility contracts, never filed with the Commission, set the rate for past service between 1991 and 1999. This case is further simplified by the fact that SFPP and the Complainant Shippers stipulated, in a Settlement, the rates for determining any reparations, as well as all other factual reparation issues, prior to litigation of the reserved legal issues.

Before the administrative law judge in the proceeding below, SFPP prevailed on one of the two reserved legal issues. *See SFPP, L.P.*, 118 FERC ¶ 63,033 (2007) ("Initial Decision"), R.135, JA 565. The only one addressed by the Commission and appealed is the issue that SFPP lost before the judge. Affirming

the judge, the Commission determined in the challenged order that SFPP violated the filing requirements of the Interstate Commerce Act. *See SFPP, L.P.*, 122 FERC ¶ 61,126 (2008) ("Commission Order"), R.140, JA 614. The Commission concluded that the unfiled contracts do not set the rate level for the past period and determined, exercising its remedial discretion, that SFPP must pay reparations to Complainant Shippers. SFPP challenges this conclusion.

STATEMENT OF FACTS

I. Statutory And Regulatory Background

In 1906, Congress extended the definition of common carrier under the Interstate Commerce Act ("ICA") to oil pipelines and required that they file their rates with the Interstate Commerce Commission ("ICC"). *See* 49 U.S.C. app. §§ 6(1), 6(7) (1988); *see also* Initial Decision at P 53 n.8, JA 572 (explaining citation to the appendix to the 1988 edition of the U.S. Code). In 1977, in conjunction with the formation of the Department of Energy, regulatory authority over oil pipelines under the ICA was transferred from the ICC to the newly-created FERC. *See* Section 402(b) of the Department of Energy Organization Act, 42 U.S.C. § 7172(b). The traditional standards governing rate regulation under the ICA were not modified. *See Frontier Pipeline Co. v. FERC*, 452 F.3d 774, 776 (D.C. Cir. 2006) (explaining that "oil pipelines were to be regulated under the version of the ICA that prevailed on October 1, 1977").

ICA Section 1(5)(a) requires "[a]ll charges" for pipeline transportation, or service in connection with transportation, to be just and reasonable and declares all "unjust and unreasonable charge[s] . . . to be unlawful." 49 U.S.C. app. § 1(5)(a). Sections 6(1) and 6(7) require that a pipeline keep its rates on file and open for "public inspection" and that an oil pipeline cannot provide transportation unless the rates are in file. 49 U.S.C. app. §§ 6(1), 6(7). Pursuant to ICA Section 8, a pipeline is liable for damages resulting from its violations of the ICA, including unlawful charges and failure to take actions required by the Act. 49 U.S.C. app. § 8. The ICA also sets forth procedures for complaints to the Commission against carriers for ICA violations. 49 U.S.C. app. § 13(1). "[A]fter hearing on a [§ 13] complaint[,]" the Commission may order the payment of reparations for a violation of the ICA. 49 U.S.C. app. § 16(1); *see ExxonMobil*, 487 F.3d at 962 (explaining procedures for determining reparations including the 2 year limitation) (citing *BP West Coast*, 374 F.3d at 1305-06).

II. FERC And Court Proceedings Concerning Watson Station Rates

A. Proceedings Prior To The Challenged Order

On August 7, 1993, Chevron U.S.A. Products Company ("Chevron") filed the first of several ICA Section 13 complaints that began the protracted proceeding resulting ultimately in this appeal of a single legal issue regarding the Watson Station facility charges. Incorporated Index for Case No. 99-1020, R.87 at 6-9, JA

6-9 (alleging "harm by being required to pay a transportation rate that has not been published [in violation of the filed rate doctrine] or shown to be just and reasonable" and requesting award of damages); *see BP West Coast*, 374 F.3d at 1277 n.2 (describing Chevron complaint); *see also* Settlement, Attachment 4 at 3-4, R.92, JA 270-71 (listing dates and dockets of other complaints on Watson Station facility charges). Complainants and all others shipping over SFPP's West Line paid these Watson Station facility charges of 3.2 cents per barrel to avoid the minimum pumping rate requirement specified in SFPP's tariff. Joint Stipulation at 7, R.112, JA 292; Initial Decision at PP 8-17, 22, JA 566-67, 568 (detailing the operation of the Watson Station "drain-dry" facility); *see also BP West Coast*, 374 F.3d at 1273 (describing contracts for this service).

In Opinion No. 435, issued on January 13, 1999, after a full hearing on the complaints conducted by an administrative law judge, the Commission first addressed these Watson Station facility charges and related contracts.[1] Finding that the Watson Station facility service was subject to the jurisdiction of the Commission under the ICA, the Commission directed SFPP to file a tariff for the service, to apply prospectively. Opinion No. 435, 86 FERC at 61,074, 61,076, JA 65, 67. With regard to the rates for the period between 1991 and 1999, the

[1] *SFPP, L.P.*, Opinion No. 435, 86 FERC ¶ 61,022 (1999), *order on reh'g*, Opinion No. 435-A, 91 FERC ¶ 61,135 (2000), *order on reh'g*, Opinion 435-B, 96 FERC ¶ 61,281 (2001), *vacated in part sub nom. BP West Coast*, 374 F.3d 1263.

Commission reversed the administrative law judge (*id*. at 61,074, JA 65), and determined that the charges contained in the contracts were "the equivalent of a lawful, effective rate." *Id*. at 61,076, JA 67. Because the Commission determined that the unfiled rates were in effect a year before enactment of the Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776, it deemed the rates just and reasonable (i.e., grandfathered) and dismissed the complaints. Opinion No. 435, 86 FERC at 61,075-76, JA 66-67.

On appeal of Opinion No. 435, this Court found the Commission's reasoning on the unfiled Watson Station facility contracts "to be fundamentally flawed and vacate[d] this portion of its order." *BP West Coast*, 374 F.3d at 1274. On remand of this and other issues from *BP West Coast*, the Commission revisited its "prior conclusions regarding the jurisdictional status of the Watson Station drain dry facility charges" and concluded that the unfiled contract rates were not grandfathered. *SFPP, L.P.*, 111 FERC ¶ 61,334 at PP 31-36 (2005) ("Remand Order"), R.33, JA 152-53. Because the charges were not grandfathered, the Commission initiated an administrative hearing to establish just and reasonable rates for the Watson Station facility "in the years for which complaints were filed against those charges." *Id*. at P 75, JA 161.

About one year later, SFPP and the Complainant Shippers[2] settled all of the

[2] Complainant Shippers are Chevron, BP West Coast Products, LLC,

issues relating to Watson Station facility service except for two legal issues. Settlement Explanatory Statement at 3, JA 186. The Settlement reserved two legal issues for briefing before an administrative law judge:

> (1) Whether SFPP's contracts with individual shippers establish the rate level or limit reparations during the period prior to April 1, 1999; and
>
> (2) Whether the payment of any reparations that may be held to be owed should start on November 1, 1991 or upon the dates two years before the filing of each individual complaint.

Settlement at 5, JA 205. As relevant here, the Settlement also stipulated the Watson Station charge for the years 1991 to 1999 at between 0.31 cents and 0.48 cents per barrel. Settlement at 4, JA 204.

On August 2, 2006, the Commission approved the Settlement and provided for further proceedings on the two reserved legal issues. *SFPP, L.P.*, 116 FERC ¶ 61,116 at PP 14-16 (2006), R.98, JA 283.

After submission of joint stipulated facts (including resubmission of the Settlement) and briefs on the two reserved legal issues, the presiding administrative law judge, on March 28, 2007, decided in favor of Complainant Shippers on the first issue and in favor of SFPP on the second issue. Initial

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ExxonMobil Oil Corporation, ConocoPhillips Company, Tosco Corporation, Ultramar Inc., Valero Marketing and Supply Company, America West Airlines, Inc., Continental Airlines, Inc., Southwest Airlines Company, Northwest Airlines Inc., and Arizona Fueling Facilities Corp. Initial Decision at P 2 & n.2, JA 565.

Decision at PP 53, 64, JA 572, 573 (as to the second issue, limiting reparations by allowing each complainant to receive reparations for two years prior to its complaint).

Regarding the first issue, the single issue on exceptions before the Commission and on appeal here, the judge determined that the contracts did not establish the rate for service because SFPP failed to file the contracts with the Commission in violation of Sections 6(1) and 6(7) of the ICA. *Id*. at PP 54-55, JA 572 (citing 49 U.S.C. app. § 6(1), 6(7)). Relying on Supreme Court precedent interpreting the ICA, the judge reasoned that the charge in the contracts at issue was not a valid rate because it was never filed with the Commission. *Id*. at P 57, JA 572 (citing *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990)). The judge further explained that the "contracts cannot operate to frustrate the Commission's regulatory responsibilities under the ICA" to ensure rates for transportation are reasonable. *Id*. at P 58, JA 572-73; *see also* 49 U.S.C. app. § 1(5) (unreasonable transportation charges are unlawful).

Rejecting SFPP's equity arguments, the administrative law judge observed that denial of reparations would reward SFPP for violating the ICA and deprive the Commission of its ability to exercise its regulatory authority over jurisdictional service. *Id*. at P 61, JA 573. Pursuant to ICA § 8, 49 U.S.C. app. § 8, the judge concluded that SFPP had violated the ICA and was, therefore, liable for damages

in the amount established through operation of the Settlement – the difference between the contract charge and the just and reasonable rate approved by the Commission in the Settlement. *Id*. at P 62, JA 573.

B. Challenged Commission Order

In the order on review here, issued on February 12, 2008, the Commission affirmed the judge. Commission Order at P 1, JA 614. The Commission adopted the judge's finding that the charge in the Watson Station facility contracts was invalid because the contracts containing the charge were not filed with the Commission. *Id*. at PP 3, 6, JA 614, 615. The Commission further affirmed that this violation of the ICA required the payment of damages (in the form of reparations), as established by the Settlement, to Complainant Shippers. *Id*. at P 12, JA 617.

The Commission clarified that failure to file the pipeline transportation rate with the Commission made the charges illegal. *Id*. at P 6, JA 615. This exposed SFPP to liability, when and if the Commission found the contract charges unreasonable. *Id*. at P 11, JA 617. The Commission determined that the contracts did not shield SFPP from liability as a matter of law. *Id*. at P 12, JA 617. As a result, and because the Settlement set the reasonable rate for the service, the Commission concluded that SFPP was liable for reparations. *Id*.

FERC also addressed SFPP's other objections to the judge's decision,

finding them inadequate to avoid reparations. Commission Order at P 8, JA 616 (explaining that Opinion No. 435 wrongly interpreted ICA precedent); *id*. at PP 13-14, JA 617 (finding discretion to craft equitable remedy, but finding no reason to deny reparations based on SFPP's equitable arguments); *id*. at P 15, JA 617-18 (presuming unfiled rate resulted from uncompetitive conditions absent evidence to the contrary); *id*. at P 16, JA 618 (addressing alleged deprivation of fair compensation for service from the Watson Station facility); *id*. at P 17, JA 618 (addressing public policy arguments).

SUMMARY OF ARGUMENT

This long-standing dispute between SFPP and Shippers using its Watson Station facility came to the Commission in 1993. At that time, Shipper Chevron filed the first of many complaints alleging that service over the facility was jurisdictional and that the contract rate for service was unreasonable. After the Commission's Opinion No. 435 was vacated (in relevant respect) by this Court, the Commission granted the Complainant Shippers' request for a reasonableness review of the unfiled contract rates. The Commission's factual inquiry to determine the reasonable rate was discontinued when SFPP and Complainant Shippers stipulated reasonable rates for each year the contracts were in effect.

Approving the stipulated replacement rates, the Commission allowed for further legal arguments on whether the unfiled contract rates could supplant the

Commission's authority to ensure just and reasonable rates. This is the sole issue addressed in the Commission's order on appeal here.

Answering this question in the negative, the Commission appropriately determined that rates that were never placed on file with the agency, and thus never reviewed by the agency, could not supersede the Commission's authority to review the reasonableness of the rates. Contracts cannot displace the congressional mandate under the ICA that the Commission ensure all rates under its jurisdiction are just and reasonable. The Commission considered SFPP's equitable arguments and reasonably determined that reparations were an appropriate remedy for these unfiled contract rates. The Commission's reasonable exercise of its remedial discretion should not, under the circumstances presented, be disturbed by this Court.

ARGUMENT

I. Standard Of Review

The Court reviews Commission orders under the Administrative Procedure Act's arbitrary and capricious standard. 5 U.S.C. § 706(2)(A); *see also, e.g.*, *Sithe/Independence Power Partners, L.P. v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999). The relevant inquiry for a reviewing court under this standard is whether the agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found

and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

The Commission must explain any deviation from its precedent, including precedent of the ICC applying the Interstate Commerce Act prior to the FERC's assumption of jurisdiction in 1977. *Frontier*, 452 F.3d at 776 (citation omitted). This Court, however, gives substantial deference to the Commission's interpretation of its own regulations and precedents. *See NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 799 (D.C. Cir. 2007); *Northern Border Pipeline Co. v. FERC*, 129 F.3d 1315, 1318 (D.C. Cir. 1997).

The Court also "defer[s] to FERC's decisions in remedial matters, respecting that the difficult problem of balancing competing equities and interests has been given by Congress to the Commission with full knowledge that this judgment requires a great deal of discretion." *Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 816 (D.C. Cir. 1998). As a result, the Court does not "reject the Commission's choice of an equitable remedy [unless] it lacks a 'rational basis.'" *Constellation Energy Commodities Group, Inc. v. FERC*, 457 F.3d 14, 22 (D.C. Cir. 2006) (citing *Koch*); *see also Connecticut Valley Elec. Co. v. FERC*, 208 F.3d 1037, 1044-45 (D.C. Cir. 2000) (explaining the Commission's broad remedial discretion under the statutes it administers).

II. SFPP Violated The ICA And Incurred Liability By Failing To File Its Rates For Jurisdictional Service For Commission Review

In the order on appeal, the Commission reasonably determined that SFPP incurred liability for violating Sections 6(1) and 6(7) of the ICA, 49 U.S.C. app. §§ 6(1), 6(7), by not filing its Watson Station contract charges with the Commission (Commission Order at P 6, JA 615), that the Settlement established the reasonable replacement rates for the unexamined charges in the Watson Station contracts, and that the Settlement thereby established the amount of damages in the form of reparations to be paid to Complainant Shippers. Commission Order at P 12, JA 617.

It is uncertain whether SFPP in its brief is arguing that it did not violate the ICA or did not incur liability for the violation. *Compare* Br. at 12 (SFPP "recognizes the validity and soundness" of the filing requirement), *with* Br. at 39 ("*if* SFPP is found to have violated the ICA for its failure to place its . . . rates on file") (emphasis added). However, assuming SFPP is raising this threshold liability issue here, the Court should find that it is without merit.

Rates for interstate pipeline transportation service must be on file with the Commission. 49 U.S.C. app. §§ 6(1), 6(7). This filing requirement is "absolute" (Commission Order at P 9, JA 616), in that it is not a requirement that the Commission can excuse. Commission Order at P 7, JA 616 ("charges contained [in jurisdictional contracts] will not be legal rates unless filed with the appropriate

regulatory body") (citing *Maislin*). This does not mean, however, that the Commission lacks discretion, as discussed below, to craft remedies when a pipeline charges contract rates that are not on file with the Commission. *Maislin*, 497 U.S. at 133 ("we agree that the Commission may have discretion to craft appropriate remedies for violations of the statute") (citation omitted); *see* Br. at 28 ("even *Maislin* recognizes the Commission's remedial powers"). Rather, it is "utterly central" that rates be on file (*id.* at 132), otherwise, "it would be monumentally difficult to enforce the requirement that rates be reasonable . . . and virtually impossible for the public to assert its right to challenge the lawfulness of existing or proposed rates." *Regular Common Carrier Conference v. United States*, 793 F.2d 376, 379 (D.C. Cir. 1986); *see Southwestern Bell Corp. v. FCC*, 43 F.3d 1515, 1522 (D.C. Cir. 1995) (*Maislin* and *Regular Common Carrier* "dwell on two points" – "[f]irst, . . . that the rate-filing provision is central to the ICA"); Commission Order at P 7, JA 616.

There is no question that SFPP failed to file rates for jurisdictional service even in the six years after complaints were lodged alleging the jurisdictional nature of the service. Joint Stipulation at 8, JA 293. While SFPP filed rates for the jurisdictional Watson Station service in 1999 pursuant to a Commission directive, it never formally submitted the contracts at issue in this case to the Commission as contracts under which jurisdictional service was provided. *Id*. SFPP's inaction

violated Sections 6(1) and 6(7) of the ICA and subjected it to liability for damages resulting from its unreasonable rates. Commission Order at P 12, JA 617.

SFPP's violation of the ICA is not a good faith error (s*ee* Br. at 33) that the Commission may cavalierly excuse. As the Commission explained, if jurisdiction is uncertain, the carrier has an obligation to "file the charges with a motion to dismiss" or risk reparations or other remedies if the service is later held to be jurisdictional. Commission Order at P 9, JA 616. This is not an obligation that newly arises from the Commission Order, as SFPP alleges. *See* Br. at 37. Rather, when jurisdiction under the ICA is in question, the long-standing "appropriate" approach is for the carrier to file an application or tariff with the regulatory agency and, at the same time, request dismissal of the application. *Schenley Distillers Corp. v. United States*, 326 U.S. 432, 436 (1946) (otherwise "a carrier . . . risk[s] . . . operating illegally and incurring criminal and other penalties"); *accord Prior Notice & Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139 at 61,977-78 (1993) ("To the extent a utility remains uncertain . . . as to its obligation to file rates and charges . . . it should assume the initiative to seek a specific ruling"); *Central Me. Power Co.*, 56 FERC ¶ 61,200 at 61,817 & n.6 (1991) (describing refund policy meant to deter repeated violations of the Federal Power Act filing obligation); *cf. Xcel Energy Serv. Inc. v. FERC*, 510 F.3d 314, 318 (D.C. Cir. 2007) (affirming FERC decision to deny waiver because utility

"could readily have filed all four disputed agreements pending the outcome of" agency or court proceedings).

Here, SFPP violated the filing requirements of the ICA. The Commission does not have the power to excuse SFPP from legal accountability for its violation of these filing requirements. Crafting the remedy for such violation is, however, within its discretion. As discussed *infra* at p. 18, the Commission may, in the exercise of its remedial authority, account for good faith errors in determining the appropriate remedy for an unfiled contract rate. The Commission did so here as we now explain.

III. The Commission Properly Exercised Its Remedial Authority In Ordering SFPP To Pay Reparations

SFPP admits that the Court owes "enhanced deference" to the Commission's remedial decisions, but argues that no deference is due here because the Commission did not consider the equitable arguments presented by SFPP. Br. at 15 ("the Commission has made it exceedingly clear that all equitable arguments are 'irrelevant'"); *see* Br. at 30 ("The core purpose of the ICA is not compromised by equitably accommodating the contracting parties' jurisdictional error."). SFPP ignores that both the Commission Order and the Initial Decision affirmed by that order addressed SFPP's arguments concerning the equity of granting reparations to Complainant Shippers. *See* Initial Decision at PP 60-63, JA 573; Commission Order at PP 13-17, JA 617-18.

SFPP argued below, and the Commission agreed, that it had discretion to limit reparations or not compel them at all. Commission Order at P 13, JA 617 (agreeing with SFPP that "reparations, like refunds, are an equitable remedy," but concluding that "there is no equitable reason to deny shippers reparation under the circumstances here"); *see Louisiana Pub. Serv. Comm'n v. FERC*, 522 F.3d 378, 393 (D.C. Cir. 2008) (Court owes "great deference" because "agency discretion is . . . at zenith when the action assailed relates primarily to the fashioning of . . . remedies") (citation and punctuation omitted). In the order on appeal, though, the Commission was constrained in its ability to reduce the reparations because it had already approved the Settlement that explicitly set the amount of reparations, if due. Exercise of the Commission's discretion was thus limited to finding whether or not reparations were due.

The Commission rejected SFPP's argument that no reparations were due because the contracts were the result of arms-length negotiation. Commission Order at P 13, JA 617. This argument was not relevant because the details of contract negotiation did not overcome the fact of non-filing of the contract charges. *Id*. In fact, the record does not establish that the negotiated charge reflected effective competition. *Id*. at P 15, JA 617-18. SFPP offered a rate "and the shippers were left with the option of accepting or rejecting the offer." *Id*. "[T]here are no compelling assurances that SFPP did not simply extract an

economic rent based on the difference between its own costs for resolving the operating issues at Watson Station and the costs each of the shippers would have incurred on its own hook." *Id.*

Similarly, the Commission rejected SFPP's contention that the Commission should bar reparations because the parties held a good faith belief that the Watson Station service was not jurisdictional. *Id*. at P 9, JA 616. Again, nothing in the record supported this contention. *Id*. Moreover, a policy of enforcing unfiled jurisdictional contracts would provide an incentive to avoid the Commission's reasonableness review by not filing a tariff with FERC. *Id*. at P 13, JA 617; *see id*. at P 17, JA 618 (filing requirement also "afford[s] shippers an opportunity to challenge . . . economic leverage" of the carrier and "places pressure on the carrier to act reasonably"). Enforcing the filing requirement, on the other hand, increases the "effectiveness of the statutory structure" and "protect[s] all parties' interests . . . ." *Id*. at P 9, JA 616; *see Louisiana Pub. Serv. Comm'n v. FERC*, 551 F.3d 1042, 1045 (D.C. Cir. 2008) (Court's "deference is at its zenith[,]" when reviewing "a predictive judgment by FERC about the effects of a proposed remedy").

IV. SFPP's ICA Section 6(3) Challenge Is Not Properly Part Of This Proceeding

SFPP seeks to overcome its failure to meet the filing requirement of the ICA by arguing on appeal that the Commission erred in failing to exercise its discretion to modify that filing requirement. *See, e.g.*, Br. at 12 (ICA Section 6(3) provides FERC with the "discretion for good cause shown to modify" the filing requirement); Br. at 14 (FERC's "failure to exercise or even to acknowledge its statutory discretion"). Throughout its brief, SFPP argues that it demonstrated good cause for the Commission to modify, pursuant to ICA Section 6(3), 49 U.S.C. app. § 6(3), the filing requirement of Sections 6(1) and 6(7) of the ICA, 49 U.S.C. app. §§ 6(1), 6(7). *See, e.g.*, Br. at 15 (FERC's "professed inability to accommodate a good-faith mistake regarding jurisdiction fails to comport with the ICA"); Br. at 17-20 (detailing "circumstances that constitute good cause" for ICA Section 6(3) accommodation). These new arguments were never presented to the Commission in this case and therefore are beyond the scope of this appeal.

In its three briefs before the administrative law judge and the Commission, SFPP failed to preserve these issues by failing to cite or even mention the statutory provision on which it now mainly relies. *Domtar Me. Corp. v. FERC*, 347 F.3d 304, 310 (D.C. Cir. 2003) (when petitioner cites a section of the statute for which there is no citation in the record below, and "FERC never had a chance to address the [statutory] issue," the argument is not considered by the Court); *California*

Dep't of Water Res. v. FERC, 341 F.3d 906, 911 (9th Cir. 2003) (raising statutory interpretation issue in single sentence "without citing the statutory language" does not preserve issue for appellate review). In the proceeding below, SFPP also did not request that the Commission exercise its discretion to modify the filing requirement or attempt to demonstrate good cause for such modification. The arguments that SFPP may properly raise, and this Court may consider, are limited to those that were actually raised before the Commission in the underlying proceeding. *Tesoro Ref. & Mktg. Co. v. FERC*, 2009 U.S. App. LEXIS 1102, at *2 (D.C. Cir. Jan. 23, 2009) (dismissing petition for failure to exhaust administrative remedies); *ExxonMobil*, 487 F.3d at 948 (not considering several arguments raised by petitioners, including Petitioner SFPP, because they failed "to raise those arguments before the Commission in the first instance").

This Court has made clear that, though the ICA does not impose a formal rehearing requirement, arguments that were never presented to the Commission are barred on appeal. *See ExxonMobil*, 487 F.3d at 962 ("A party must first raise an issue with an agency before seeking judicial review."); *Frontier*, 452 F.3d at 793 ("[Petitioners] did not raise this argument below . . . and thus we do not consider it."). "This requirement . . . ensures 'simple fairness' to the agency and . . . provides this Court with a record to evaluate complex regulatory issues." *Tesoro*, 2009 U.S. App. LEXIS 1102, at *7 (citing *ExxonMobil*, 487 F.3d at 962); *see also*

United States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33 (1952) ("Simple fairness . . . requires . . . that courts should not topple over administrative decisions unless the [agency] not only has erred but has erred against objection made").

While Section 6(3), 49 U.S.C. app. § 6(3), may grant the Commission authority to modify for good cause the tariff filing requirements, it is not clear that this would apply to a situation in which the contracts were never filed. Precedent interpreting the similar provisions of the Federal Power Act and the Natural Gas Act (Br. at 16-17) are of no help here as they do not contain the language allowing the Commission to "modify the requirements of this section with respect to publishing, posting, and filing of tariffs" contained in Section 6(3) of the ICA. 49 U.S.C. app. § 6(3); *but see MCI Telecomm. Corp. v. AT&T Co*., 512 U.S. 218, 231-32 (1994) (holding that agency policy to waive tariff filing requirement is not a valid exercise of authority under §203 of the Communications Act to "modify any requirement" in that section).

In any event, the Commission evaluated many of the arguments that SFPP has repackaged as "good cause" for Section 6(3) waiver in its brief (Br. at 17-20), and determined, through the exercise of its discretion, that denying reparations in those circumstances was not an appropriate remedy here. Commission Order at PP 12-17, JA 617-18; *see Xcel*, 510 F.3d at 318 (Court's review of Commission's exercise of discretion is "quite limited").

V. SFPP's Other Arguments Are Without Merit

A. The Unfiled Watson Station Contracts Failed To Establish A Valid Rate

SFPP argues that precedent interpreting the ICA favors the preservation of the Watson Station facility contract rates, even if those rates are not filed with the Commission. Br. at 2, 24-26. SFPP fails to recognize that the Commission may not abdicate its duty to ensure that rates for jurisdictional service are just and reasonable. *Maislin*, 497 U.S. at 119 (FERC "has primary responsibility for determining whether a rate or practice is reasonable"); *BP West Coast*, 374 F.3d at 1286 (FERC "must ensure that the rates charged by jurisdictional pipelines are 'just and reasonable.'") (citation omitted). By not filing the jurisdictional contracts with the Commission, SFPP "exposed itself to liability that the Commission might find the charges to be unjust and unreasonable" and order reparations. Commission Order at P 11, JA 617; *see also id*. at P 14, JA 617 (SFPP failed to show that shippers agreed that the contract "charge was just and reasonable"). In the challenged order, the Commission reasonably found that enforcing the SFPP's unfiled contract rate would "defeat the fundamental purposes of the Act," to ensure rates are filed, reasonable and non-discriminatory. *Id*. at P 7, JA 616.

Relying on four district court decisions and, in particular, a decision from the Court of Appeals for the Eight Circuit, SFPP argues that the Commission is required by ICA precedent to enforce the Watson Station contracts. Br. at 24-26

(citing, *inter alia*, *Ets-Hokin & Galvan, Inc. v. Maas Transport, Inc.*, 380 F.2d 258, 259 (8th Cir. 1967)). The issue in all of these cases is whether unfiled contracts may be voided, i.e., whether the contracts are given "no legal effect" and treated as if they did not exist in the first instance. Black's Law Dictionary 326 (7th ed. 1999); *see, e.g.*, *Ets-Hokin*, 380 F.2d. at 259-261 (shipper arguing that contract is void and thereby seeking to avoid paying all contract transportation charges). Contrary to SFPP's assertion (Br. at 26), the Commission did address whether, in ordering reparations, it was voiding the Watson Station contracts. The Commission explained that its order and the Settlement had not voided the contracts because "SFPP is entitled to recover the reasonable value of its services even if its rate was unfiled . . . on a quasi-contract, or *quantum meruit*" basis. Commission Order at P 16, JA 618. The cases cited by SFPP, therefore, are inapplicable here because the Commission, by finding that SFPP was due the value of its services under the Watson Station contracts (as determined by the Settlement), did not void the contracts.[3]

[3] SFPP's reliance on *Morgan Stanley Capital Group, Inc. v. Public Util. Dist. No. 1 of Snohomish County*, 128 S. Ct. 2733 (2008), is also misplaced. Br. at 35-36. Under the ICA there is no *Mobile-Sierra* doctrine (*see Morgan Stanley* 128 S. Ct. at 2737), which is based on the Natural Gas Act and the Federal Power Act rate filing provisions. *See United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 338-40 (1956); *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 353 (1956). Nor does the ICA impose any "public interest" screening test that FERC must apply before considering whether an agreed rate is reasonable. *Compare Sierra Pacific*, 350 U.S. at 354-55.

The Commission explained that SFPP could have sought enforcement of the contract rate through filing the contracts with the Commission as a consensual common carrier rate. *Id*. at P 15, JA 617 (citing its regulations, 18 C.F.R. § 342.2(b) (2007), that now allow such filing). Here, however, the record showed a lack of consensus regarding that rate. *Id*. at P 14, JA 617 (complaints show that shippers were not satisfied that the rate was reasonable). It also reflected a lack of "effective competition" at the time the contracts were signed. *Id*. at P 15, JA 617; *see id*. at P 14, JA 617 (facts did not show that SFPP was unable to "exercise market power").

B. The Commission Reasonably Determined That The Settlement Established Damages

SFPP's contention that the Settlement cannot support the Complainant Shippers' burden to prove damages is also unavailing. Br. at 38-40 (citing 49 U.S.C. app. § 8).

In the proceeding below, the Commission did not conduct the normal substantive review of cost of service and rate of return to determine the reasonable rate for the Watson Station facility service. *See, e.g.*, *BP West Coast*, 374 F.3d at 1275 (remanding Commission's determination of reasonable rates as unsupported by any substantive review). This was unnecessary because the Settlement stipulated the rates, setting aside the need for any fact-finding as to costs or return, and the Commission approved them as reasonable. *SFPP, L.P.*, 116 FERC ¶

61,116 at P 14, JA 283.

The record in this case shows that SFPP collected a contract charge that was in excess of the stipulated reasonable rates for the past period. Joint Stipulation at 7-8, JA 292-93. The record also demonstrates that Complainant Shippers paid the contract charge and provides the volumes for determining reparations. Settlement Agreement at 4, JA 204; Appendix A, JA 216. Given this record evidence, the Commission reasonably determined that "the amount of any reparations is established by the [S]ettlement" and thus, that Complainant Shippers need not prove the amount of damages due. Commission Order at P 12, JA 617. Further, the Commission properly affirmed the administrative law judge's determination that the damages are measured by the difference between what Complainant Shippers paid and the reasonable rate for the volumes shipped. Initial Decision at P 62, JA 573; Commission Order at P 12, JA 617; *see also ExxonMobil*, 487 F.3d at 962 ("shippers who filed complaints . . . are entitled to the difference between the rates they paid and the rates the Commission retrospectively determines to be just and reasonable").

C. Opinion No. 435 Was Vacated By This Court And Thus Does Not Control Disposition Of The Contract Rate Issue Here

SFPP contends that the Commission's Opinion No. 435 correctly determined that the rates in the Watson Station contracts should be enforced. Br. at 21-24. It argues that the Commission erred in failing to provide a reasoned basis for deviating from its findings in Opinion No. 435. Br. at 12, 21; *see also* Br. at 23 ("[t]he Commission has not explained why . . . Opinion [No.] 435 . . . abruptly ceased to carry any weight). Neither of these arguments has merit.

SFPP's reliance upon Opinion No. 435, including subsequent opinions, and the Commission's brief to this Court in support of those decisions, is misplaced. *See* Br. at 21-23. This Court not only vacated Opinion No. 435 and subsequent orders (*BP West Coast*, 374 F.3d at 1271), it explicitly vacated "the portion of [the Commission's] order" on the Watson Station facility contracts. *Id*. at 1274; *see id*. at 1293 (the only other "portion of the FERC opinion" explicitly vacated was the tax allowance portion). While the Court left the door open for the Commission to reach the same conclusions that it had reached in the vacated portion of the orders, the Court struck down those conclusions as unsupported. *Id*. at 1273-74 (finding FERC's conclusion that the Watson Station "rates were the equivalent of a lawful, effective rate" was supported by "fundamentally flawed" reasoning). And, in fact, the Commission on remand reached the opposite conclusion, finding, as relevant here, that the contract charges required a reasonableness review. Remand Order at

PP 31-36, JA 152-53.

In the order below, the Commission, responding to SFPP's arguments in opposition to the rulings of the administrative law judge, explained that its prior ruling was in error. *See* Commission Order at PP 7-8, JA 616. In Opinion No. 435, the Commission wrongly determined that the unfiled contract charge was a legal rate. Opinion No. 435, 86 FERC at 61,075-76, JA 66-67. Under the ICA, legal rates are those rates on file with the appropriate regulatory agency. *Maislin*, 497 U.S. at 126 (the rate in the published tariff is the legal rate) (citing *Keogh v. Chicago & Northwestern R. Co.*, 260 U.S. 156, 163 (1922)); *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Ry. Co.*, 284 U.S. 370, 384 (1932) ("the statute required the filing and publishing of tariffs specifying the rates adopted by the carrier, and made these the *legal* rates" (emphasis in original)); *see also* Commission Order at P 7, JA 616 (contract charges are not "legal rates unless filed with the appropriate regulatory body"). Noting this error, the Commission reasonably explained that Opinion No. 435 "failed to address" the pipeline's "fundamental obligation to file the contract with the Commission." Commission Order at P 8, JA 616. On remand, the Commission corrected its error and granted the Complainant Shippers' requests to determine the reasonable rate. Remand Order at PP 31-36, JA 152-53.

In any event, SFPP ignores the settled distinction between "legal" (filed) and

"lawful" (just and reasonable) rates, as explained in *Arizona Grocery*. *See* 284 U.S. at 384. The focus of the Commission's attention in Opinion No. 435 was whether the contract rates were "in effect" for purposes of the grandfathering provision of the 1992 Energy Policy Act. Opinion No. 435, 86 FERC at 61,075, JA 66; s*ee BP West Coast*, 374 F.3d at 1271 (explaining the grandfathering provisions). It considered them "legal," i.e., the equivalent of filed rates, for that purpose, and so "deemed lawful" because they had been "in effect" the required period of time. Opinion No. 435, 86 FERC at 61,075, JA 66; s*ee BP West Coast*, 374 F.3d at 1273. Once the finding that they were not "in effect" was set aside (Remand Order at PP 33-35, JA 152-53), a holding that SFPP does not contest, the issue of lawfulness in fact became open for determination. That would have been true, as the Commission explained, even if the contracts or rates had been filed. Commission Order at P 7, JA 616 ("[e]ven if the charges are filed the carrier . . . chances that . . . these might be adjudged unreasonable"). Thus, the earlier findings treating the rates as if they were filed would not support a different result in the Commission Order, even if the Court had not vacated them.

CONCLUSION

For the reasons stated, the petition should be denied and the challenged Commission Order should be affirmed in all respects.

Respectfully submitted,

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