ORAL ARGUMENT SCHEDULED FOR FEBRUARY 12, 2010

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

No. 08-1268

RESOLUTE NATURAL RESOURCES COMPANY, LLC,
AND RESOLUTE ANETH, LLC,
PETITIONERS,

v.

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

ON PETITION 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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CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties

All parties appearing before the Commission and this Court are listed in Petitioners' Rule 28(a)(1) certificate.

B. Rulings Under Review:

1. *Western Refining Pipeline Company*, 122 FERC ¶ 61,210 (March 7, 2008) ("Order Accepting Tariffs"), JA 225; and

2. *Western Refining Pipeline Company*, 123 FERC ¶ 61,271 (June 19, 2008) ("Rehearing Order"), JA 325.

C. Related Cases:

This case has not previously been before this Court or any other court.

/s/ Beth G. Pacella
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January 4, 2010

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: **PAGE**

TABLE OF AUTHORITIES

COURT CASES: **PAGE**

TABLE OF AUTHORITIES

COURT CASES: **PAGE**

ADMINISTRATIVE CASES:

TABLE OF AUTHORITIES

ADMINISTRATIVE CASES: **PAGE**

STATUTES:

TABLE OF AUTHORITIES

REGULATIONS: **PAGE**

GLOSSARY

Commission	Federal Energy Regulatory Commission
EPAct	Energy Policy Act of 1992, Pub. L. No. 102-486, §§ 1801-1804, 106 Stat. 2776, 3010-12 (1992), *reprinted in* 42 U.S.C. § 7172 note
FERC	Federal Energy Regulatory Commission
Giant	Giant Pipeline Company
ICA	Interstate Commerce Act
Navajo	Intervenors Navajo Nation and Navajo Nation Oil and Gas Company
Order Accepting Tariffs	*Western Refining Pipeline Co.*, 122 FERC ¶ 61,210 (2008)
Rehearing Order	*Western Refining Pipeline Co.*, 123 FERC ¶ 61,271 (2008)
Resolute	Petitioners Resolute Natural Resources Company, LLC and Resolute Aneth, LLC
TexNewMex	TexNewMex Pipeline Company
Western Pipeline	Western Refining Pipeline Company

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STATEMENT OF THE ISSUES

1. Whether the determination of the Federal Energy Regulatory Commission ("Commission" or "FERC") not to initiate an investigation, under § 15(7) of the Interstate Commerce Act, of an oil pipeline company's tariff filing establishing initial rates, is reviewable.

2. Whether, assuming its determination is judicially reviewable, the Commission reasonably determined that the Petitioners lacked administrative standing, under FERC regulations, to protest the tariff filing because they failed to establish that they had a substantial economic interest in it.

3. Whether the Commission's alternative determination rejecting the anticompetitive and discriminatory claims raised on protest was reasonable.

COUNTERSTATEMENT OF JURISDICTION

Petitioners Resolute Natural Resources Company, LLC and Resolute Aneth, LLC ("Resolute") and Intervenors Navajo Nation and Navajo Nation Oil and Gas Company ("Navajo") ask the Court to reverse the challenged FERC orders and to mandate that the Commission conduct a hearing on an initial oil pipeline tariff filing by Western Refining Pipeline Company ("Western Pipeline"). As set forth more fully *infra* in Part I of the Argument, however, the Commission's determination not to initiate an investigation under § 15(7) of the Interstate Commerce Act ("ICA"), 49 U.S.C. App. § 15(7) (1988), of a rate filing is not reviewable.

In addition, Resolute has not established its Article III Constitutional standing to bring this petition. As discussed more fully *infra* in Part II of the Argument, where as here, petitioner's claimed injury stems from changes in levels

of competition, it must show that it almost surely will lose business as a result of the challenged orders. Resolute has not made that showing here.

STATUTORY AND REGULATORY PROVISIONS

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

INTRODUCTION

This case concerns a protest filed by Resolute regarding an initial tariff filing by Western Pipeline. The Commission found that Resolute had failed to show that it had a substantial economic interest in Western Pipeline's filing and, therefore, that it lacked standing under the Commission's regulations to protest the filing. Alternatively, the Commission rejected the claims raised in the protest. *Western Refining Pipeline Co.*, 122 FERC ¶ 61,210 ("Order Accepting Tariffs"), JA 225, *on reh'g*, 123 FERC ¶ 61,271 (2008) ("Rehearing Order"), JA 325.

Intervenor Western Pipeline moved to dismiss Resolute's petition for review because it challenges a judicially unreviewable FERC determination not to initiate an ICA § 15(7) investigation. The Court directed the parties to address this issue in their briefs. Neither Resolute's nor Navajo's brief addressed this issue. FERC addresses this issue *infra* in Part I of the Argument, explaining that the petition for review should be dismissed because it challenges FERC's unreviewable determination not to initiate an ICA § 15(7) investigation of Western Pipeline's

tariff filing.

STATEMENT OF FACTS

I. Statutory And Regulatory Background

In 1906, Congress enacted the Hepburn Act, 34 Stat. 584, which extended the definition of common carrier under the ICA to oil pipelines and required that they file for and charge just and reasonable and not unduly preferential rates. *See* 49 U.S.C App. § 1(5) (1988); *Revisions to Oil Pipeline Regulations Pursuant to the Energy Policy Act of 1992*, Order No. 561, FERC Stats. & Regs. [Regs. Preambles, 1991-1996] ¶ 30,985 at 30,942 (1993), *on reh'g*, Order No. 561-A, FERC Stats. & Regs. [Regs. Preambles, 1991-1996] ¶ 31,000 (1994), *aff'd, Ass'n of Oil Pipe Lines v. FERC*, 83 F.3d 1424 (D.C. Cir. 1996). In 1977, in conjunction with the formation of the Department of Energy, regulatory authority over oil pipelines under the ICA was transferred from the Interstate Commerce Commission to the newly-created FERC. *See* Section 402(b) of the Department of Energy Organization Act, 42 U.S.C. § 7172(b); *see generally Frontier Pipeline Co. v. FERC*, 452 F.3d 774, 776 (D.C. Cir. 2006) (explaining history of oil pipeline regulation under, and citation to, the ICA).

In 1985, the Commission, in *Williams Pipe Line Company*, Opinion No. 154-B, 31 FERC ¶ 61,377 at 61,833 (1985), applied traditional cost-of-service principles to oil pipeline ratemaking. Following Opinion No. 154-B, adjudicated

proceedings for oil pipelines were long, complicated, and costly, requiring considerable expenditure of the parties' and the Commission's time and resources. *See* Order No. 561 at 30,943. To remedy this, Congress passed the Energy Policy Act of 1992 ("EPAct"), Pub. L. No. 102-486, §§ 1801-1804, 106 Stat. 2776, 3010-12 (1992), *reprinted in* 42 U.S.C. § 7172 note, which required FERC to establish "a simplified and generally applicable ratemaking methodology" for oil pipelines and "to streamline procedures . . . relating to oil pipeline rates in order to avoid unnecessary costs and delays." EPAct §§ 1801(a), 1802(a); *see also* Order No. 561 at 30,944, 30,961-62 (same). *See generally ExxonMobil Oil Corp. v. FERC*, 487 F.3d 945, 956-57 (D.C. Cir. 2007) (discussing background of EPAct and Order No. 561).

"[C]learly intend[ing] for the Commission to expedite its handling of oil pipeline rate filings," EPAct § 1802(b) directed the Commission to consider specific procedural issues in streamlining its ratemaking process. Order No. 561 at 30,962. As relevant here, the Commission was required to consider the qualifications necessary for parties to establish standing to protest rate filings. EPAct § 1802(b)(2); *see* Order No. 561 at 30,944-45.

In compliance with EPAct, the Commission issued Order No. 561, which streamlined the oil ratemaking process in several ways. For example, oil pipelines can establish initial rates for new service either "through a cost-of-service showing,

or . . . through agreement of the pipeline and potential shippers, at least one of which must not be affiliated with the pipeline." Order No. 561 at 30,960; *see* 18 C.F.R. § 342.2 (Commission regulation setting out the two alternative ways a pipeline can justify an initial rate for new service). If an agreed-to rate is protested by a party with standing, however, the pipeline would have to cost-justify its initial rate. Order No. 561 at 30,960, 30,964; Order No. 561-A at 31,105, 31,107.

Also to streamline the oil ratemaking process, the Commission determined that, while it would continue to use a permissive rule for interventions, it would "adopt a 'substantial economic interest' test for determining the standing of parties to file protests against proposed rates." Order No. 561 at 30,964; *see* 18 C.F.R. § 343.2(a) (regarding interventions) and § 343.2(b) (regarding standing, and requiring a "substantial economic interest," to file a protest). This would "ensure that all persons will have the opportunity to be heard in regard to a proposed rate increase, but only those who have a substantial economic stake in the rates can protest and trigger an investigation." Order No. 561 at 30,964. As the Commission explained, "the policy of [EPAct] would be furthered by restricting the ability to initiate investigations of proposed rates to those who have a substantial economic interest in those rates." *Id.* "The 'substantial economic interest' standard is intended to assure that parties protesting a filing have sufficient interest in the matter to warrant the commitment of agency and pipeline

resources to a review of the merits." *Shell Pipeline Co., LP*, 104 FERC ¶ 61,021 at P 6 (2003).

The Commission made clear that "the requirement for standing promulgated [in Order No. 561] applies only to the filing of protests. The ICA provides that 'any person' may bring a complaint against an existing rate or practice under section 13(1) of the ICA. The Commission [did] not attempt to define a class of persons eligible to file complaints" under § 13(1). Order No. 561 at 30,964.

Under the ICA, a challenge to a pipeline's existing rates is made under § 13(1), 49 U.S.C. App. § 13(1) (1988). By contrast, a challenge to a pipeline's proposed initial rates for new service, as occurred in the instant case, is made under ICA § 15(7), 49 U.S.C. App. § 15(7) (1988). That section provides that:

> Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; . . . .

II. Events Leading To The Challenged Orders

A. Western Pipeline Files Initial Rates Pursuant To 18 C.F.R. § 342.2(b)

On February 8, 2008, Western Pipeline filed initial rate tariffs, pursuant to 18 C.F.R. § 342.2(b), "to establish common carrier service between the Midland, Texas origin; and Star Lake and Bisti, New Mexico destinations." R.1, Transmittal Letter at 1, JA 1; *see also* R.1, Tariff No. 1 at 9-10, JA 12-13 (stating that crude oil would be accepted for transportation only at the Midland, Texas and Lynch, New Mexico Origin points with delivery only to the Star Lake and Bisti, New Mexico Destination points; *id.* at 16, JA 19 (system map showing transportation service only in a south-to-north direction); R.1, Tariff No. 2, JA 20 (setting out transportation rates from: (1) Midland, Texas to Star Lake, New Mexico; (2) Midland Texas to Bisti, New Mexico; (3) Lynch, New Mexico to Star Lake, New Mexico; and (4) Lynch, New Mexico to Bisti, New Mexico).

As required by 18 C.F.R. § 342.2(b), Western Pipeline's filing included an affidavit stating that the initial rates "ha[d] been agreed to in writing by a non-affiliated shipper who ha[d] advised [Western Pipeline] they are a potential shipper on this line and as such may intend to use the service described in the tariff." R.1, Affidavit, JA 3; *see also* R.1, Transmittal Letter at 1, JA 1 ("Attached is an Affidavit stating that a non-affiliated shipper has agreed to the rate.").

B. Resolute And Navajo File Protests

On February 25, 2008, Resolute and Navajo filed motions to intervene and protest. R.3, Navajo Intervention and Protest, JA 21; R. 4, Resolute Intervention and Protest, JA 53. The protests argued that Western Pipeline was attempting to use the tariffs to exercise market power by illegally preferring its affiliates and discriminating against third parties seeking access to competitive markets to sell crude oil. *See* Rehearing Order P 3, JA 325. Resolute and Navajo requested that the Commission: (1) suspend Western Pipeline's proposed transportation rates; (2) require Western Pipeline to justify its transportation rates through a cost-of-service showing; (3) find the proposed transportation service discriminatory; and (4) require Western Pipeline to offer an exchange or displacement service not offered in the tariffs. R. 3, Navajo Intervention and Protest at 30, JA 51; R. 4, Resolute Intervention and Protest at 25-26, JA 77-78; *see also* R. 11, Resolute Rehearing Request at 31, JA 299 (asking the Commission to find: (1) that Resolute and Navajo had standing; (2) that Western Pipeline must file a cost-justification for its proposed transportation rates; and (3) that Western Pipeline must offer exchange transportation services at cost-based rates); R. 10, Navajo Rehearing Request at 27, JA 243 (same).

Western Pipeline responded to the protests, explaining that they should be dismissed for lack of standing and for failing to raise an issue warranting

suspension and investigation. R. 5 and R. 6, JA 94, 159.

III. The Challenged Orders

The challenged orders: rejected Resolute's and Navajo's protests for lack of standing under 18 C.F.R. § 343.2(b); alternatively rejected the protest allegations; and accepted Western Pipeline's tariffs, to be effective March 10, 2008. Order Accepting Tariffs PP 1, 11, 13, 14, 17, 18, JA 225, 228-31; Rehearing Order PP 9-12, JA 327-29.

A. Standing To Protest

The Commission found that "neither Resolute nor the Navajo Protestors ha[d] shown that they have a substantial economic interest in the transportation of crude oil over Western [Pipeline] that would warrant them having standing to protest the filing." Order Accepting Tariffs P 13, JA 229; *see also* Rehearing Order P 9, JA 327 (same). While acknowledging "that the price that Resolute and [Navajo] receive for crude oil may be reduced due to increased competition from crude oil that will be moving north on [Western Pipeline] to refineries in the Four Corners region," that "fact alone [did] not establish that Resolute and [Navajo] ha[d] a substantial economic interest in the tariff filing and transportation of crude oil over [Western Pipeline]." Rehearing Order P 10, JA 327; *see also id.* at P 12, JA 328 ("Resolute and [Navajo] have shown that they are likely to receive a lower price for their crude oil due to increased competition from deliveries of crude oil

from Midland to the refineries in northwestern New Mexico," but they have offered only "speculat[ion]" and mere "allegations" as to anticompetitive conduct by Western Pipeline).

The Commission also looked to the history of the pipeline. Years ago, the Western Pipeline system was owned by TexNewMex Pipeline Company ("TexNewMex"), which transported oil in a north-to-south direction from producing areas in New Mexico and Utah to refineries in New Mexico and Texas. Order Accepting Tariffs P 11, JA 228. TexNewMex abandoned that service, however, and the pipeline was idle for seven years until Giant Pipeline Company ("Giant") acquired it in 2005. *Id.*; *see also Giant Pipeline Co.*, 120 FERC ¶ 61,275 at PP 2-3 (2007).

"During that time," the Commission found, "Resolute and [Navajo] had been able to command their price for crude oil to feed the New Mexico refineries," as "'[t]hose landlocked New Mexico refineries were otherwise captive to the declining crude oil reserves in the Four Corners region, and subject to maximum prices charged by crude oil producers in the region, including [Resolute and Navajo].'" Order Accepting Tariffs P 11 and n.4, JA 229 (quoting R. 6, Western Pipeline's Response to Navajo's Protest at 4, JA 162); *see also id.* P 15, JA 230 (noting Resolute's Protest (at 9 n.7, JA 61) asserted that, if Western Pipeline were not shipping crude oil up from Midland, Texas, there would be adequate demand

for Resolute's oil at the Four Corners refineries); R. 4, Resolute Protest at 3, JA 55 (acknowledging that "[o]ver time" its "production has steadily decreased").

Giant refurbished the pipeline, and in 2007 put it into service transporting crude in a south-to-north direction from producing areas in Texas to refineries in New Mexico. Order Accepting Tariffs P 11, JA 229. Western Pipeline acquired the pipeline system on May 31, 2007, and filed tariffs to maintain the same flow of oil on the pipeline. *Id.*

The Commission found that Resolute and Navajo had never shipped oil to refineries in Texas. Order Accepting Tariffs P 11, JA 228. Instead, they always had shipped their oil, which is produced in the Four Corners region of Utah and New Mexico, on other pipeline systems only within the Four Corners region to refineries in New Mexico. Order Accepting Tariffs P 11, JA 228-29; Rehearing Order P 11, JA 328.

Not only were Resolute and Navajo not current (or even previous) shippers on the Western Pipeline system, the Commission found that Resolute and Navajo did not intend to ship on Western Pipeline in the future. Order Accepting Tariffs P 13, JA 229; *see also* Rehearing Order P 11, JA 328 ("Resolute and Navajo's argument that its oral and written transportation requests to [Western Pipeline] are evidence of their intent to ship on the pipeline is without merit."). Resolute and Navajo's February 22, 2008 letter purportedly requesting transportation on

Western Pipeline (R. 4, Resolute's Protest at Att. IV, JA 88-89) was not a valid transportation request. Order Accepting Tariffs P 17, JA 231. "The letter did not even request service based on the terms and conditions, and rates being proposed by [Western Pipeline] in its tariff filing." *Id.* Instead:

> At best, [the] "request" [was] nebulous. For example, [Western Pipeline] [had] propos[ed] various rates in its tariff but the request state[d] service would be at "[a] negotiated rate not to exceed the currently effective FERC approved tariff rates." It also state[d] a term of "May 1, 2008 through April 30, 2009, and year to year thereafter," receipt points described as all "existing and future meter stations measuring receipts and deliveries into or off of [Western Pipeline]," and delivery points described as all "existing and future meter stations measuring deliveries off of or into [Western Pipeline]," including "deliveries by 'non delivery.'" The request for deliveries by "non delivery" in all likelihood [was] a reference to an exchange, but the request [did] not indicate at all how an exchange would be accomplished.

Order Accepting Tariffs P 17, JA 231 (quoting R. 4, Resolute's Protest at Att. IV, JA 88-89).

Moreover, the Commission pointed out, while shipments on Western Pipeline were proposed to be (as they had been under Giant) in a south-to-north direction from Midland, Texas to points in northwestern New Mexico, Resolute and Navajo's oil production is in the Four Corners region of Utah and New Mexico. Rehearing Order P 11, JA 328; *see* R. 1, Western Pipeline's Tariff Filing at Tariff No. 1 p. 16 (System Map), JA 19. Resolute and Navajo had not shown that they have barrels of oil available to ship from Midland or other receipt points

in southeastern New Mexico (*i.e.*, Lynch, New Mexico), or that they were actively pursuing such an arrangement. Order Accepting Tariffs P 17, JA 231; Rehearing Order P 11, JA 328. The Commission concluded, therefore, that "[t]he fact that Resolute and [Navajo] requested an exchange transportation service, which Western was not even offering, [did] not constitute a valid transportation request demonstrating an intent to become a future shipper on Western's pipeline." *Id.*

"Since Resolute and [Navajo] [did] not have standing to protest, the Commission [found] that [Western Pipeline] [was] not required to file cost, revenue, and throughput data supporting the rate in accordance with section 342.2 of the Commission's regulations." Order Accepting Tariffs P 13, JA 229.

B. Anticompetitive and Discrimination Claims

Alternatively, the Commission rejected Resolute's and Navajo's anticompetitive and discrimination claims. "[T]he arguments of Resolute and [Navajo] alleging an anticompetitive exercise of market power by [Western Pipeline] [were] speculative and unsupported with respect to oil pipeline transportation services." Order Accepting Tariffs P 14, JA 229. While "Resolute and [Navajo] [had] shown that they [were] likely to receive a lower price for their crude oil due to increased competition from deliveries of crude oil from Midland to the refineries in northwestern New Mexico," they failed to present any "evidence that [Western Pipeline] ha[d] engaged in anticompetitive conduct with respect to

oil pipeline transportation service." Rehearing Order P 12, JA 329.

Moreover, Resolute's and Navajo's allegations that Western Pipeline's actions were part of an overall scheme to give Western Pipeline and its refining affiliates anticompetitive control over crude oil production in the Four Corners region were both speculative and beyond the Commission's jurisdiction. Rehearing Order P 12, JA 328-29; *see also* Order Accepting Tariffs P 14, JA 229-30 (same); *id.* P 12, JA 229 ("the price of the oil commodity itself is beyond the Commission's jurisdiction, which relates to oil pipeline transportation.").

The Commission further explained that "the fact that [Western Pipeline] is not offering an exchange transportation service does not constitute discrimination under the ICA or a failure of [Western Pipeline] to fulfill its common carrier duty of providing service upon reasonable request." Rehearing Order P 12, JA 328. Western Pipeline's tariff does not offer service in a north-to-south direction or in the form of an exchange to any shipper. *Id.* In addition, as already discussed, "it [did] not appear that either Resolute or [Navajo] ha[d] made a valid request for transportation service on [Western Pipeline]." Order Accepting Tariffs P 14, JA 230; *see also* Order Accepting Tariffs P 17, JA 231; Rehearing Order P 11, JA 328; R. 4, Resolute's Protest at Att. IV, JA 88-89.

Furthermore, "[t]he fact that other oil pipelines may offer exchange transportation services does not compel [Western Pipeline] to offer such services."

Rehearing Order P 12, JA 328. Nor can the Commission compel Western Pipeline to offer an exchange transportation service. Rehearing Order P 12, JA 328. The Commission pointed to a similar situation addressed in *Chevron Pipeline Company*, 64 FERC ¶ 61,213 (1993), where the Commission was confronted with "unsubstantiated" allegations of anticompetitive conduct and found that it did not have jurisdiction over the pipeline's ability to suspend operations or to order the pipeline to provide new services. *Id.*

SUMMARY OF ARGUMENT

Under Supreme Court and D.C. Circuit precedent, the Commission's decision not to initiate an ICA § 15(7) investigation of Western Pipeline's initial rate filing is not judicially reviewable. Accordingly, the petition for review should be dismissed.

Alternatively, the petition should be dismissed because Resolute has not shown that it has Article III Constitutional standing. Resolute's claimed injury stems from changes in levels of competition for crude oil. But Resolute offered only speculation on this point, and failed to establish that the Commission's acceptance of Western Pipeline's initial rates for transportation service that Resolute will not take countenances anticompetitive or discriminatory behavior or that Resolute will be unable to meet increased competition.

Assuming judicial reviewability, the Commission reasonably determined that Resolute lacked administrative standing under its regulations to protest Western Pipeline's tariff filing. While Resolute likely would receive reduced prices for its crude oil due to increased competition in the Four Corners region, the Commission found that possibility alone did not establish Resolute had a substantial economic interest in the tariff filing. Thus, consistent with its precedent, the Commission looked to whether Resolute intended to become a shipper on the Western Pipeline system, and found that Resolute never had been, nor intended to become, a shipper on the system. In these circumstances, the Commission concluded Resolute did not have a substantial economic interest in, and, therefore, lacked standing to protest, Western Pipeline's tariff filing.

The Commission's alternative determination rejecting Resolute's protest claims was reasonable as well. As the Commission explained, Resolute's claims relating to crude oil production and sales were beyond the Commission's ICA jurisdiction and were, in any event, speculative. Moreover, Resolute's only transportation-related claim -- that Western Pipeline should be required to provide it an exchange service -- lacked merit. Because Western Pipeline's tariff does not offer service in a north-to-south direction, or in the form of an exchange service, to any shipper, it was not discriminatory, prejudicial or preferential, or a failure to

fulfill its common carrier duty, for Western Pipeline to reject Resolute's requested exchange service.

ARGUMENT

I. THE COMMISSION'S DETERMINATION NOT TO INITIATE AN ICA SECTION 15 INVESTIGATION IS NOT REVIEWABLE[1]

In filing their protests to Western Pipeline's proposed initial rates, Resolute and Navajo were asking the Commission to initiate an investigation under ICA § 15(7). *See ExxonMobil Oil Corp. v. FERC*, 219 Fed. Appx. 3 (D.C. Cir. Feb. 27, 2007) (explaining that the Commission's rejection of a protest to a rate filing is a refusal to initiate an investigation under ICA § 15(7)); *Frontier*, 452 F.3d at 776 (explaining that protests regarding newly filed rates fall under ICA § 15(7)). Resolute's petition seeks judicial review of the Commission's determination not to initiate a § 15(7) investigation.

However, "Section 15(7) is a statute that 'precludes judicial review,' 5 U.S.C. § 701(a)(1)." *ExxonMobil*, 219 Fed. Appx. 3 (citing *Heckler v. Chaney*, 470 U.S. 821, 828-29 (1985) (pointing to *Southern Railway Co. v. Seaboard Allied*

[1] As mentioned above, on March 23, 2009, Intervenor Western Refining Pipeline Company filed a motion to dismiss the instant petition for lack of jurisdiction because the Commission's decision not to conduct an ICA § 15 investigation regarding Western Pipeline's tariff filing is not judicially reviewable. On June 8, 2009, this Court issued an order directing the parties "to address in their briefs the issues presented in the motion[] to dismiss . . . ."

Milling Corp., 442 U.S. 444, 454 (1979), as illustrative of a case where a "statute[] preclude[s] judicial review" within the meaning of 5 U.S.C. § 701(a)(1), as opposed to a statute where "agency action is committed to agency discretion by law" under § 701(a)(2) because there are no standards to apply)); *Mo. Pub. Serv. Comm'n v. FERC*, No. 07-1304, 2007 U.S. App. LEXIS 26581 (D.C. Cir. Nov. 13, 2007) (holding that a Commission decision not to investigate a proposed rate under the ICA is not judicially reviewable). "The Commission's decision not to investigate is therefore not reviewable." *ExxonMobil*, 219 Fed. Appx. at 4; *Mo. Pub. Serv.*, 2007 U.S. App. LEXIS 26581 at *1.

It has long been understood that Commission determinations not to investigate rate filings under ICA § 15 are unreviewable.[2] As this Court has explained, "[t]he Supreme Court held in [*Southern Railway*, 442 U.S. at 454], that former section 15(8)(a) of the [ICA],[3] 49 U.S.C. § 15(8)(a) (1976), a derivative of § 15(7), *see Exxon Pipeline Co. v. United States*, [725 F.2d 1467, 1478 n.6 (D.C. Cir. 1984) (Wright, J., concurring)], precluded judicial review of an agency's

[2] In contrast, Commission determinations following complaint filings under ICA § 13 are reviewable.

[3] Former ICA § 15(8)(a), the subsection at issue in *Southern Railway*, provided that "the Commission may, upon the complaint of an interested party or upon its own initiative, order a hearing concerning the lawfulness of [a] rate [which] hearing may be conducted without answer or other formal pleading . . . ."

decision not to order a hearing." *ExxonMobil*, 219 Fed. Appx. at 3 (citing *Arctic Slope Reg'l Corp. v. FERC*, 832 F.2d 158, 164-65 (D.C. Cir. 1987) (FERC "enjoys unreviewable discretion to determine whether to initiate section 15 investigations at all")). In *Southern Railway*, shippers protested railroads' proposed rate increase and asked the Interstate Commerce Commission to suspend the rates and investigate claims of illegality. The Supreme Court held that the agency's decision to accept the rate filing was not a final decision on the merits that the proposed rates were lawful but, rather, a discretionary decision not to investigate their lawfulness. *Southern Railway*, 442 U.S. at 452. The Supreme Court found that Congress affirmatively intended to preclude judicial review of such a determination. *Id.* at 455-59.

Despite this Court's June 8, 2009, order directing the parties to address in their briefs whether the challenged orders are judicially reviewable, as well as Fed. R. App. P. 28(a)(4)(B)'s requirement that the petitioner's brief address "the basis for the court of appeals' jurisdiction," neither Resolute nor Navajo address in their briefs the issue of whether the challenged orders are judicially reviewable. *See* Resolute Br. at 3 n.2 (recognizing the Court's directive but failing to further address the matter). Accordingly, the Commission can address only the matters Resolute raised in its April 6, 2009 response to Western Pipeline's motion to dismiss.

Resolute's response argued that the nonreviewability of a decision whether to initiate a § 15 investigation is based entirely on the proposition that decisions whether or not to suspend a rate are unreviewable. April 6, 2009 Response at 4-6. In fact, however, the determination that courts cannot review Commission decisions not to investigate a pipeline's rate filing is "based on the language, structure, and history of the [ICA] as well as relevant case law . . . ." *Southern Railway*, 442 U.S. at 455.

First, "[w]ith respect to the Commission's investigation power, [the statute] is written in language of permission and discretion. Under it, 'the Commission *may* . . . order a hearing concerning the lawfulness of [a] rate . . . ." *Id.* *Cf.* ICA § 15(7) ("the Commission shall have, and it is given, *authority* . . . to enter upon a hearing concerning the lawfulness of such rate . . . .") (emphasis added). Moreover, "[t]he statute is silent on what factors should guide the Commission's decision." *Id.*

"The structure of the [ICA]," the Supreme Court found, "also indicates that Congress intended to prohibit judicial review. Congress did not use permissive language such as that found in [Section 15] when it wished to create reviewable duties under the Act. Instead, it used mandatory language," such as that in "§ 13(1), which plainly authorizes rate-investigation decisions that are reviewable," as it states: "[if] . . . there shall appear to be any reasonable ground for investigating

said complaint, it *shall* be the duty of the Commission to investigate the matters complained of . . . ." *Id.* at 456 (omissions and emphasis by Court).

The Supreme Court found its interpretation confirmed by the "disruptive practical consequences" of allowing review, given the numerous rate filings reviewed each year and the limited time frame (usually 30 days) in which investigation decisions are made. *Id.* at 457. As the Court explained, "[i]f the Commission . . . must carefully analyze and explain its actions with regard to each component of each proposed schedule, and it must increase the number of investigations it conducts, all in order to avoid judicial review and reversal, its workload would increase tremendously." *Id.*

As "an additional structural reason why the Commission's investigation decisions are unreviewable," the Court noted that the Commission's power to investigate is linked to its power to suspend rates and that, under its precedent, "the merits of a suspension decision are not reviewable . . . ." *Id.* at 458 (citing, *e.g.*, *Arrow Transp. Co. v. Southern Ry. Co.*, 372 U.S. 658 (1963)).

Resolute's response tries to make much of the fact that the Commission has a statutory obligation to give a reason for a suspension decision. April 6, 2009 Response at 5-6; *see* ICA § 15(7) (requiring the Commission to provide "a statement in writing of its reasons for [a] suspension"); *Exxon*, 725 F.2d at 1473 (the ICA "imposes on FERC an obligation to state reasons for a suspension and for

the length of the suspension"). Because of this obligation, this Court has determined that it can conduct a limited review of FERC's stated reasons for a decision to suspend, and the length of suspension of, a new rate. *Exxon*, 725 F.2d at 1473.[4] The ICA, however, does not require FERC to state a reason for its decision whether to initiate a § 15(7) investigation.

Resolute also attempts to invoke judicial review by arguing that "the Commission has refused to exercise any authority, thus clearly overstepping its statutory bounds." April 6, 2009 Response at 7-8 (citing *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 638 n.17 (1978) ("although we reaffirm our previous holding that courts may not independently appraise the reasonableness of rates, no such appraisal is involved in inquiring whether the Commission has overstepped the bounds of its authority. Therefore, we conclude that Congress did not mean to cut off judicial review for such limited purposes.")).

As this Court has explained, an agency oversteps its statutory bounds when it impermissibly extends its authority. *Papago Tribal Util. Auth. v. FERC*, 628

[4] Resolute also contended that "in *Northeast Energy Assocs. v. FERC*, 158 F.3d 150 (D.C. Cir. 1998), the Court, citing *Exxon* rejected the Commission's argument that petitioners seeking review of the length of a suspension order lacked standing to seek review." April 6, 2009 Response at 6. In fact, however, *Northeast* cited to *Exxon* in the section of the opinion on "Consistency with Agency Precedent and Policy" in reviewing FERC's stated reasons for suspending a rate and the length of that suspension, not in the section on "Standing." *Northeast*, 158 F.3d at 153-56.

F.2d 235, 243 n.20 (D.C. Cir. 1980). For example, a court had jurisdiction to review a Commission suspension order issued after the rate took effect under the Act. *Id.* (citing *Ind. & Mich. Elec. Co. v. FPC*, 502 F.2d 336 (D.C. Cir. 1974)). "The assumption of jurisdiction in that case, therefore, was based not on the invalidity of the rate filing, but on the impermissible extension of agency authority." *Id. See also Nader v. Civil Aeronautics Bd.*, 657 F.2d 453, 456 (D.C. Cir. 1981) ("Where, as here, the claim is that [the agency acted] beyond [its] province . . . the nonreviewability-of-suspension-orders doctrine is simply inapplicable.").

The Commission did not overstep its statutory bounds here. Resolute does not cite to any alleged extra-statutory action by the Commission. Rather, Resolute's April 6, 2009 Response at 7-8 asserts that, "[b]y denying Resolute standing and concluding that it lacks jurisdiction, the Commission has refused to exercise any authority, thus clearly overstepping its statutory bounds."

As Supreme Court and D.C. Circuit precedent make clear, however, the Commission has absolute discretion in determining whether to initiate a § 15 investigation. *Southern Railway*, 442 U.S. at 454; *ExxonMobil*, 219 Fed. Appx. at 3- 4; *Mo. Pub. Serv.*, 2007 U.S. App. LEXIS 26581 at *1; *Arctic Slope*, 832 F.2d at 164-65. Thus, it was wholly within the Commission's statutory authority to refuse to initiate a § 15 investigation here, where the protestors did not intend to take

service under the filed Western Pipeline tariff.

Resolute's response also attempted to distinguish *Southern Railway*, *ExxonMobil*, *Missouri Public Service*, and *Arctic Slope* by asserting that those cases "did not involve contentions that the agency had failed to exercise its jurisdiction or that it had denied a person an opportunity to present arguments." April 6, 2009 Response at 8. Under the Supreme Court's and this Court's precedent, however, the Commission's rejection of Resolute's protest, based on its failure to establish a substantial economic interest in Western Pipeline's tariff filing, was a refusal to initiate an investigation under ICA § 15(7), and § 15(7) precludes judicial review. *Southern Railway*, 442 U.S. at 454; *Heckler*, 470 U.S. at 828-29; *Mo. Pub. Serv.*, 2007 U.S. App. LEXIS 26581 at *1; *ExxonMobil*, 219 Fed. Appx. at 3-4; *Frontier*, 452 F.3d at 776; *Arctic Slope*, 832 F.2d at 164-65. Thus, Commission determinations not to investigate rate filings under ICA § 15 are unreviewable regardless of the basis for the Commission's determination. *Arctic Slope*, 832 F.2d at 164-65 (FERC "enjoys unreviewable discretion to determine whether to initiate section 15 investigations at all").

Finally, Resolute argued that the challenged orders could preclude it from bringing an ICA § 13(1) complaint. April 6, 2009 Response at 11-13. As Order No. 561 makes clear, however, the standing requirement applies only to protests of initial tariff filings, not to complaints against existing rates or practices under ICA

§ 13(1). Order No. 561 at 30,964. Moreover, "collateral estoppel does not apply to an unappealable determination . . . ." *Sea-Land Serv., Inc. v. Dep't of Transp.*, 137 F.3d 640, 648 (D.C. Cir. 1998).

II. EVEN IF THE DECISION NOT TO INVESTIGATE WERE REVIEWABLE, RESOLUTE HAS NOT ESTABLISHED ITS STANDING TO OBTAIN JUDICIAL REVIEW OF THE CHALLENGED ORDERS[5]

"A party seeking review of a final Commission order under the ICA must demonstrate that it has been 'aggrieved' by the order." *Shell Oil Co. v. FERC*, 47 F.3d 1186, 1200 (D.C. Cir. 1995) (citing 28 U.S.C. § 2344); *see also Exxon Co. v. FERC*, 182 F.3d 30, 43 (D.C. Cir. 1999) (same); *Oxy USA, Inc. v. FERC*, 64 F.3d 679, 696 (D.C. Cir. 1995) (same). Moreover, "[l]ike all parties seeking access to the federal courts, petitioner[] [is] held to the constitutional requirement of standing." *Shell*, 47 F.3d at 1200. "Common to both these thresholds is the requirement that petitioner[] establish, at a minimum, 'injury in fact' to a protected interest." *Id.* "To demonstrate 'injury in fact,' petitioner[] must identify 'an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.'" *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)).

[5] The United States, as a separate statutory Respondent pursuant to 28 U.S.C. §§ 2344 and 2348, and Fed. R. App. P. 15, does not join this argument.

Furthermore, where, as here, "a claimed injury stems from changes in levels of competition, this court ordinarily requires claimants to show that 'a challenged agency action . . . will *almost surely* cause [them] to lose business.'" *Interstate Natural Gas Ass'n v. FERC*, 285 F.3d 18, 46 (D.C. Cir. 2002) (quoting *El Paso Natural Gas Co. v. FERC*, 50 F.3d 23, 27 (D.C. Cir. 1995) (emphasis in original; omission by court); citing *DEK Energy Co. v. FERC*, 248 F.3d 1192, 1195 (D.C. Cir. 2001)). In other words, the "nub of the 'competitive standing' doctrine is that when a challenged agency action authorized allegedly illegal transactions that will almost surely cause petitioner to lose business, there is no need to wait for injury from specific transactions to claim standing." *El Paso*, 50 F.3d at 27.

Resolute has presented nothing to demonstrate that it almost surely will lose business as a result of the Commission's orders. In fact, its brief states that Resolute continues to sell its joint production with Navajo to Western Refining pursuant to a one-year contract. Br. at 5 n.3. While, as the Commission found, Resolute likely will receive a lower price for their crude oil, Rehearing Order P 12, JA 329, that likelihood is entirely the result of "increased competition" resulting from Western Pipeline's proposed service. *Id.* Resolute offers only speculation and unsubstantiated allegations that the price it will receive is the product of anticompetitive and discriminatory activity by Western Pipeline. *Id. See also* Order Accepting Tariffs P 17, JA 231 (Resolute and Navajo's "position is no more

than speculative"). Resolute fails altogether to explain how it will be unable to meet the increased competition resulting from the challenged orders. Accordingly, the instant petition should be dismissed for Resolute's failure to establish Article III standing.

III. EVEN IF THE DECISION NOT TO INVESTIGATE WERE REVIEWABLE, THE COMMISSION'S DETERMINATIONS WERE REASONABLE

A. Standard Of Review

The Court reviews FERC oil pipeline orders under the Administrative Procedure Act's arbitrary and capricious standard. *ExxonMobil*, 487 F.3d at 951; *Ass'n of Oil Pipe Lines*, 83 F.3d at 1431. Under this familiar standard, FERC's decision will be upheld as long as the Commission examined the relevant data and articulated a rational connection between the facts found and the choice made. *Blumenthal v. FERC*, 552 F.3d 875, 881 (D.C. Cir. 2009); *ExxonMobil*, 487 F.3d at 951. The Court is "'particularly deferential to the Commission's expertise' with respect to ratemaking issues." *Id.* (quoting *Ass'n of Oil Pipe Lines*, 83 F.3d at 1431); *see also Morgan Stanley Capital Group, Inc. v. Pub. Util. Dist. No. 1*, 128 S. Ct. 2733, 2738 (2008) ("we afford the Commission great deference in its rate decisions.").

In addition, courts "afford substantial deference to the Commission's interpretations of its own regulations, deferring to the agency unless its

interpretation is plainly erroneous or inconsistent with the regulation[s] . . . ." *Northern Border Pipeline Co. v. FERC*, 129 F.3d 1315, 1318 (D.C. Cir. 1997) (internal quotation marks and citation omitted); *see also Central Vt. Pub. Serv. Corp. v. FERC*, 214 F.3d 1366, 1369 (D.C. Cir. 2000) (same). Likewise, the Court "defer[s] to the Commission's interpretation of its own precedents." *NSTAR Elec. Co. v. FERC*, 481 F.3d 794, 799 (D.C. Cir. 2007).

B. The Commission Reasonably Found Resolute (And Navajo) Lacked Standing Under Commission Regulation 343.2(b)

Resolute asserts that "rather than being a factor among others, the Commission treated shipper status as the sole factor for determining standing," ignoring "the substantial economic impacts of the tariff filing." Br. at 33; *see also id.* at 33-36, 43-44; Navajo Br. 14-19. Resolute is mistaken.

As the challenged orders demonstrate, the Commission considered the "substantial economic impact" Resolute proffered -- *i.e.*, that, because Western Pipeline would move crude oil under the tariffs in a south-to-north direction from Texas and southwestern New Mexico, Resolute would face increased competition and would receive reduced prices for its crude oil supply. Rehearing Order PP 10, 12, JA 327-29. "The Commission [did] not dispute that the price that Resolute and [Navajo] receive for the crude oil may be reduced due to increased competition," but found that "that fact alone [did] not establish that Resolute and [Navajo] ha[d]

a substantial economic interest in the tariff filing and transportation of crude oil over [Western Pipeline]." Rehearing Order P 10, JA 327-28.

Accordingly, the Commission also looked to the history of the Western Pipeline system, and whether Resolute (and Navajo) had ever been, or were intending to be, shippers on that system. Order Accepting Tariffs PP 11, 13, JA 228-29; Rehearing Order PP 10, 11, JA 327-28. The Commission determined that Resolute had never shipped on the Western Pipeline system, even during the period, many years before, when TexNewMex owned the pipeline and transported oil in a north-to-south direction. Order Accepting Tariffs P 11, JA 228-29. Rather, Resolute (and Navajo) always had shipped their oil on other pipeline systems, and only within the Four Corners region. *Id.*; Rehearing Order P 11, JA 328.

The Commission further found that Resolute (and Navajo) did not intend to ship on the Western Pipeline system in the future. Order Accepting Tariffs P 13, JA 229; Rehearing Order P 11, JA 328. The purported "transportation request" submitted on February 22, 2008 (R.4, Resolute's Protest at Att. IV, JA 88-89) "[did] not even request service based on the terms and conditions, and rates being proposed by [Western Pipeline] in its tariff filing;" rather, it was, at best, a "nebulous" request for service in a north-to-south direction, seemingly via an unexplained exchange process (*i.e.*, "deliveries by 'nondelivery'"), at unspecified rates. Order Accepting Tariffs P 17, JA 231. While Resolute and Navajo later

explained, through a hypothetical example, that an exchange could be accomplished only if a counter-party in Midland, Texas, were willing to exchange its barrels with Resolute and Navajo barrels in Bisti, New Mexico, the Commission pointed out that "Resolute and [Navajo] [did] not indicate that they have a counter-party in Midland who has barrels of oil available and is agreeable to an exchange, or even that they are actively pursuing such an arrangement." *Id.* This was "further evidence that Resolute and [Navajo's] position [was] no more than speculative and that they [were] without a substantial economic interest [to] protest[] [Western Pipeline's] proposed rates." *Id.*; *see also Equilon Pipeline Co., LLC*, 91 FERC ¶ 61,210 at 61,762 (2000), cited Rehearing Order n.5, JA 328 (the prospect of some unspecified future shipments is speculative and insufficient to establish a substantial economic interest).

The Commission did not ignore that, before Western Pipeline's tariffs were filed, Resolute verbally asked Western Pipeline to provide it an exchange service, as Resolute contends. Br. 41. Rather, the Commission found Resolute's "argument that its oral and written transportation requests to [Western Pipeline] [were] evidence of [its] intent to ship on the pipeline [was] without merit." Rehearing Order P 11, JA 328. As the Commission explained, while "[s]hipments on the Western pipeline system, as well as under the predecessor Giant, were in a northerly direction from Midland Texas to points in northwestern New Mexico,"

Resolute and Navajo's oil production "is in the Four Corners region of Utah and New Mexico and they have not shown that they have barrels of oil available to ship north from Midland or other receipt points in southeastern New Mexico." *Id.* In short, the Commission concluded, "[t]he fact that Resolute and [Navajo] requested an exchange transportation service, which [Western Pipeline] [was] not even offering, [did] not constitute a valid transportation request demonstrating an intent to become a future shipper on [Western Pipeline]." *Id.*

Resolute does not appear to dispute that it is consistent with Order Nos. 561 and 561-A to consider, in determining whether a party has standing under Commission regulation 343.2(b) to protest an initial rate filing, whether that party is a current or future shipper on a pipeline. *See* Br. 33; *see also supra* pp. 5-7 (discussing Order No. 561 and FERC's efforts following EPAct to streamline oil pipeline ratemaking). This is not surprising, as the Commission explained that, while "the Commission in Order No. 561 did not adopt specific classifications such as customer, customer of customer, or competitor for purposes of standing, that finding did not mean that such considerations were irrelevant in determining whether a party had a substantial economic stake in a tariff filing and the associated pipeline transportation." Rehearing Order P 10, JA 327-28. In fact, Commission precedent since Order No. 561 establishes that "whether a party was a current or future shipper is relevant in determining if a party has a substantial

economic interest in the tariff filing." *Id.* (citing *Bridger Pipeline, LLC*, 112 FERC ¶ 61,349 at P 21 (2005); *Rocky Mountain Pipeline System, LLC*, 101 FERC ¶ 61,269 at P 37 (2002); *Equilon*, 91 FERC at 61,762).

Resolute complains that the Commission did not apply the same analysis to determine whether the non-affiliated shipper referenced in the affidavit attached to Western Pipeline's tariff filing (R. 1, Affidavit, JA 3) had made a valid transportation request. Br. 41-43. As Navajo's Protest (at 15-16, JA 36-37) recognized, however, Western Pipeline's affidavit was submitted to satisfy 18 C.F.R. § 342.2(b)'s requirement that the proposed initial rate "is agreed to by at least one non-affiliated person who intends to use the service in question." *See* R.1, Transmittal Letter at 1, JA 1; Order Accepting Tariffs P 2, JA 225. The Commission found that requirement satisfied. Order Accepting Tariffs P 10, JA 228. By contrast, the Commission analyzed whether Resolute and Navajo had made a valid transportation request in determining whether they satisfied 18 C.F.R. § 343.2(b)'s "Standing to file protest" requirement. It was reasonable for the Commission to treat these different regulatory matters differently.

C. The Commission Reasonably Rejected Resolute's Claims

1. The Claims Regarding Crude Oil Production And Sales Were Beyond The Commission's Jurisdiction And, In Any Event, Were Speculative

Resolute contends ICA § 3(1) "requires that the Commission prohibit anticompetitive behavior by common carriers" and, therefore, that the Commission had "jurisdiction to consider whether [Western Pipeline] and its affiliates were using [Western Pipeline's] tariff filing as part of an overall scheme to obtain competitive control over crude oil production in the Four Corners region." Br. 21 (capitalization in heading altered); *see also id.* at 38; Navajo Br. at 24 ("the Commission fail[ed] to uphold its statutory responsibility to remedy [Western Pipeline's] discriminatory and anticompetitive conduct") (capitalization in heading altered), 30 (same). Resolute and Navajo are incorrect.

Resolute's and Navajo's claims of anticompetitive control relate to the commodity crude oil. The ICA, including § 3(1), however, applies to "discrimination only with respect to transportation." [6] *Shaw Warehouse Co. v. S.*

[6] ICA § 1(3)(a) defines "transportation" to include:

> locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported.

Ry. Co., 288 F.2d 759, 766 (5th Cir. 1961). As the Commission found, therefore, "the price of the oil commodity itself is beyond the Commission's jurisdiction, which relates to oil pipeline transportation." Order Accepting Tariffs P 12, JA 229. *See Oxy*, 64 F.3d at 701 ("an agency's interpretation of the limits of its jurisdiction is entitled to '*Chevron* deference'") (citing *Okla. Nat. Gas Co. v. FERC*, 28 F.3d 1281, 1283-84 (D.C. Cir. 1994), and *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842-44 (1984)). While "Resolute and [Navajo] [had] shown that they [were] likely to receive a lower price for their crude oil due to increased competition from deliveries of crude oil from Midland to the refineries in northwestern New Mexico," the Commission found that likelihood was "not evidence that [Western Pipeline] ha[d] engaged in anticompetitive conduct with respect to oil pipeline transportation service." Rehearing Order P 12, JA 329.

The Commission alternatively found that the anticompetitive scheme claims were speculative and unsupported. Order Accepting Tariffs P 14, JA 229-30. In fact, the Commission determined, the tariff filings appropriately would allow increased crude oil supply to be delivered into the Four Corners region, where oil reserves were declining. *Id.* at P 11 and n.4, JA 229. While that increased supply would likely reduce the price Resolute and Navajo could secure for their crude oil, the Commission reasonably could find that the protestors failed to advance, with

any specificity, a competitive interest protected under the ICA. *See*, *e.g.*, *Brooke Group v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993) (antitrust principles protect competition, not competitors).

2. Western Pipeline Did Not Have To Provide, And The Commission Could Not Require Western Pipeline To Provide, An Exchange Service

Resolute's only transportation-related complaint is that Western Pipeline should have provided, or the Commission should have compelled Western Pipeline to provide, Resolute "an exchange transportation service" so Resolute could sell its production to refineries in southeast New Mexico and west Texas. Br. at 22, 29-31, 38, 44-45; *see also* Navajo Br. at 28.

As the Commission found, however, Western Pipeline's tariff does not offer service in a southbound direction, or in the form of an exchange or displacement service, to any one. Rehearing Order P 12, JA 328. In those circumstances, it was not discriminatory, prejudicial or preferential, or a failure of Western Pipeline to fulfill its common carrier duty to provide service upon reasonable request under the ICA, for Western Pipeline to reject Resolute's requested exchange service. Order Accepting Tariffs P 14, JA 229-30; *see also* Order Accepting Tariffs P 17, JA 231; Rehearing Order P 11, JA 328; *Baltimore & Ohio Railroad v. U.S.*, 305 U.S. 507, 524 (1939) ("Since the carrier warehouse rates . . . [were] not open to all shippers alike, there [was] violation of §§ 2 and 3(1) prohibiting discrimination and

unreasonable prejudice.") (internal citation omitted)); *Potomac Elec. Power Co. v. U.S.*, 584 F.2d 1058, 1063 (D.C. Cir. 1978) (a common carrier's "obligation to furnish transportation is defined by what it holds out to the public in its tariffs"); *ARCO Pipe Line Co.*, 66 FERC ¶ 61,159 at 61,314-15 (1994) (providing service in a northbound direction does not require pipeline to provide service in southbound direction under the common carrier duty because the southbound and northbound routes involve different services; providing only northbound service is not discriminatory because northbound and southbound shippers are not similarly situated as different services are involved).

Moreover, as the Commission explained, it does not have authority under the ICA to compel Western Pipeline to offer an exchange transportation service. Rehearing Order P 12, JA 328 (citing *Chevron*, 64 FERC ¶ 61,213 at 62,616 (the Commission does not have jurisdiction under the ICA over an oil pipeline's ability to abandon service or to provide a new service)); *see also Farmers Union Cent. Exch., Inc. v. FERC*, 734 F.2d 1486, 1509 (D.C. Cir. 1984) (oil "pipeline companies may abandon service at will (which would be unlawful for many other utilities.")). "Given the Commission's lack of authority over abandonment of service by oil pipelines, it would [have] be[en] illogical and inconsistent for the Commission to conclude here that it has the power to compel [a service] that [the pipeline] does not want and could abandon." *Plantation Pipe Line Co. v. Colonial*

Pipeline Co., 104 FERC ¶ 61,271 (2003). Thus, even if Resolute's objections were less speculative, and the Commission had found that Western Pipeline's tariffs would be unjust or unreasonable, unjustly discriminatory, or unduly preferential or prejudicial, it did not have the discretion under ICA § 15(1), 49 U.S.C. App. § 15(1) (1988), to require Western Pipeline to provide an exchange service, as Resolute claims. Br. at 29-31. *See also* R. 4, Resolute Protest at 20, JA 72 ("Resolute acknowledges that the Commission heretofore may not previously have required an oil pipeline specifically to offer an exchange or displacement service").

3. The Circumstances Here Are Not Like Those That Caused The ICA To Be Extended To Oil Pipelines

Resolute contends that "[t]he actions of Western [Pipeline] and Western Refining are a microcosm of identical behavior that was the cause for the extension of the ICA to oil pipelines." Br. at 22-23 (citing *Pipeline Cases*, 234 U.S. 548, 559 (1914); *U.S. v. Champlin Refining Co.*, 341 U.S. 290, 297 (1951)); *see also* Navajo Br. 24-27. As the Supreme Court has explained, however, the behavior that caused ICA extension to oil pipelines involved "Standard Oil Company[']s refus[al] through its subordinates to carry any oil unless the same was sold to it or to them and through them to it on terms more or less dictated by itself." *Pipeline Cases*, 234 U.S. at 559.

Here, by contrast, Western Pipeline's tariffs offered to transport any shipper's oil in a northbound direction from designated receipt points in Texas and

southern New Mexico to designated delivery points in northwestern New Mexico. As a result, there will be additional oil supply in the Four Corners region, which, the record showed, had declining oil reserves that prevented New Mexico oil refineries from being able to operate at capacity. R.5, Western Pipeline's Response to Resolute's Protest at 4-5, JA 97-98; Order Accepting Tariffs P 11 and n. 4, JA 229.

This would not, as Resolute posits, "secure anticompetitive benefits for [a Western Pipeline] affiliate." Br. at 24. Rather, as additional oil supply will be introduced into the Four Corners region, Resolute will "fac[e] legitimate competition for the first time in decades." R.5, Western Pipeline's Response to Resolute's Protest at 8, JA 101. As the Commission explained, "Resolute and [Navajo] had been able to command their price for crude oil to feed the New Mexico refineries" because "'[t]hose landlocked New Mexico refineries [had been] captive to the declining crude oil reserves in the Four Corners region, and subject to maximum prices charged by crude oil producers in the region, including [Resolute and Navajo].'" Order Accepting Tariffs P 11 and n.4, JA 229 (quoting R. 6, Western Pipeline's Response to Navajo's Protest at 4, JA 162). In short, the Commission reasonably could find that Western Pipeline's tariff promotes, rather than subverts, precisely the type of competitive, non-discriminatory policies underlying ICA application to oil pipelines.

4. The Commission Properly Understood The Facts

The Commission understood, contrary to Resolute's claim otherwise, Br. at 28, that Resolute's protest sought redress in the form of an exchange service on Western Pipeline. *See, e.g.*, Order Accepting Tariffs P 10, JA 228-29 (noting that Resolute and Navajo "request[ed] that the Commission direct [Western Pipeline] to provide exchange or displacement service"); Rehearing Order P 3, JA 325 (same).

In addition, the Commission did not base its determinations on a belief that Resolute and Navajo were the sole suppliers to the refineries, as Resolute asserts. Br. 26-27, 39-40. The Commission explained that the New Mexico refineries were "'captive to the declining crude oil reserves in the Four Corners region, and subject to maximum prices charged by crude oil producers in the region, *including* the two producers that have filed protests in this docket,'" *i.e.*, Resolute and Navajo. Order Accepting Tariffs P 11 and n.4, JA 229 (quoting R. 6, Western Pipeline's Response to Navajo Protest at 4, JA 162) (emphasis added); *see also* Rehearing Order P 10, JA 327 ("The Commission does not dispute that the price Resolute and [Navajo] receive for their crude oil may be reduced due to *increased* competition from crude oil that will be moving north on Western to refineries in the Four Corners region.") (emphasis added); *id.* P 12, JA 329 ("Resolute and [Navajo] have shown that they are likely to receive a lower price for their crude oil due to *increased* competition from deliveries of crude oil from Midland to the refineries in northwestern New

Mexico") (emphasis added).

CONCLUSION

For the foregoing reasons, the petition should be dismissed for lack of jurisdiction or, alternatively, denied on its merits.

Respectfully submitted,

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January 4, 2010

Resolute Natural Resources Co., LLC v. FERC
D.C. Cir. No. 08-1268

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 9,451 words, not including the tables of contents and authorities, the certificates of counsel, or the addenda.

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January 4, 2010

ADDENDUM
Statutes & Regulations

Table of Contents

EPAct §§ 1801-1804 provide as follows:

TITLE XVIII--OIL PIPELINE REGULATORY REFORM

SEC. 1801. OIL PIPELINE RATEMAKING METHODOLOGY.

(a) ESTABLISHMENT- Not later than 1 year after the date of the enactment of this Act, the Federal Energy Regulatory Commission shall issue a final rule which establishes a simplified and generally applicable ratemaking methodology for oil pipelines in accordance with section 1(5) of part I of the Interstate Commerce Act.

(b) EFFECTIVE DATE- The final rule to be issued under subsection (a) may not take effect before the 365th day following the date of the issuance of the rule.

SEC. 1802. STREAMLINING OF COMMISSION PROCEDURES.

(a) RULEMAKING- Not later than 18 months after the date of the enactment of this Act, the Commission shall issue a final rule to streamline procedures of the Commission relating to oil pipeline rates in order to avoid unnecessary regulatory costs and delays.

(b) SCOPE OF RULEMAKING- Issues to be considered in the rulemaking proceeding to be conducted under subsection (a) shall include the following:

(1) Identification of information to be filed with an oil pipeline tariff and the availability to the public of any analysis of such tariff filing performed by the Commission or its staff.

(2) Qualification for standing (including definitions of economic interest) of parties who protest oil pipeline tariff filings or file complaints thereto.

(3) The level of specificity required for a protest or complaint and guidelines for Commission action on the portion of the tariff or rate filing subject to protest or complaint.

(4) An opportunity for the oil pipeline to file a response for the record to an initial protest or complaint.

(5) Identification of specific circumstances under which Commission staff may initiate a protest.

(c) ADDITIONAL PROCEDURAL CHANGES- In conducting the rulemaking proceeding to carry out subsection (a), the Commission shall identify and transmit to Congress any other procedural changes relating to oil pipeline rates which the Commission determines are necessary to avoid unnecessary regulatory costs and delays and for which additional legislative authority may be necessary.

(d) WITHDRAWAL OF TARIFFS AND COMPLAINTS-

(1) WITHDRAWAL OF TARIFFS- If an oil pipeline tariff which is filed under part I of the Interstate Commerce Act and which is subject to investigation is withdrawn--

(A) any proceeding with respect to such tariff shall be terminated;

(B) the previous tariff rate shall be reinstated; and

(C) any amounts collected under the withdrawn tariff rate which are in excess of the previous tariff rate shall be refunded.

(2) WITHDRAWAL OF COMPLAINTS- If a complaint which is filed under section 13 of the Interstate Commerce Act with respect to an oil pipeline tariff is withdrawn, any proceeding with respect to such complaint shall be terminated.

(e) ALTERNATIVE DISPUTE RESOLUTION- To the maximum extent practicable, the Commission shall establish appropriate alternative dispute resolution procedures, including required negotiations and voluntary arbitration, early in an oil pipeline rate proceeding as a method preferable to adjudication in resolving disputes relating to the rate. Any proposed rates derived from implementation of such procedures shall be considered by the Commission on an expedited basis for approval.

SEC. 1803. PROTECTION OF CERTAIN EXISTING RATES.

(a) RATES DEEMED JUST AND REASONABLE-Except as provided in subsection (b)--

(1) any rate in effect for the 365-day period ending on the date of the enactment of this Act shall be deemed to be just and reasonable (within the meaning of section 1(5) of the Interstate Commerce Act); and

(2) any rate in effect on the 365th day preceding the date of such enactment shall be deemed to be just and reasonable (within the meaning of such section 1(5)) regardless of whether or not, with respect to such rate, a new rate has been filed with the Commission during such 365-day period;

if the rate in effect, as described in paragraph (1) or (2), has not been subject to protest, investigation, or complaint during such 365-day period.

(b) CHANGED CIRCUMSTANCES- No person may file a complaint under section 13 of the Interstate Commerce Act against a rate deemed to be just and reasonable under subsection (a) unless--

(1) evidence is presented to the Commission which establishes that a substantial change has occurred after the date of the enactment of this Act--

(A) in the economic circumstances of the oil pipeline which were a basis for the rate; or

(B) in the nature of the services provided which were a basis for the rate; or

(2) the person filing the complaint was under a contractual prohibition against the filing of a complaint which was in effect on the date of enactment of this Act and had been in effect prior to January 1, 1991, provided that a complaint by a party bound by such prohibition is brought within 30 days after the expiration of such prohibition.

If the Commission determines pursuant to a proceeding instituted as a result of a complaint under section 13 of the Interstate Commerce Act that the rate is not just and reasonable, the rate shall not be deemed to be just and reasonable. Any tariff reduction or refunds that may result as an outcome of such a complaint shall be prospective from the date of the filing of the complaint.

(c) LIMITATION REGARDING UNDULY DISCRIMINATORY OR PREFERENTIAL TARIFFS- Nothing in this section shall prohibit any aggrieved person from filing a complaint under section 13 or section 15(l) of the Interstate Commerce Act challenging any tariff provision as unduly discriminatory or unduly preferential.

SEC. 1804. DEFINITIONS.

For the purposes of this title, the following definitions apply:

(1) COMMISSION- The term `Commission' means the Federal Energy Regulatory Commission and, unless the context requires otherwise, includes the Oil Pipeline Board and any other office or component of the Commission to which the functions and authority vested in the Commission under section 402(b) of the Department of Energy Organization Act (42 U.S.C. 7172(b)) are delegated.

(2) OIL PIPELINE-

(A) IN GENERAL- Except as provided in subparagraph (B), the term `oil pipeline' means any common carrier (within the meaning of the Interstate Commerce Act) which transports oil by pipeline subject to the functions and authority vested in the Commission under section 402(b) of the Department of Energy Organization Act (42 U.S.C. 7172(b)).

(B) EXCEPTION- The term `oil pipeline' does not include the Trans-Alaska Pipeline authorized by the Trans-Alaska Pipeline Authorization Act (43 U.S.C. 1651 et seq.) or any pipeline delivering oil directly or indirectly to the Trans-Alaska Pipeline.

(3) OIL- The term `oil' has the same meaning as is given such term for purposes of the transfer of functions from the Interstate Commerce Commission to the Federal Energy Regulatory Commission under section 402(b) of the Department of Energy Organization Act (42 U.S.C. 7172 (b)).

(4) RATE- The term `rate' means all charges that an oil pipeline requires shippers to pay for transportation services.

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Sec. 1(3)(a) & 1(5) of the Interstate Commerce Act, 49 U.S.C. App. § 1(3)(a) & 1(5) provide as follows:

from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only insofar as such transportation takes place within the United States.

(2) Transportation subject to regulation

The provisions of this chapter shall also apply to such transportation of passengers and property, but only insofar as such transportation takes place within the United States, but shall not apply—

(a) To the transportation of passengers or property, or to the receiving, delivering; storage, or handling of property, wholly within one State and not shipped to or from a foreign country from or to any place in the United States as aforesaid, except as otherwise provided in this chapter;

(b) Repealed. June 19, 1934, ch. 652, title VI, § 602(b), 48 Stat. 1102.

(c) To the transportation of passengers or property by a carrier by water where such transportation would not be subject to the provisions of this chapter except for the fact that such carrier absorbs, out of its port-to-port water rates or out of its proportional through rates, any switching, terminal, lighterage, car rental, trackage, handling, or other charges by a rail carrier for services within the switching, drayage, lighterage, or corporate limits of a port terminal or district.

(3) Definitions

(a) The term "common carrier" as used in this chapter shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this chapter it shall be held to mean "common carrier." The term "railroad" as used in this chapter shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" as used in this chapter shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. The term "person" as used in this chapter includes an individual, firm, copartnership, corporation, company, association, or joint-stock association; and includes a trustee, receiver, assignee, or personal representative thereof.

(b) For the purposes of sections 5, 12(1), 20, 304(a)(7), 310, 320, 904(b), 910, and 913 of this Appendix, where reference is made to control (in referring to a relationship between any person or persons and another person or persons), such reference shall be construed to include actual as well as legal control, whether maintained or exercised through or by reason of the method of or circumstances surrounding organization or operation, through or by common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or through or by any other direct or indirect means; and to include the power to exercise control.

(4) Duty to furnish transportation and establish through routes; division of joint rates

It shall be the duty of every common carrier subject to this chapter to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this chapter to establish reasonable through routes with common carriers by water subject to chapter 12 of this Appendix, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

(5) Just and reasonable charges; applicability; criteria for determination

(a) All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful. The provisions of this subdivision shall not apply to common carriers by railroad subject to this chapter.

(b) Each rate for any service rendered or to be rendered in the transportation of persons or property by any common carrier by railroad subject to this chapter shall be just and reasonable. A rate that is unjust or unreasonable is prohibited and unlawful. No rate which contributes or which would contribute to the going concern value of such a carrier shall be found to be unjust or unreasonable, or not shown to be just and reasonable, on the ground that such rate is below a just or reasonable minimum for the service rendered or to be rendered. A rate which equals or exceeds the variable costs (as determined through formulas prescribed by the Commission) of providing a service shall be presumed, unless such presumption is rebutted by clear and convincing evidence, to contribute to the going concern value of the carrier or carriers proposing such rate (hereafter in this paragraph referred to as the "proponent carrier"). In determining variable costs, the Commission shall, at the request of the carrier proposing the rate, determine only those costs of the carrier proposing the rate and only those costs of the specific service in question, except where such specific data and cost information is not available. The Commission shall not include in variable cost any expenses which do not vary directly with the level of service provided under the rate in question. Notwithstanding any other provision of this chapter, no rate shall be found to be unjust or unreasonable, or not shown to be just and reasonable, on the ground that such rate exceeds a just or reasonable maximum for the service rendered or to be rendered, unless the Commission has first found that the proponent carrier has market dominance over such service. A finding that a carrier has market dominance over a service shall not create a presumption that the rate or rates for such service exceed a just and reasonable maximum. Nothing in this paragraph shall prohibit a rate increase from a level which reduces the going concern value of the proponent carrier to a level which contributes to such going concern value and is otherwise just and reasonable. For the purposes of the preceding sentence, a rate increase which does not raise a rate above the incremental costs (as determined through formulas prescribed by the Commission) of rendering the service to which such rate applies shall be presumed to be just and reasonable.

Sec. 3(1) of the Interstate Commerce Act, 49 U.S.C. App. § 3(1) provides as follows:

not in reorganization, as determined by the Commission.

(Feb. 4, 1887, ch. 104, pt. I, § 1a, as added and amended Feb. 5, 1976, Pub. L. 94-210, title VIII, §§ 802, 809(c), 90 Stat. 127, 146; Oct. 19, 1976, Pub. L. 94-555, title II, § 218, 90 Stat. 2628.)

§ 2. Repealed. Pub. L. 95–473, § 4(b), (c), Oct. 17, 1978, 92 Stat. 1466, 1470

Section repealed subject to an exception related to transportation of oil by pipeline. For disposition of this section in revised Title 49, Transportation, see Table at beginning of Title 49. See, also, notes following Table.

Prior to repeal, section read as follows:

§ 2. Special rates and rebates prohibited

If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property, subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful.

(Feb. 4, 1887, ch. 104, pt. I, § 2, 24 Stat. 379; Feb. 28, 1920, ch. 91, § 404, 41 Stat. 479; June 19, 1934, ch. 652, § 602(b), 48 Stat. 1102; Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543.)

§ 3. Repealed. Pub. L. 95–473, § 4(b), (c), Oct. 17, 1978, 92 Stat. 1466, 1470

Section repealed subject to an exception related to transportation of oil by pipeline. For disposition of this section in revised Title 49, Transportation, see Table at beginning of Title 49. See, also, notes following Table.

Prior to repeal, section read as follows:

§ 3. Preferences; interchange of traffic; terminal facilities

(1) Undue preferences or prejudices prohibited

It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

(1a) Export rates on farm commodities; Commission's power to carry out policy

It is declared to be the policy of Congress that shippers of wheat, cotton, and all other farm commodities for export shall be granted export rates on the same principles as are applicable in the case of rates on industrial products for export. The Commission is directed, on its own initiative or an application by interested persons, to make such investigations and conduct such hearings, and, after appropriate proceedings, to issue such orders, as may be necessary to carry out such policy.

(2) Payment of freight as prerequisite to delivery

No carrier by railroad and no express company subject to the provisions of this chapter shall deliver or relinquish possession at destination of any freight or express shipment transported by it until all tariff rates and charges thereon have been paid, except under such rules and regulations as the Commission may from time to time prescribe to govern the settlement of all such rates and charges and to prevent unjust discrimination: *Provided,* That the provisions of this paragraph shall not be construed to prohibit any carrier or express company from extending credit in connection with rates and charges on freight or express shipments transported for the United States, for any department, bureau, or agency thereof, or for any State or Territory or political subdivision thereof, or for the District of Columbia. Where carriers by railroad are instructed by a shipper or consignor to deliver property transported by such carriers to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect of the transportation of such property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (a) is an agent only and has no beneficial title in the property, and (b) prior to delivery of the property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of a shipment reconsigned or diverted to a point other than that specified in the original bill of lading, has also notified the delivering carrier in writing of the name and address of the beneficial owner of the property. In such cases the shipper or consignor, or, in the case of a shipment so reconsigned or diverted, the beneficial owner, shall be liable for such additional charges, irrespective of any provisions to the contrary in the bill of lading or in the contract under which the shipment was made. An action for the enforcement of such liability may be begun within the period provided in paragraph (3) of section 16 of this Appendix or before the expiration of six months after final judgment against the carrier in an action against the consignee begun within the period provided in paragraph (3) of section 16 of this Appendix. If the consignee has given to the carrier erroneous information as to who the beneficial owner is, such consignee shall himself be liable for such additional charges, notwithstanding the foregoing provisions of this paragraph. An action for the enforcement of such liability may be begun within the period provided in paragraph (3) of section 16 of this Appendix or before the expiration of six months after final judgment against the carrier in an action against the beneficial owner named by the consignee begun within the period provided in paragraph (3) of section 16 of this Appendix. On shipments reconsigned or diverted by an agent who has furnished the carrier in the reconsignment or diversion order with a notice of agency and the proper name and address of the beneficial owner, and where such shipments are refused or abandoned at ultimate destination, the said beneficial owner shall be liable for all legally applicable charges in connection therewith. If the reconsignor or diverter has given to the carrier erroneous information as to who the beneficial owner is, such reconsignor or diverter shall himself be liable for all such charges, and an action for the enforcement of his liability may be begun within the same period provided in the case of an action against a consignee who has given erroneous information as to the beneficial owner.

(3) Liability of shipper-consignee for freight where delivery is made to another party upon instruction

If a shipper or consignor of a shipment of property (other than a prepaid shipment) is also the consignee named in the bill of lading and, prior to the time of delivery, notifies, in writing, a delivering carrier by railroad or a delivering express company subject to

Sec. 13(1) of the Interstate Commerce Act, 49 U.S.C. App. § 13(1) provides as follows:

by the Commission, and would serve a useful public purpose.

(2) Attendance of witnesses and production of documents

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the Commission, or any party to a proceeding before the commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section.

(3) Compelling attendance and testimony of witnesses, etc.

And any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any common carrier subject to the provisions of this chapter, or other person, issue an order requiring such common carrier or other person to appear before said Commission (and produce books and papers if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(4) Depositions

The testimony of any witness may be taken, at the instance of a party, in any proceeding or investigation depending [pending] before the Commission, by deposition, at any time after a cause or proceeding is at issue on petition and answer. The Commission may also order testimony to be taken by deposition in any proceeding or investigation pending before it, at any stage of such proceeding or investigation. Such depositions may be taken before any judge of any court of the United States, or any United States commissioner, or any clerk of a district court, or any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court, or court of common please of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, nor interested in the event of the proceeding or investigation. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition. Any person may be compelled to appear and depose, and to produce documentary evidence, in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the Commission as hereinbefore provided.

(5) Oath; subscription of testimony on deposition

Every person deposing as herein provided shall be cautioned and sworn (or affirm, if he so request) to testify the whole truth, and shall be carefully examined. His testimony shall be reduced to writing by the magistrate taking the deposition, or under his direction, and shall, after it has been reduced to writing, be subscribed by the deponent.

(6) Deposition in foreign country; filing of depositions

If a witness whose testimony may be desired to be taken by deposition be in a foreign country, the deposition may be taken before an officer or person designated by the Commission, or agreed upon by the parties by stipulation in writing to be filed with the Commission. All depositions must be promptly filed with the Commission.

(7) Fees for depositions

Witnesses whose depositions are taken pursuant to this chapter, and the magistrate or other officer taking the same, shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

(Feb. 4, 1887, ch. 104, pt. I, § 12, 24 Stat. 383; Mar. 2, 1889, ch. 382, § 3, 25 Stat. 858; Feb. 10, 1891, ch. 128, 26 Stat. 743; May 28, 1896, ch. 252, § 19, 29 Stat. 184; Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167; Feb. 28, 1920, ch. 91, § 415, 41 Stat. 484; Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543; Sept. 18, 1940, ch. 722, title I, § 9(a), 54 Stat. 910; June 25, 1948, ch. 646, § 1, 62 Stat. 909; Feb. 5, 1976, Pub. L. 94-210, title II, § 207, 90 Stat. 42.)

§ 13. Repealed. Pub. L. 95-473, § 4(b), (c), Oct. 17, 1978, 92 Stat. 1466, 1470

Section repealed subject to an exception related to transportation of oil by pipeline. For disposition of this section in revised Title 49, Transportation, see Table at beginning of Title 49. See, also, notes following Table.

Prior to repeal, section read as follows:

§ 13. Complaints to and investigations by Commission

(1) Complaint to Commission of violation of law by carrier; reparation; investigation

Any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier complaining of anything done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

(2) Complaints by State commissions; inquiry on Commission's own motion; expenses of State commissions

Said Commission shall, in like manner and with the same authority and powers, investigate any complaint forwarded by the railroad commissioner or railroad commission or any State or Territory at the request of such commissioner or commission, and the Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said Commission by any provision of this chapter, or concerning which any question may arise under any of the provisions of this chapter, or relating to the enforcement of any of the provisions of this chapter. And the said Commission shall have the same powers and authority to proceed with any inquiry instituted on its motion as though it had been appealed to by complaint or petition under any of the provisions of this chapter, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had excepting orders for the payment of money. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant. Representatives of State commissions sitting with the Commission, under the provisions of this section, in cases pending before the Commission, shall receive such allowances for travel and subsistence expense as the Commission shall provide.

Sec. 15(1) of the Interstate Commerce Act, 49 U.S.C. App. § 15(1) provides as follows:

§ 15. Determination of rates, routes, etc.; routing of traffic; disclosures, etc.

(1) Commission empowered to determine and prescribe rates, classifications, etc.

Whenever, after full hearing, upon a complaint made as provided in section 13 of this Appendix, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property, as defined in section 1 of this Appendix, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

(2) Orders of Commission

Except as otherwise provided in this chapter, all orders of the Commission, other than orders for the payment of money, shall take effect within such reasonable time as the Commission may prescribe. Such orders shall continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order, unless the same shall be suspended or modified or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction.

(3) Establishment of through routes, joint classifications, joint rates, fares, etc.

The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this chapter, or by carriers by railroad subject to this chapter and common carriers by water subject to chapter 12 of this Appendix, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancelation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section. With respect to carriers by railroad, in determining whether any such cancellation or proposed cancellation involving any common carrier by railroad is consistent with the public interest, the Commission shall, to the extent applicable, (a) compare the distance traversed and the average transportation time and expense required using the through route, and the distance traversed and the average transportation time and expense required using alternative routes, between the points served by such through route, (b) consider any reduction in energy consumption which may result from such cancellation, and (c) take into account the overall impact of such cancellation on the shippers and carriers who are affected thereby.

(4) Through routes to embrace entire length of railroad; temporary through routes

In establishing any such through route the Commission shall not (except as provided in section 3 of this Appendix, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however,* That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b) of this paragraph, give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs. In time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest.

(5) Transportation of livestock in carload lots; services included

Transportation wholly by railroad of ordinary livestock in carload lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee, or owner, except in cases where the unloading or reloading en route is at the request of the shipper, consignee, or owner, or to try an intermediate market, or to comply with quarantine regulations. The Commission may prescribe or approve just and reasonable rules governing each of such excepted services. Nothing in this paragraph shall be construed to affect the duties and liabilities of the carriers existing on February 28, 1920, by virtue of law respecting the transportation of other than ordinary livestock, or the duty of performing service as to shipments other than those to or from public stockyards.

Sec. 15(7) of the Interstate Commerce Act, 49 U.S.C. App. § 15(7) provides as follows:

(6) Commission to establishment just divisions of joint rates, fares, or charges; adjustments; procedures applicable

(a) Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares, and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare, or charge.

(b) Notwithstanding any other provision of law, the Commission shall, within 180 days after February 5, 1976, establish, by rule, standards and procedures for the conduct of proceedings for the adjustment of divisions of joint rates or fares (whether prescribed by the Commission or otherwise) in accordance with the provisions of this paragraph. The Commission shall issue a final order in all such proceedings within 270 days after the submission to the Commission of a case. If the Commission is unable to issue such a final order within such time, it shall issue a report to the Congress setting forth the reasons for such inability.

(c) All evidentiary proceedings conducted pursuant to this paragraph shall be completed, in a case brought upon a complaint, within 1 year following the filing of the complaint, or, in a case brought upon the Commission's initiative, within 2 years following the commencement of such proceeding, unless the Commission finds that such a proceeding must be extended to permit a fair and expeditious completion of the proceeding. If the Commission is unable to meet any such time requirement, it shall issue a report to the Congress setting forth the reasons for such inability.

(d) Whenever a proceeding for the adjustment of divisions of joint rates or fares (whether prescribed by the Commission or otherwise established) is commenced by the filing of a complaint with the Commission, the complaining carrier or carriers shall (i) attach thereto all of the evidence in support of their position, and (ii) during the course of such proceeding, file only rebuttal or reply evidence unless otherwise directed by order of the Commission. Upon receipt of a notice of intent to file a complaint pursuant to this paragraph, the Commission shall accord, to the party filing such notice, the same right to discovery that would be accorded to a party filing a complaint pursuant to this paragraph.

(7) Commission to determine lawfulness of new rates; suspension; refunds; nonapplicability to common carriers by railroad subject to chapter

Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible. This paragraph shall not apply to common carriers by railroad subject to this chapter.

(8) Commission to determine lawfulness of new rates; applicability to common carrier by railroad; suspensions; accounts; hearing and basis of decision

(a) Whenever a schedule is filed with the Commission by a common carrier by railroad stating a new individual or joint rate, fare, or charge, or a new individual or joint classification, regulation, or practice affecting a rate, fare, or charge, the Commission may, upon the complaint of an interested party or upon its own initiative, order a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice. The hearing may be conducted without answer or other formal pleading, but reasonable notice shall be provided to interested parties. Such hearing shall be completed and a final decision rendered by the Commission not later than 7 months after such rate, fare, charge, classification, regulation, or practice was scheduled to become effective, unless, prior to the expiration of such 7-month period, the Commission reports in writing to the Congress that it is unable to render a decision within such period, together with a full explanation of the reason for the delay. If such a report is made to the Congress, the final decision shall be made not later than 10 months after the date of the filing of such schedule. If the final decision of the Commission is not made within the applicable time period, the rate, fare, charge, classification, regulation, or practice shall go into effect

indirectly to the Trans-Alaska Pipeline.

§ 342.1 General rule.

Each carrier subject to the jurisdiction of the Commission under the Interstate Commerce Act:

(a) Must establish its initial rates subject to such Act pursuant to § 342.2; and

(b) Must make any change in existing rates pursuant to § 342.3 or § 342.4, whichever is applicable, unless directed otherwise by the Commission.

§ 342.2 Establishing initial rates.

A carrier must justify an initial rate for new service by:

(a) Filing cost, revenue, and throughput data supporting such rate as required by part 346 of this chapter; or

(b) Filing a sworn affidavit that the rate is agreed to by at least one non-affiliated person who intends to use the service in question, *provided* that if a protest to the initial rate is filed, the carrier must comply with paragraph (a) of this section.

[Order 561, 58 FR 58779, Nov. 4, 1993, as amended at 59 FR 59146, Nov. 16, 1994]

§ 342.3 Indexing.

(a) *Rate changes.* A rate charged by a carrier may be changed, at any time, to a level which does not exceed the ceiling level established by paragraph (d) of this section, upon compliance with the applicable filing and notice requirements and with paragraph (b) of this section. A filing under this section proposing to change a rate that is under investigation and subject to refund, must take effect subject to refund.

(b) *Information required to be filed with rate changes.* The carrier must comply with Part 341 of this title. Carriers must specify in their letters of transmittal required in § 341.2(c) of this chapter the rate schedule to be changed, the proposed new rate, the prior rate, the prior ceiling level, and the applicable ceiling level for the movement. No other rate information is required to accompany the proposed rate change.

(c) *Index year.* The index year is the period from July 1 to June 30.

(d) *Derivation of the ceiling level.* (1) A carrier must compute the ceiling level for each index year by multiplying the previous index year's ceiling level by the most recent index published by the Commission. The index will be published by the Commission prior to June 1 of each year.

(2) The index published by the Commission will be based on the change in the final Producer Price Index for Finished Goods (PPI-FG), seasonally adjusted, as published by the U.S. Department of Labor, Bureau of Labor Statistics, for the two calendar years immediately preceding the index year. The index will be calculated by dividing the PPI-FG for the calendar year immediately preceding the index year, by the previous calendar year's PPI-FG.

(3) A carrier must compute the ceiling level each index year without regard to the actual rates filed pursuant to this section. All carriers must round their ceiling levels each index year to the nearest hundredth of a cent.

(4) For purposes of computing the ceiling level for the period January 1, 1995 through June 30, 1995, a carrier must use the rate in effect on December 31, 1994 as the previous index year's ceiling level in the computation in paragraph (d)(1) of this section. If the rate in effect on December 31, 1994 is subsequently lowered by Commission order pursuant to the Interstate Commerce Act, the ceiling level based on such rate must be recomputed, in accordance with paragraph (d)(1) of this section, using the rate established by such Commission order in lieu of the rate in effect on December 31, 1994.

(5) When an initial rate, or rate changed by a method other than indexing, takes effect during the index year, such rate will constitute the applicable ceiling level for that index year. If such rate is subsequently lowered by Commission order pursuant to the Interstate Commerce Act, the ceiling level based on such rate must be recomputed, in accordance with paragraph (d)(1) of this section, using the rate established by such Commission order as the ceiling level for the index year which includes the effective date of the rate established by such Commission order.

18 C.F.R. § 343.2 provides as follows:

(e) *Rate decreases.* If the ceiling level computed pursuant to § 342.3(d) is below the filed rate of a carrier, that rate must be reduced to bring it into compliance with the new ceiling level; provided, however, that a carrier is not required to reduce a rate below the level deemed just and reasonable under section 1803(a) of the Energy Policy Act of 1992, if such section applies to such rate or to any prior rate. The rate decrease must be accomplished by filing a revised tariff publication with the Commission to be effective July 1 of the index year to which the reduced ceiling level applies.

[Order 561, 58 FR 58779, Nov. 4, 1993, as amended by Order 561–A, 59 FR 40256, Aug. 8, 1994; 59 FR 59146, Nov. 16, 1994; Order 606, 64 FR 44405, Aug. 16, 1999; Order 650, 69 FR 53801, Sept. 3, 2004]

§ 342.4 Other rate changing methodologies.

(a) *Cost-of-service rates.* A carrier may change a rate pursuant to this section if it shows that there is a substantial divergence between the actual costs experienced by the carrier and the rate resulting from application of the index such that the rate at the ceiling level would preclude the carrier from being able to charge a just and reasonable rate within the meaning of the Interstate Commerce Act. A carrier must substantiate the costs incurred by filing the data required by part 346 of this chapter. A carrier that makes such a showing may change the rate in question, based upon the cost of providing the service covered by the rate, without regard to the applicable ceiling level under § 342.3.

(b) *Market-based rates.* A carrier may attempt to show that it lacks significant market power in the market in which it proposes to charge market-based rates. Until the carrier establishes that it lacks market power, these rates will be subject to the applicable ceiling level under § 342.3.

(c) *Settlement rates.* A carrier may change a rate without regard to the ceiling level under § 342.3 if the proposed change has been agreed to, in writing, by each person who, on the day of the filing of the proposed rate change, is using the service covered by the rate. A filing pursuant to this section must contain a verified statement by the carrier that the proposed rate change has been agreed to by all current shippers.

[Order 561, 58 FR 58779, Nov. 4, 1993, as amended at 59 FR 59146, Nov. 16, 1994]

PART 343—PROCEDURAL RULES APPLICABLE TO OIL PIPELINE PROCEEDINGS

Sec.

AUTHORITY: 5 U.S.C. 571–583; 42 U.S.C. 7101–7352; 49 U.S.C. 60502; 49 App. U.S.C. 1-85.

SOURCE: Order 561, 58 FR 58780, Nov. 4, 1993, unless otherwise noted.

§ 343.0 Applicability.

(a) *General rule.* The Commission's Rules of Practice and Procedure in part 385 of this chapter will govern procedural matters in oil pipeline proceedings under part 342 of this chapter and under the Interstate Commerce Act, except to the extent specified in this part.

§ 343.1 Definitions.

For purposes of this part, the following definitions apply:

(a) *Complaint* means a filing challenging an existing rate or practice under section 13(1) of the Interstate Commerce Act.

(b) *Protest* means a filing, under section 15(7) of the Interstate Commerce Act, challenging a tariff publication.

[Order 561, 58 FR 58780, Nov. 4, 1993, as amended by Order 578, 60 FR 19505, Apr. 19, 1995]

§ 343.2 Requirements for filing interventions, protests and complaints.

(a) *Interventions.* Section 385.214 of this chapter applies to oil pipeline proceedings.

(b) *Standing to file protest.* Only persons with a substantial economic interest in the tariff filing may file a protest to a tariff filing pursuant to the Interstate Commerce Act. Along with

18 C.F.R. § 343.2 provides as follows:

the protest, a verified statement that the protestor has a substantial economic interest in the tariff filing in question must be filed.

(c) *Other requirements for filing protests or complaints*—(1) *Rates established under § 342.3 of this chapter*. A protest or complaint filed against a rate proposed or established pursuant to § 342.3 of this chapter must allege reasonable grounds for asserting that the rate violates the applicable ceiling level, or that the rate increase is so substantially in excess of the actual cost increases incurred by the carrier that the rate is unjust and unreasonable, or that the rate decrease is so substantially less than the actual cost decrease incurred by the carrier that the rate is unjust and unreasonable. In addition to meeting the requirements of the section, a complaint must also comply with all the requirements of § 385.206, except § 385.206(b)(1) and (2).

(2) *Rates established under § 342.4(c) of this chapter*. A protest or complaint filed against a rate proposed or established under § 342.4(c) of this chapter must allege reasonable grounds for asserting that the rate is so substantially in excess of the actual cost increases incurred by the carrier that the rate is unjust and unreasonable. In addition to meeting the requirements of the section, a complaint must also comply with all the requirements of § 385.206, except § 385.206(b)(1) and (2).

(3) *Non-rate matters*. A protest or complaint filed against a carrier's operations or practices, other than rates, must allege reasonable grounds for asserting that the operations or practices violate a provision of the Interstate Commerce Act, or of the Commission's regulations. In addition to meeting the requirements of this section, a complaint must also comply with the requirements of § 385.206.

(4) A protest or complaint that does not meet the requirements of paragraphs (c)(1), (c)(2), or (c)(3) of this section, whichever is applicable, will be dismissed.

[Order 561, 58 FR 58780, Nov. 4, 1993, as amended by Order 602, 64 FR 17097, Apr. 8, 1999; Order 606, 64 FR 44405, Aug. 16, 1999]

§ 343.3 Filing of protests and responses.

(a) *Protests*. Any protest pursuant to section 15(7) of the Interstate Commerce Act must be filed not later than 15 days after the filing of a tariff publication. If the carrier submits a separate letter with the filing, providing a telefax number and contact person, and requesting all protests to be telefaxed to the carrier by a protestant, any protest must be so telefaxed to the pipeline at the time the protest is filed with the Commission. Only persons with a substantial economic interest in the tariff filing may file a protest to a tariff filing pursuant to the Interstate Commerce Act. Along with the protest, the protestant must file a verified statement which must contain a reasonably detailed description of the nature and substance of the protestant's substantial economic interest in the tariff filing.

(b) *Responses*. The carrier may file a response to a protest no later than 5 days from the filing of the protest.

(c) *Commission action*. Commission action, including any hearings or other proceedings, on a protest will be limited to the issues raised in such protest. If a filing is protested, before the effective date of the tariff publication or within 30 days of the tariff filing, whichever is later, the Commission will determine whether to suspend the tariff and initiate a formal investigation.

(d) *Termination of investigation*. Withdrawal of the protest, or protests, that caused the initiation of an investigation automatically terminates the investigation.

[Order 561, 58 FR 58780, Nov. 4, 1993, as amended by Order 561–A, 59 FR 40256, Aug. 8, 1994]

§ 343.4 Procedure on complaints.

(a) *Responses*. The carrier must file an answer to a complaint filed pursuant to section 13(1) of the Interstate Commerce Act within 20 days after the filing of the complaint in accordance with Rule 206.

(b) *Commission action*. Commission action, including any hearings or other proceedings, on a complaint will be

Resolute Natural Resources Company, LLC and Resolute Aneth, LLC v. FERC **Docket No. IS08-131**
D.C. Cir. 08-1268

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P.25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 4th day of January 2010, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system or via U.S. Mail, as indicated below:

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