ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

In the United States Court of Appeals for the District of Columbia Circuit

No. 10-1075

MARKWEST MICHIGAN PIPELINE COMPANY, L.L.C.,
PETITIONER,

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

Christine A. Varney
Assistant Attorney General

Robert B. Nicholson
Robert J. Wiggers
Attorneys

For Respondent
United States of America
U.S. Department of Justice
Washington, DC 20530

Thomas R. Sheets
General Counsel

Robert H. Solomon
Solicitor

Carol J. Banta
Attorney

For Respondent
Federal Energy
Regulatory Commission
Washington, DC 20426

Final Brief: November 12, 2010

CIRCUIT RULE 28(A)(1) CERTIFICATE

A. Parties and Amici

To counsel's knowledge, the parties and intervenors before this Court and before the Federal Energy Regulatory Commission in the underlying docket are as stated in the Brief of Petitioner.

B. Rulings Under Review

1. Order on Tariff Filing and Granting Clarification, *MarkWest Michigan Pipeline Company, L.L.C.*, 126 FERC ¶ 61,300 (Mar. 31, 2009) ("Tariff Order"), R. 5, JA 63; and

2. Order Denying Rehearing, *MarkWest Michigan Pipeline Company, L.L.C.*, 130 FERC ¶ 61,084 (Feb. 2, 2010) ("Rehearing Order"), R. 9, JA 84.

C. Related Cases

This case has not previously been before this Court or any other court. Counsel is not aware of any other related cases pending before this or any other court.

s/ Carol J. Banta
Carol J. Banta
Attorney

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GLOSSARY

2006 Offer of Settlement	Offer of Settlement, *MarkWest Michigan Pipeline Co.*, FERC Docket No. IS06-41 (filed Jan. 31, 2006), describing terms and submitting public version of Settlement, JA 93
Annual Inflation Cap	Contractual limitation of MarkWest's annual rate increases during a three-year moratorium, set forth in Section 2.04(a)(i) of the Settlement
Commission or FERC	Federal Energy Regulatory Commission
EPAct	Energy Policy Act of 1992
FERC Orders	Collectively, the Tariff Order and the Rehearing Order
ICA	Interstate Commerce Act
MarkWest	Petitioner MarkWest Michigan Pipeline Company, L.L.C.
Order No. 561	*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 (1993)
Rehearing Order	Order Denying Rehearing, *MarkWest Michigan Pipeline Company, L.L.C.*, 130 FERC ¶ 61,084 (2010), R. 9, JA 84
Settlement	Settlement Agreement between MarkWest and the Shippers, approved by the Commission in April 2006 and made effective as of January 31, 2006, resolving Shippers' protest of MarkWest's November 2005 oil pipeline tariff filing, JA 104 (pertinent provisions quoted in Rehearing Order at P 7, JA 86-87)

GLOSSARY

Shippers	Parties that protested MarkWest's November 2005 tariff filing and entered into Settlement in 2006: GulfMark Energy, Inc.; Sunoco Partners Marketing & Terminals, L.P.; and Merit Energy Company, LLC
Tariff Order	Order on Tariff Filing and Granting Clarification, *MarkWest Michigan Pipeline Company, L.L.C.*, 126 FERC ¶ 61,300 (2009), R. 5, JA 63

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

STATEMENT OF THE ISSUE

Whether the Federal Energy Regulatory Commission ("Commission" or "FERC") reasonably rejected a proposed rate increase, based on its interpretations of its oil pipeline rate indexing regulations and of a rate settlement it had previously approved, and its determination that annual rate increases implemented under the terms of that settlement constituted the pipeline's ceiling levels for purposes of FERC's indexing regulations.

STATUTORY AND REGULATORY PROVISIONS

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

INTRODUCTION

This case concerns an issue of first impression arising from the interplay between the Commission's oil pipeline rate indexing regulations and a provision in a Commission-approved rate settlement, each of which the Commission has broad authority to interpret. In the orders challenged on appeal, the Commission determined the treatment of annual rate increases that were capped, pursuant to a settlement, below the indexed ceiling levels otherwise permitted by the Commission's indexing regulations.

In 2006, Petitioner MarkWest Michigan Pipeline Company, L.L.C. ("MarkWest") entered into a settlement resolving objections to its oil pipeline tariff filing. The settlement instituted a three-year moratorium on rate increases, with a limited exception providing for MarkWest to implement annual inflation-based increases determined by a formula set forth in the tariff, in lieu of the generic inflation-based increases provided under the Commission's rate indexing regulations.

After the contractual moratorium expired, MarkWest sought to raise its rates to the ceiling level that would have accrued if it had fully indexed its rates each

year during the moratorium. In the orders on appeal here, the Commission rejected the increase, concluding that the annual increases filed during the moratorium were settlement rates and thus constituted the applicable ceiling levels under the indexing regulations, and holding that MarkWest could not increase its rates further by indexing until the next index period. *MarkWest Mich. Pipeline Co., L.L.C.*, 126 FERC ¶ 61,300 (2009) ("Tariff Order"), R. 5, JA 63, *reh'g denied*, 130 FERC ¶ 61,084 (2010) ("Rehearing Order"), R. 9, JA 84 (together, the "FERC Orders").[1]

STATEMENT OF FACTS

I. STATUTORY AND REGULATORY BACKGROUND

In 1906, Congress extended the definition of common carrier under the Interstate Commerce Act ("ICA") to oil pipelines and required that their rates be just and reasonable. *See* 49 U.S.C. app. § 1(5) (1988). 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). The traditional standards governing rate regulation under the ICA were not modified. *See generally Ass'n of Oil Pipe Lines v. FERC*, 83 F.3d 1424, 1428 n.6 (D.C. Cir. 1996) (explaining

[1] "R." refers to a record item. "JA" refers to the Joint Appendix page number. "P" refers to the internal paragraph number within a FERC order.

background of statute and its unusual citation format, to 49 U.S.C. § 1 *et seq.* (1976), *reprinted in* 49 U.S.C. app. § 1 *et seq.* (1988)).

In 1985, the Commission established a fairly traditional cost-of-service methodology for determining oil pipeline rates. *Williams Pipe Line Co.*, 31 FERC ¶ 61,377 at 61,833 (1985). In the years that followed, adjudicated rate proceedings for oil pipelines, although few in number, were long, complicated, and costly. *See 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 30,943 (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*, 83 F.3d 1424. For that reason, Congress passed the Energy Policy Act of 1992 ("EPAct"),[2] requiring 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 regulatory costs and delays." EPAct §§ 1801(a), 1802(a). *See generally ExxonMobil Oil Corp. v. FERC*, 487 F.3d 945, 956-57 (D.C. Cir. 2007) (summarizing background of EPAct and Order No. 561).

Accordingly, in 1993, the Commission issued Order No. 561, in which it adopted a methodology for oil pipelines to adjust their rates using an index system

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

that establishes industry-wide ceiling levels for such rates. *See id.* at 30,940-41. *See generally Ass'n of Oil Pipe Lines*, 83 F.3d at 1430-31. The purpose of this process is to allow rates to track inflation in the general economy, essentially preserving pipelines' existing rates in real economic terms. Order No. 561 at 30,948-50.

The Commission's methodologies and procedures for indexed rate changes are set forth in 18 C.F.R. § 342.3. Under that regulation, each index year runs from July 1 to June 30. 18 C.F.R. § 342.3(c). At any time during that period, a carrier may change its rate "to a level [that] does not exceed the ceiling level" established in accordance with the regulation. 18 C.F.R. § 342.3(a). In general, that "ceiling level" is to be determined by multiplying the previous year's ceiling level by an index that the Commission publishes each year. 18 C.F.R. § 342.3(d)(1).[3] If, however, the new ceiling level calculated is below the carrier's filed rate — for instance, if the published index for a given year is negative, as might occur in times of deflation — the carrier must reduce its rate to comply with

[3] In 2006, 2007, and 2008 (the years in which MarkWest filed annual rate adjustments during the moratorium period under the Settlement), the industry-wide ceilings for the index increases, set by the Commission based on annual changes in the Producer Price Index for Finished Goods, were 6.1485%, 4.3186%, and 5.1653%, respectively. *See* Notices of Annual Change in the Producer Price Index For Finished Goods, *Revisions to Oil Pipeline Regulations Pursuant to the Energy Policy Act of 1992*, 115 FERC ¶ 61,295 (2006), 119 FERC ¶ 61,155 (2007), and 123 FERC ¶ 61,195 (2008).

that new, lower ceiling level. 18 C.F.R. § 342.3(e). Regardless of those generally applicable ceiling level calculations, however, "[w]hen 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." 18 C.F.R. § 342.3(d)(5).

II. THE COMMISSION PROCEEDINGS AND ORDERS

A. Prior Proceeding: 2006 Settlement

The instant dispute stems from the settlement of a previous rate proceeding. In November 2005, MarkWest filed new rates for an oil pipeline that it operates in Michigan. Two shippers, GulfMark Energy, Inc. and Sunoco Partners Marketing & Terminals, L.P., joined by another party, Merit Energy Company, LLC (collectively, the "Shippers"), protested the rate filing. *See* Offer of Settlement at 3, *MarkWest Mich. Pipeline Co.*, FERC Docket No. IS06-41 (filed Jan. 31, 2006) ("2006 Offer of Settlement"). (As MarkWest notes (Br. 3 n.2), Merit is not itself a shipper; rather, Merit claims an economic interest in MarkWest's rates, based on Merit's sales of crude oil to GulfMark, in that Merit's revenues from such sales are affected by pipeline transportation rates. *See* Joint Motion to Intervene, Protest and Request for Clarification, *MarkWest Mich. Pipeline Co.*, FERC Docket No. IS09-147 (filed Mar. 11, 2009), R. 2 at 5, JA 15.)

MarkWest and the Shippers reached a settlement agreement resolving the dispute (the "Settlement"), which the Commission approved on April 3, 2006. Letter Order, *MarkWest Mich. Pipeline Co.*, 115 FERC ¶ 61,002 (2006); *see also* 2006 Offer of Settlement (describing terms and submitting public version of Settlement).[4] Consistent with its standard for approving uncontested settlements (*see* 18 C.F.R. § 385.602(g)(3)), the Commission concluded that the Settlement "appears to be fair and reasonable and in the public interest . . . ." 115 FERC ¶ 61,002 at P 3.

The Settlement established new pipeline rates, to be made effective February 1, 2006. *See* 2006 Offer of Settlement at 5. The Settlement also instituted a three-year moratorium during which MarkWest would not alter its rates, except as provided in the Settlement itself, and the Shippers would not challenge MarkWest's rates. Settlement, Sec. 2.04(a) (submitted as Attachment 2 to 2006 Offer of Settlement; quoted in Rehearing Order at P 7, JA 86-87), JA 107-08. Of relevance here, one exception to the moratorium was that MarkWest was permitted to implement an annual inflation-based rate increase, subject to a contractually-determined cap:

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[4] MarkWest notes that there was "at least one" other shipper that was not a party to the Settlement. Br. 19. In any event, the unnamed remaining shipper did not protest MarkWest's initial tariff filing in November 2005, the Settlement in January 2006, any of the annual rate increases that MarkWest filed during the moratorium, or MarkWest's February 2009 rate filing at issue here.

> (i) MarkWest may file to increase Michigan Line rates effective each July 1st during the Moratorium Period to reflect positive inflation adjustments as promulgated annually by the FERC pursuant to 18 C.F.R. Section 342.3(d); and Sunoco, GulfMark and Merit agree not to protest MarkWest's rate changes, provided, however, that any increase in rates does not exceed an annual inflation cap herein agreed to by the Parties ("Annual Inflation Cap") . . . .

Settlement, Sec. 2.04(a)(i), JA 107. The Settlement set forth the method for calculating the Annual Inflation Cap, based on data reported annually by the U.S. Department of Labor. *Id.*, Sec. 2.04(a)(i)(1)-(2), JA 107-08.[5]

The Settlement further limited such annual increases to 10 percent and preserved the operation of the indexing regulations in requiring rate *decreases*:

> The Parties agree that July 1st adjustments to MarkWest's rates under the Annual Inflation Cap shall be limited to no less than zero (0) percent and no more than ten (10) percent in any year. MarkWest shall reflect negative inflation adjustments only to the extent such decreases are required by 18 C.F.R. Section 342.3(e) due to MarkWest's ceiling rates falling below the rates permitted under Section 2.04(a)(i).

Settlement, Sec. 2.04(a)(ii), JA 108.

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[5] That formula, which is not at issue in this appeal, provided that the Annual Inflation Cap would equal the Producer Price Index for Finished Goods Less Food and Energy for the prior calendar year, plus 50 percent of the Energy component. Settlement, Sec. 2.04(a)(i)(1)-(2). For comparison, the industry-wide index factor published by the Commission in each of the relevant years was derived from the annual change in the Producer Price Index for Finished Goods plus 1.3 percent. *See* Order Establishing Index for Oil Price Change Ceiling Levels, *Five-Year Review of Oil Pricing Index*, 114 FERC ¶ 61,293 at P 2 (2006); *see also* Notices cited in *supra* note 3.

B. Tariff Order

The three-year moratorium expired, by the terms of the Settlement, on January 31, 2009. Tariff Order at P 2, JA 63; Settlement, Sec. 2.04(a)(ii), JA 108. On February 24, 2009, MarkWest filed a revised tariff that would raise its rates to the full ceiling level to which, absent the moratorium and the Annual Inflation Cap, it could have escalated the initial rates under the Commission's indexing regulations during that three-year period — that is, multiplying the initial rates established in the Settlement by the FERC index factors for 2006, 2007, and 2008. *See* Tariff Filing at 2, R. 1, JA 2; *see also* Tariff Order at P 10, JA 67-68. Specifically, MarkWest proposed to increase the initial 2006 rate by 6.1485% (the multiplier for the 2006-2007 index year), then increase that new total by 4.3186% (for 2007-2008), then increase that total by 5.1653% (for 2008-2009). *See* Tariff Filing, Attachment 2, JA 10; *cf. supra* note 3. Two of the parties to the Settlement, GulfMark Energy, Inc. and Merit Energy Company, LLC, protested the filing. R. 2, JA 11.

On March 31, 2009, the Commission rejected MarkWest's tariff filing. Order on Tariff Filing and Granting Clarification, *MarkWest Mich. Pipeline Co., L.L.C.*, 126 FERC ¶ 61,300 (2009) ("Tariff Order"), R. 5, JA 63. The Commission concluded, based on its interpretation of the Settlement and of its indexing regulations, that the capped annual increases during the moratorium were

settlement rates, because they implemented the Settlement. *Id.* at PP 5-6, JA 65-66. Therefore, the Commission determined that each annual increase was a "rate changed by a method other than indexing" that became the next ceiling level under 18 C.F.R. § 342.3(d)(5); accordingly, the adjusted rate that MarkWest had filed in 2008, in accordance with the Annual Inflation Cap, was the relevant ceiling level for purposes of calculating the first post-moratorium increase under the indexing regulations. Tariff Order at P 10, JA 67-68. The Commission also held that MarkWest could not increase its rates by indexing until the next index period (beginning in July 2009) because the Settlement contemplated only one adjustment during each index period. *Id.* at P 9, JA 67.

C. Rehearing Order

MarkWest filed a Request for Rehearing on April 30, 2009. R. 7, JA 69. On February 2, 2010, the Commission issued its Order Denying Rehearing, *MarkWest Mich. Pipeline Co., L.L.C.*, 130 FERC ¶ 61,084 (2010) ("Rehearing Order"), R. 9, JA 84. The Commission reaffirmed its conclusions that the capped annual increases were settlement rates and thus constituted MarkWest's ceiling levels for the 2006/2007, 2007/2008, and 2008/2009 index years. *See id.* at PP 9-11, 15, 18, JA 88-89, 91, 92. The Commission found that MarkWest had failed to demonstrate that the Commission's construction of its regulations and the

Settlement were unreasonable, and found MarkWest's contrary interpretations unpersuasive. *See id.* at PP 7-8, 12, JA 86-88, 89-90.

This appeal followed.

SUMMARY OF ARGUMENT

The FERC Orders in this case center upon the relationship between FERC's rate indexing regulations and a FERC-approved rate settlement — both of which the Commission is uniquely equipped to interpret. Therefore, the Commission's analysis of the Settlement's rate indexing provisions, in conjunction with FERC's indexing regulations, is particularly entitled to substantial deference.

First, the Commission reasonably determined that the annual inflation-based increases provided in the moratorium provisions of the Settlement were "rate[s] changed by a method other than indexing" for purposes of the indexing regulations. The Commission found that those rate adjustments implemented the Settlement, which had been joined by all but one shipper, with no opposition from any party. Therefore, the Commission's conclusion that the capped increases were settlement rates for purposes of the Commission's indexing regulations was consistent with those regulations, longstanding FERC policy in favor of rate settlements, the Congressional policy mandate to expedite and streamline oil pipeline ratemaking, and the terms of the uncontested Settlement itself.

Because FERC's indexing regulations provide that a "rate changed by a method other than indexing . . . will constitute the applicable ceiling level for that index year," each capped increase under the Settlement established MarkWest's ceiling level for the corresponding index year. Accordingly, the Commission properly concluded that, after the Settlement moratorium expired, MarkWest could not subsequently raise its rates to recapture the three years of fully indexed ceiling levels that would have accrued absent the Settlement, that MarkWest must calculate its next index increase based on the ceiling level set by its last contractual increase, and that MarkWest could not increase its rates by indexing before the next regulatory index year. The Commission did not extend the terms of the Settlement moratorium, explaining that MarkWest retained the option of filing at any time for non-indexed rates.

ARGUMENT

I. STANDARD OF REVIEW

The Court reviews FERC orders under the Administrative Procedure Act's arbitrary and capricious standard. *See, e.g.*, *Sithe/Independence Power Partners v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999). A court must satisfy itself that the agency "articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs.*

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

The Commission's decisions regarding rate issues are entitled to broad deference, because of "the breadth and complexity of the Commission's responsibilities." *Permian Basin Area Rate Cases*, 390 U.S. 747, 790 (1968); *see also Mo. Pub. Serv. Comm'n v. FERC*, 215 F.3d 1, 3 (D.C. Cir. 2000). The Commission's policy assessments are owed "great deference." *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 702 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

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] . . . ." *N. Border Pipeline Co. v. FERC*, 129 F.3d 1315, 1318 (D.C. Cir. 1997) (internal quotation marks and citation omitted); *accord Cent. Vt. Pub. Serv. Corp. v. FERC*, 214 F.3d 1366, 1369 (D.C. Cir. 2000); *ExxonMobil Oil Corp. v. FERC*, No. 07-1163, 2010 U.S. App. LEXIS 2620, at *5 (D.C. Cir. Feb. 5, 2010) (affirming FERC's interpretation of indexing regulation, 18 C.F.R. § 343.2(c)(1)). *See also Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) ("This broad deference is all the more warranted when . . . the regulation concerns a complex and highly technical regulatory program . . . [requiring] significant expertise and

entail[ing] the exercise of judgment grounded in policy concerns.") (internal quotation marks and citation omitted); *Amerada Hess Pipeline Corp. v. FERC*, 117 F.3d 596, 601 (D.C. Cir. 1997) ("FERC is entrusted with administering the regulations relating to oil pipelines and has an expertise in the field based on that jurisdiction.").

This Court likewise affords such deference to the Commission's interpretation of settlements it previously approved. *See Transcont'l Gas Pipe Line Corp. v. FERC*, 922 F.2d 865, 869 (D.C. Cir. 1991) (Court "affords a high degree of deference to the Commission's interpretation of a settlement agreement"); *Ameren Servs. Co. v. FERC*, 330 F.3d 494, 498 (D.C. Cir. 2003) (employing "a variation of the now familiar 'two-step'" set forth in *Chevron*); *see also N. Mun. Distribs. Group v. FERC*, 165 F.3d 935, 943 (D.C. Cir. 1999) ("Once the Commission has approved a settlement, the court will defer to the Commission's interpretation of it.").

II. THE COMMISSION REASONABLY INTERPRETED THE TERMS OF THE SETTLEMENT IN CONJUNCTION WITH ITS OWN INDEXING REGULATIONS

In considering MarkWest's February 2009 indexed rate filing, the Commission construed both its indexing regulations and the FERC-approved Settlement that had controlled MarkWest's annual inflation-based increases for the previous three years. The Commission noted that this dispute presented "a case of

first impression" involving interpretation of its oil rate indexing regulations. Tariff Order at P 5, JA 65.

Specifically, the Commission considered, for the first time, the effect of annual inflation-based increases implemented under a settlement that capped such increases at lower levels than the ceilings that otherwise would have been permitted under the indexing regulations. *See id.* at P 6, JA 66. The Commission had previously considered a scenario in which settlement rates set a ceiling level *higher* than the indexing regulations would otherwise permit. *See* Order No. 561 at 30,959 (noting that commenters had suggested allowing rate increases set by agreement "even though these rates may be above the ceiling level that would apply under the indexing methodology"). There, the Commission decided that permitting such higher rates "would further its policy of favoring settlements" (notwithstanding the Commission's lingering "concern[] that a pipeline [that] has market power can establish a higher rate through 'negotiation'"). *Id.* (explaining adoption of 18 C.F.R. § 342.4(c)). In the instant case, the Commission concluded that the same principle supported an interpretation of its indexing regulations that gave effect to a settlement that had established ceiling levels lower than the indexing methodology otherwise would have permitted.

A. The Commission Reasonably Determined That The Annual Increases Under The Settlement Were "Rate[s] Changed By A Method Other Than Indexing" Under Its Regulations

The Commission's rejection of MarkWest's post-moratorium effort to re-capture three years of index increases hinged on the Commission's conclusion that the annual rate increases provided in Section 2.04(a) of the Settlement were "rate[s] changed by a method other than indexing" under 18 C.F.R. § 342.3(d)(5). *See, e.g.*, Rehearing Order at PP 9-11, 15, 18, JA 88-89, 91, 92. As discussed below, each of the determinations that MarkWest challenges on appeal flowed from that finding: (1) that each capped annual increase constituted MarkWest's "ceiling level" for the corresponding index year (*see* Parts A.1 and A.2, *infra*); (2) that MarkWest could not, after the Settlement moratorium expired, raise its rates to the ceiling levels that would have accumulated under ordinary indexing (*see* Part B.1, *infra*); (3) that the 2008 increase was the ceiling level to be used in calculating the next index, for 2009/2010 (*see* Part B.2, *infra*); and (4) that MarkWest could not change its rates again by indexing during the 2008/2009 index year (*see* Part C, *infra*).

1. The Capped Increases Provided In The Settlement Were Settlement Rates

The Commission first reasonably determined that MarkWest's annual rate increases during the moratorium were settlement rates. Tariff Order at P 5, JA 65. The Commission began with the uncontroversial premise that the Settlement

validly established MarkWest's initial rates in 2006. *Id.*; *see also id.* at P 7 ("The Commission considers the January 2006 settlement rates as initial rates."), JA 66. In fact, MarkWest concurs outright: "It is not in dispute that, as of February 1, 2006, those rates were the 'initial rates' under [18 C.F.R.] Section 342.2 . . . ."). Br. 17 (citing Tariff Order at P 5, JA 65).

The Commission did note that the Settlement was "not filed in complete conformance with the provisions of section 342.2(b)," which requires the carrier to include a sworn affidavit attesting that at least one shipper agrees to an initial rate. Tariff Order at P 5, JA 65. That technicality, however, was immaterial because the Settlement was filed with the express consent — in the form of the executed Settlement — of more than one shipper and without a protest by any party. *Id.*; *see also id.* at P 6, JA 65; *cf.* 18 C.F.R. § 342.2(b) (allowing initial rate to be justified with consent of at least one shipper and absence of protest). Similarly, the Commission noted that 18 C.F.R. § 342.4(c) provides for a change in existing rates with shippers' agreement, and that, here, the subsequent rate changes were provided in the original uncontested Settlement. Tariff Order at P 5, JA 65.

The Commission's interpretation, moreover, is consistent with both statutory and regulatory purposes of simplifying oil rate cases and encouraging settlements to avoid lengthy and complex rate litigation. *See* Tariff Order at P 6 (citing "the broader purpose of the Energy Policy Act of 1992 . . . to simplify oil pipeline

regulation, including encouraging settlements in the context of litigation because of the efficiencies that may result."), JA 65-66; *id.* at P 5 ("[Order] No. 561 clearly encourages the setting of rates by agreement."), JA 65; *see also id.* at PP 5-6 nn.10-11 (citing Order No. 561 at 30,940-41, 30,944-45, 30,946-47, 30,959), JA 65-66. *See generally* Order No. 561 at 30,959 ("Congress, in the Act of 1992, encouraged settlement of oil pipeline rate cases. . . . Therefore, the existing Commission policy, of encouraging settlements, has been supplemented by Congressional policy mandate to expedite and streamline the ratemaking process for oil pipelines by lessening the need to rely on traditional adversarial processes.").

The Commission then reasonably construed Section 2.04 of the Settlement to mean that each annual rate increase "implemented" the original Settlement. Tariff Order at P 5, JA 65; *see also id.* at P 6 ("the rates established by the settlement were to be implemented as part of an indexing process over the course of the settlement"), JA 66; Rehearing Order at P 12 (Settlement "uses the Commission's indexing regulations as a procedural framework to implement the Settlement"), JA 90. The Commission reasoned that each such increase had been authorized in the Settlement, and was calculated in accordance with the Annual Inflation Cap formula stipulated therein. Rehearing Order at PP 10, 12, JA 88, 89-90. Once the Settlement had been put into effect without opposition, "there was

no need for any affidavits or other process as the settlement was implemented each indexing season thereafter" (also without opposition). Tariff Order at P 5, JA 65. As such, "the rates MarkWest filed in 2006, 2007, and 2008 pursuant to section 2.04 of the Settlement are 'settlement rates.'" Rehearing Order at P 12, JA 89; *accord id.* at P 15, JA 91.

Accordingly, the capped annual increases, being settlement rates, were "rate[s] changed by a method other than indexing" for purposes of the indexing regulations and thus would "constitute the applicable ceiling level" for each index year. 18 C.F.R. § 342.3(d)(5); *see* Rehearing Order at P 10 (when MarkWest filed to increase its rates up to the Annual Inflation Cap under Section 2.04(a) of the Settlement, it "changed its rates . . . by a method other than indexing, pursuant to section 342.3(d)(5)"), JA 88; *see also id.* at PP 9, 15, JA 88, 91.

2. MarkWest's Arguments To The Contrary Are Unavailing

MarkWest argues at length (*see* Br. 15-19) that the capped increases it implemented pursuant to the Settlement could not be considered "rate[s] changed by a method other than indexing" under 18 C.F.R. § 342.3(d)(5) because its annual filings during the moratorium did not meet a technical requirement for "settlement rates" under 18 C.F.R. § 342.4(c). That section provides that "[a] carrier may change a rate without regard to the [indexed] ceiling level" if the carrier verifies that every shipper agrees to the change. *Id.*

MarkWest notably "[did] not challenge on rehearing . . . the Commission's finding that the rates [MarkWest] filed during the three year term of the Settlement were settlement rates." Rehearing Order at P 12, JA 89. Nor did its Rehearing Request even cite, let alone discuss, the Commission's interpretation of "rate[s] changed by a method other than by indexing" in 18 C.F.R. § 342.3(d)(5) — which MarkWest now understands to be "central to the instant matter" (Br. 17). *See* Rehearing Order at P 9 ("MarkWest's argument on rehearing regarding its ceiling level ignores section 342.3(d)(5)"), JA 88; *see also* Rehearing Request at 2-3 (stating specific objections to Tariff Order), JA 70-71.

MarkWest did discuss those points earlier in the proceeding (Answer at 6-8, R. 3, JA 28-30), and thus arguably is not precluded from raising its objections on appeal[6]; nevertheless, its newfound emphasis on key agency findings that it left unchallenged below is notable. But MarkWest has never — either before the Commission or in its opening brief on appeal — disputed the Commission's finding that each capped increase was determined in accordance with the Settlement and "implemented" its provisions, without the need for further negotiations or agreements. *See supra* pp. 18-19; Tariff Order at P 5, JA 65.

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[6] *Cf. ExxonMobil Oil Corp. v. FERC*, 487 F.3d 945, 962 (D.C. Cir. 2007) (though raising issue on rehearing is not required under Interstate Commerce Act, "full airing" of issues before agency affords more complete record for judicial review and ensures "simple fairness" to agency and other litigants).

In any case, MarkWest's contentions lack merit. The Commission supported its finding of settlement rates by explaining that 18 C.F.R. § 342.4(c) was premised on shippers' support and, consistent with Order No. 561, encouraged the setting of rates by agreement. Tariff Order at PP 5-6, JA 65-66. As noted *supra* at p. 15, Order No. 561 and § 342.4(c) contemplated settlement rates that could *exceed* the indexed ceiling levels, and required shippers' unanimous consent for that reason. Conversely, MarkWest's regulatory interpretation — which would disregard a lower ceiling level established by a settlement agreement, in the absence of an objecting shipper (and based on the pipeline's own filing of the agreed-upon rate change without a representation regarding unanimous shipper consent) — "would defeat both purposes" of simplification and settlement. Tariff Order at P 6, JA 66. Such interpretations — and assessments of their policy implications — are uniquely within the Commission's purview, and its findings are entitled to substantial deference. *See supra* pp. 13-14.

Nor did MarkWest submit any evidence to contradict the Commission's finding; MarkWest simply pointed to its own inclusion, in its annual filings for capped increases during the moratorium, of a separate calculation of what its ceiling level would have been under ordinary indexing, absent the Settlement's alternative methodology. *See* Rehearing Order at P 12, JA 89-90; *see also* Br. 5, 19. But the Settlement itself did not direct MarkWest to maintain separate

calculations of the indexed increases; the Settlement's only mention of the indexed ceiling was to determine whether MarkWest would be required to lower its rates to reflect a negative inflation adjustment. *See* Rehearing Order at P 12, JA 89; Settlement, Sec. 2.04(a)(ii) (providing for rate decreases pursuant to 18 C.F.R. § 342.3(e)). And, contrary to MarkWest's claim (Br. 13-14), there is no inherent contradiction between the Settlement's preservation of the Commission's indexed ceiling to determine any *downward* rate adjustment (in Section 2.04(a)(ii)), on the one hand, and the Settlement's establishment of an alternative methodology to constrain any *upward* adjustment (in Section 2.04(a)(i)), on the other. *Cf.* Rehearing Order at P 10 (explaining that, under Section 2.04(a)(ii), MarkWest should calculate the FERC index to check whether a rate decrease was required; "[i]f not, pursuant to section 2.04(a)(i) . . . MarkWest was free to increase its . . . rate up to the Annual Inflation Cap established by the Settlement terms"), JA 88.

B. The Commission Reasonably Concluded That The Capped Annual Increases Implemented Under The Settlement Established MarkWest's Ceiling Levels For Each Index Year

1. MarkWest Cannot Revise Its Ceiling Levels To The Maximum Indexed Levels For The Three Years That It Filed Settlement Rates

Based on its determination that the annual increases under the Settlement were settlement rates and thus constituted MarkWest's ceiling levels under 18 C.F.R. § 342.3(d)(5), the Commission reasonably concluded "that the operation of

the Commission's indexing regulations, in conjunction with the Settlement[,] precludes MarkWest during the 2006/2007, 2007/2008, and 2008/2009 index years from raising its rates to what [its] ceiling level would have been if it had not been subject to the Settlement." Rehearing Order at P 15, JA 91.

MarkWest disagrees, arguing that the capped increases provided in the Settlement did not displace the ceiling level calculation under 18 C.F.R. § 342.3(d). Br. 8-9. Instead, MarkWest suggests, the rate increases that it filed during the moratorium were only its "actual rates," which did not alter the indexed ceiling level. *See* Br. 4-5, 17-18; 18 C.F.R. § 342.3(d)(3) ("A carrier must compute the ceiling level each index year without regard to the actual rates filed pursuant to this section."), *quoted at* Br. 4. MarkWest, however, ignores the fact that, under § 342.3(d)(5), a "rate changed by a method other than indexing" *is* the "applicable ceiling level."

Moreover, the Commission explained that the distinction in its indexing regulations between ceiling levels and "actual rates" recognizes that oil pipelines "may not always be able to take the full annual increase due to competitive pressures." Tariff Order at P 10, JA 68. Thus, the regulations recognize that a carrier may, for competitive reasons, file actual rates that are below the permissible ceiling levels. *See* 18 C.F.R. § 342.3(d)(3). The regulations allow pipelines to "raise their rates at any time to the ceiling [level] if the competitive situation later

permits such a rate increase [*see* 18 C.F.R. § 342.3(a)] because any increase up to that [inflation-based] level is presumed to be just and reasonable." Tariff Order at P 10 (citing Order No. 561 at 30,949-50), JA 68. But that rationale for those regulatory provisions "does not apply when the parties have established a contractual rate level that has been accepted by the Commission as reasonable in the context of a litigated proceeding." Tariff Order at P 10, JA 68; *cf. supra* p. 7 (noting FERC approval of the Settlement as "fair and reasonable").

Turning to that contractual arrangement, the Commission found further support in Section 2.04 of the Settlement, concluding that the purpose of the Annual Inflation Cap was "to hold down the index increase below what MarkWest would otherwise have been able to pursue, that is, a full annual index increase under the indexing regulations." Tariff Order at P 9, JA 67; *cf. supra* note 5 (noting that FERC's published index is derived from the full Producer Price Index For Finished Goods plus 1.3 percent, while the Settlement's Annual Inflation Cap was derived from that same Producer Price Index minus certain components). Thus, by entering into the Settlement, MarkWest "gave up the right to index its rates to the full percentage allowed for the three subsequent [annual] increases, July 1, 2006, 2007, and 2008." Tariff Order at P 10, JA 68. That concession "was contractually binding and precludes MarkWest from later increasing the ceiling rate to the level that would otherwise have been available under the Commission's

regulations." *Id.*; *see also id.* (MarkWest "permanently surrendered the right to a maximum rate increase above the agreed [Settlement] levels" that governed its 2006, 2007, and 2008 filings); *cf. id.* at P 6 ("the indexing regulations allow only one 'bite of the apple'"), JA 66.[7] The Commission's interpretation of the Settlement it had earlier approved, and the purpose of the Settlement's provision for inflation-based increases, is entitled to substantial deference — especially where that provision operates in the context of the Commission's own regulatory indexing scheme.

2. The Capped Increase That MarkWest Filed In 2008 Pursuant To The Settlement Constitutes Its Ceiling Level For Calculating Its 2009/2010 Indexed Ceiling Level

Having rejected MarkWest's effort to recapture the three years of fully indexed ceiling levels that it had forgone pursuant to the Settlement, the Commission properly determined that its then current (for the 2008-2009 index year) ceiling level was its last rate increase subject to the Annual Inflation Cap, filed in 2008 for the 2008/2009 index year. Tariff Order at P 10, JA 67-78; *accord* Rehearing Order at P 15 ("Once MarkWest's third annual increase to its settlement

[7] MarkWest has not suggested that the cumulative effect of this contractual limitation on its ceiling levels prevents it from recovering its costs. Of course, in such a case, the Commission's regulations provide for a cost-of-service rate change. *See* 18 C.F.R. § 342.4(a) (carrier may change rate "if it shows that there is a substantial divergence between the actual costs experienced by the carrier" and its ceiling level such that the carrier could not "charge a just and reasonable rate").

rates became effective on July 1, 2008, those rates became [its] ceiling level through the end of that index year, June 30, 2009."), JA 91; *see also id.* at P 18 (same), JA 92. The Commission explained the cumulative calculation of MarkWest's three capped increases under the annual indexing procedures: "Because MarkWest changed its rates during the 2006/2007 index year by a method other than indexing, pursuant to [18 C.F.R. § 342.3(d)(5)]," the rate increase MarkWest filed in mid-2006 "became its ceiling level for the remainder of the 2006/2007 index year." Rehearing Order at P 10, JA 88. Likewise, MarkWest's rate changes pursuant to Section 2.04(a) of the Settlement during the 2007/2008 and 2008/2009 index years became its ceiling levels for each of those index years. Rehearing Order at P 11, JA 89. Accordingly, MarkWest's rate increase in 2008 "became [its] ceiling level for the remainder of the 2008/2009 index year; i.e., through June 30, 2009." *Id.*

C. The Commission Did Not Extend The Settlement Moratorium, But Only Precluded MarkWest From Filing Indexed Rates Before The Next Index Period

The Commission's determination that each annual rate increase implemented under the Settlement would constitute MarkWest's ceiling level by operation of the indexing regulations also compelled rejection of MarkWest's February 2009 rate filing. The Commission did not "re-form[]" the contract to "extend[] the term" of the moratorium beyond January 31, 2009, as MarkWest

contends. Br. 8, 21-22. To the contrary, because MarkWest's annual inflation increase filed in 2008 constituted its rate ceiling level for the index year that began July 1, 2008, the Commission reasonably read its regulation to preclude further rate increases during the same index year. Rehearing Order at P 15, JA 91; 18 C.F.R. § 342.3(d)(5) ("When . . . [a] 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*.") (emphasis added); 18 C.F.R. § 342.3(c) ("The index year is the period from July 1 to June 30.").

The Commission also found this result consistent with its intent when it promulgated the indexing regulations in Order No. 561. Rehearing Order at P 16, JA 91. In that rulemaking, the Commission explained why it would not allow a pipeline, having implemented an initial rate or a rate change through a method other than indexing, to index its rates before the next index period:

> This limitation is to preserve the integrity of the annual indexing concept. The index is intended to limit the amount by which a rate may be increased on an annual basis. To allow a rate established, or changed by a method other than indexing, during the index year to be further increased by the full amount allowed by the index would be contrary to the policy that the ceiling level is established on an annual basis, to be applied during an index year.

Order No. 561 at 30,954, *quoted in* Rehearing Order at P 16, JA 91.

Moreover, the Commission found additional support for its conclusion in the Settlement itself. Though the contractual rate moratorium ended in January, the

Settlement's rate increase mechanism was expressly tied to the Commission's indexing procedures — including its demarcation of the index year. *See, e.g.*, Rehearing Order at P 12, JA 90; *see also* Settlement, Sec. 2.04(a)(i) (referencing index regulations and specifying that MarkWest could file capped increases "effective each July 1st"). In addition, the Settlement described the limitation on MarkWest's annual increase as an *Annual* Inflation Cap, "which makes sense only if the increase is projected forward for an entire year." Tariff Order at P 9, JA 67. Indeed, to read the language otherwise would convert the formula applied in 2008 to "a semi-annual inflation cap." *Id.* Thus, the Commission reasonably concluded that, "[h]aving agreed to limit the amount of the annual increase by contract, . . . MarkWest cannot shorten that period." *Id.* (emphasis in original).

That said, the Commission did not hold that MarkWest could not seek a rate increase *other than* by indexing. The Commission clarified that its ruling precluded only an index-based rate change during the then-current index year: "[B]ecause MarkWest changed its rates by a method other than indexing in the 2008/2009 index year, . . . by operation of the Commission's indexing regulations MarkWest was barred from seeking a further rate increase *under 18 C.F.R. § 342.3(a)* during the remainder of the 2008/2009 index year, i.e., through June 30, 2009." Rehearing Order at P 18 (emphasis added), JA 92. But the Commission recognized that the moratorium under the Settlement had ended on January 31,

2009, "leaving MarkWest free to petition for a rate change to the extent permitted under the Commission's oil pipeline rate methodologies." *Id.* "After[] January 31, 2009 . . . MarkWest could have filed for cost-of-service rates, market-based rates, or new settlement rates." *Id.* at P 14 (citing 18 C.F.R. § 342.4), JA 90.

CONCLUSION

For the reasons stated, the petition for review should be denied and the challenged FERC Orders should be affirmed in all respects.

Respectfully submitted,

Christine A. Varney
Assistant Attorney General

Robert B. Nicholson
Robert J. Wiggers
Attorneys

U.S. Department of Justice
Washington, DC 20530
(202) 514-2460

Thomas R. Sheets
General Counsel

Robert H. Solomon
Solicitor

/s/ Carol J. Banta
Attorney

Federal Energy Regulatory Commission
Washington, DC 20426
(202) 502-6600

September 22, 2010
Final Brief: November 12, 2010

MarkWest Michigan Pipeline Company, L.L.C. v. FERC & U.S.,
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CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I certify that the Brief of Respondents contains 6,701 words, not including the tables of contents and authorities, the glossary, the certificates of counsel, and the addendum.

s/ Carol J. Banta
Carol J. Banta
Attorney

Federal Energy Regulatory
Commission
Washington, DC 20426
Tel.: (202) 502-6433
Fax: (202) 273-0901

November 12, 2010

ADDENDUM

Statute and Regulations

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Interstate Commerce Act, 49 U.S.C. app. § 1(5), provides 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.

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.

(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

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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 12th day of November 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:

Charles F. Caldwell Vinson & Elkins LLP 1001 Fannin Street First City Tower, Suite 2500 Houston, TX 77002-6760	Email
Elizabeth Barnidge Kohlhausen Vinson & Elkins LLP 1001 Fannin Street First City Tower, Suite 2500 Houston, TX 77002-6760	Email
John J. Powers III U.S. Department of Justice (DOJ) Antitrust Division, Appellate Section 950 Pennsylvania Avenue, NW Washington, DC 20530	US Mail
John Paul Floom Edwards & Associates 1517 King Street Alexandria, VA 22314	Email

Katherine Bourke Edwards — Email
Edwards & Associates
1517 King Street
Alexandria, VA 22314

Robert B. Nicholson — Email
U.S. Department of Justice
(DOJ) Antitrust Division,
Appellate Section
950 Pennsylvania Avenue, NW
Washington, DC 20530

Robert J. Wiggers — Email
U.S. Department of Justice
(DOJ) Antitrust Division,
Appellate Section
950 Pennsylvania Avenue, NW
Washington, DC 20530

/s/ Carol J. Banta
Carol J. Banta
Attorney

Federal Energy Regulatory
Commission
Washington, DC 20426
Tel: (202) 502-6433
Fax: (202) 273-0901
Email: carol.banta@ferc.gov