

ORAL ARGUMENT NOT YET SCHEDULED

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

No. 08-1270

**(consolidated with 08-1271, 09-1025, 09-1026, 09-1030, 09-1031,
09-1033, 09-1215, 09-1222, 09-1223, 09-1229, 09-1232)**

**FLINT HILLS RESOURCES ALASKA, LLC, *et al.*,
PETITIONERS**

v.

**FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.**

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

**BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

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COMMISSION
WASHINGTON, DC 20426**

**APRIL 16, 2010
FINAL BRIEF: JULY 21, 2010**

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties

The parties are as stated in the Joint Brief of Petitioners Flint Hills Resources Alaska, LLC, *et al.*

B. Rulings Under Review:

The rulings under review appear in the following orders issued by the Federal Energy Regulatory Commission:

1. *BP Pipelines (Alaska) Inc.*, 123 FERC ¶ 61,287 (June 20, 2008) (“Opinion No. 502”) (JA 117);
2. *BP Pipelines (Alaska) Inc.*, 125 FERC ¶ 61,215 (November 20, 2008) (“First Rehearing Order”) (JA 231); and
3. *BP Pipelines (Alaska) Inc.*, 127 FERC ¶ 61,317 (June 30, 2009) (“Second Rehearing Order”) (JA 268).

C. Related Cases:

Earlier petitions for review of Opinion No. 502 were dismissed as incurably premature in *BP Pipelines (Alaska) Inc. v. FERC*, D.C. Cir. Nos. 08-1269, *et al.* (consolidated) (dismissed Jan. 22, 2009). Petitions for review of later FERC orders concerning interstate rates on the same pipeline for 2007 and 2008 are currently pending in abeyance before this Court in *Williams Alaska Petroleum, Inc. v. FERC*, D.C. Cir. Nos. 09-1078, *et al.* (consolidated).

In addition, petitions for review of FERC orders concerning the method for calculating certain inflation adjustments for the TAPS Quality Bank are pending before the Court in *Flint Hills Resources Alaska, LLC v. FERC*, DC. Cir. Nos. 06-1361, *et al.* (consolidated). Consolidated appeals also are before this Court in *Petro Star Inc. v. FERC*, D.C. Cir. Case Nos. 09-1236, *et al.*, relating to the effective date for certain TAPS Quality Bank changes. Both of those sets of consolidated appeals are currently in briefing.

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GLOSSARY

Alaska	State of Alaska
Alaska Commission	Regulatory Commission of Alaska
Alaska Pipeline or TAPS	Trans Alaska Pipeline System
ALJ	Administrative Law Judge
ALJ Decision	<i>BP Pipelines (Alaska) Inc.</i> , 119 FERC ¶ 63,007 (2007)
<i>Amerada Hess v. Alaska Comm'n</i>	<i>Amerada Hess Pipeline Co. v. Regulatory Commission of Alaska</i> , 176 P.3 667 (Alaska 2008)
<i>Arctic Slope</i>	<i>Arctic Slope Regional Corp. v. FERC</i> , 832 F.2d 158 (D.C. Cir. 1987)
<i>Association of Oil Pipelines</i>	<i>Association of Oil Pipelines v. FERC</i> , 83 F.3d 1424 (D.C. Cir. 1996)
Commission or FERC	Federal Energy Regulatory Commission
<i>Farmers Union I</i>	<i>Farmers Union Central Exchange v. FERC</i> , 584 F.2d 408 (D.C. Cir. 1978)
<i>Farmers Union II</i>	<i>Farmers Union Central Exchange v. FERC</i> , 734 F.2d 1486 (D.C. Cir. 1984)
First Rehearing Order	<i>BP Pipelines (Alaska) Inc.</i> , 125 FERC ¶ 61,215 (2008)
ICA	Interstate Commerce Act
ICC	Interstate Commerce Commission

Indicated TAPS Carriers	ConocoPhillips Transportation Alaska, Inc., ExxonMobil Pipeline Company, and Koch Alaska Pipeline Company, LLC
Opinion No. 154-B	<i>Williams Pipe Line Co.</i> , 31 FERC ¶ 61,377 (1985)
Opinion No. 502	<i>BP Pipelines (Alaska) Inc.</i> , 123 FERC ¶ 61,287 (2008)
Second Rehearing Order	<i>BP Pipelines (Alaska) Inc.</i> , 127 FERC ¶ 61,317 (June 30, 2009)
Settlement Order	<i>Trans Alaska Pipeline System</i> , 33 FERC ¶ 61,064 (1985)
TAPS Carriers	BP Pipelines (Alaska) Inc., ConocoPhillips Transportation Alaska, Inc., ExxonMobil Pipeline Company, Koch Alaska Pipeline Company, and Unocal Pipeline Company.
TAPS Settlement Agreement or TSA	TAPS interstate settlement agreement, a FERC-approved 1985 rate settlement between Pipeline owners and State of Alaska
TAPS Settlement Methodology or TSM	Rate-setting methodology set forth in the TAPS Settlement Agreement

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**BRIEF FOR RESPONDENT
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STATEMENT OF THE ISSUES

Three groups of petitioners seek review of orders of the Federal Energy Regulatory Commission (“Commission” or “FERC”) determining just, reasonable, and not unduly discriminatory rates for transportation of oil through the Trans Alaska Pipeline System (“Alaska Pipeline” or “TAPS”). The issues raised are as follows:

(1) **Cost analysis.** Whether the Commission reasonably resolved various cost methodology issues and disputes pertaining to calculation of particular cost items such as depreciation and deferred return. [Raised by all TAPS Carriers]

(2) **Uniform rates.** Whether the Commission reasonably determined that the TAPS Carriers should charge a uniform rate and pool revenues, when the carriers all have virtually identical costs and provide the same service. [Raised by some TAPS Carriers.]

(3) **Undue discrimination.** Whether the Commission reasonably denied the request of the state of Alaska for additional relief based on Alaska's claim that the TAPS interstate rates for 2005 and 2006 were unduly discriminatory in comparison with intrastate rates. [Raised by the State of Alaska.]

STATUTES AND REGULATIONS

Pertinent statutes and regulations are set out in the Addendum to this brief.

INTRODUCTION

The Commission orders challenged here are *BP Pipelines (Alaska) Inc.*, “Opinion and Order on Initial Decision,” 123 FERC ¶ 61,287 (June 20, 2008) (“Opinion No. 502”) (JA 117); “Order on Rehearing and Compliance,” 125 FERC ¶ 61,215 (November 20, 2008) (“First Rehearing Order”) (JA 231); and “Order on Rehearing,” 127 FERC ¶ 61,317 (June 30, 2009) (“Second Rehearing Order”) (JA 268). The overarching issue is whether the 2005 and 2006 rates filed by the Trans

Alaska Pipeline System carriers (“TAPS Carriers”)¹ are just and reasonable under the Interstate Commerce Act (“ICA”). By statute, simplified ratemaking methods such as indexing may not be used to determine the reasonableness of Alaska Pipeline rates. Accordingly, the Commission applied long-standing cost-of-service ratemaking principles in determining the reasonableness of the challenged rates.

Agreeing with the Administrative Law Judge (“ALJ”) after hearing, the Commission found the rates to be unjust and unreasonable, and ordered them reduced. Because the TAPS Carriers provide the same service and incur virtually identical costs, FERC also required the TAPS Carriers to file uniform maximum rates and to develop a pooling mechanism to ensure that each individual carrier’s rates would be just and reasonable. Consistent with its usual policy, the Commission ordered refunds limited to the difference between the 2004 rate and the rates set forth in the TAPS Carriers’ 2005 and 2006 rate filings.

The Commission rejected Alaska’s claim for further refunds. The Commission upheld the ALJ’s finding that Alaska’s claim of discrimination, based on the disparity between the TAPS Carriers’ proposed interstate rates and the lower intrastate rates imposed by Alaska regulators, was rendered moot by the

¹ The TAPS Carriers are BP Pipelines (Alaska) Inc., ConocoPhillips Transportation Alaska, Inc., ExxonMobil Pipeline Company, Koch Alaska Pipeline Company, and Unocal Pipeline Company.

Commission's adjustment of the interstate rates. Nevertheless, the Commission also found that Alaska had not shown undue discrimination or proved damages to support additional relief.

STATEMENT OF FACTS

I. Statutory And Regulatory Background

A. The Interstate Commerce Act

In 1906, Congress extended the Interstate Commerce Commission's ("ICC") rate regulation authority to oil pipeline rates. In 1977, regulatory authority over oil pipelines was transferred from the ICC to FERC. Consequently, the Commission's regulation of oil pipeline rates (as relevant here) is dictated by the Interstate Commerce Act ("ICA") as it stood on October 1, 1977, 49 U.S.C. §§ 1-15 (1976), *reprinted in* 49 U.S.C. app. §§ 1-15 (1988). *See Association of Oil Pipelines v. FERC*, 83 F.3d 1424, 1428 n.6 (D.C. Cir. 1996) (explaining background and statute's unusual citation format); *Resolute Natural Resources Co. v. FERC*, 596 F.3d 840, 841 (D.C. Cir. 2010) (same).

The ICA requires oil pipelines to file all rates, fares, and charges. ICA § 6(1), 49 U.S.C. app. § 6(1). ICA §§ 1(5)(a) requires that all rates charged for oil pipeline transportation be just and reasonable. 49 U.S.C. app. §§ 1(5)(a). ICA § 2 prohibits "unjust discrimination" by a pipeline, defined as charging different rates for "a like and contemporaneous service . . . under substantially similar

circumstances and conditions” 49 U.S.C. app. § 2. Similarly, ICA § 3(1) bars a pipeline from giving “any undue preference or advantage.” *Id.* § 3(1).

The ICA also sets forth procedures for parties to challenge pipelines’ rates. *See* 49 U.S.C. app. §§ 13(1) (providing for complaints against carriers), 15(1) (authorizing Commission to prescribe just and reasonable rates if it determines, “after full hearing” upon a § 13 complaint or an investigation undertaken on the Commission’s own initiative, that a carrier’s rates are unjust and unreasonable), 15(7) (authorizing Commission to hold a hearing concerning lawfulness of newly-filed rate and, at its discretion, to suspend the rate pending such hearing).

B. Oil Pipeline Ratemaking

On the few occasions it addressed oil pipeline ratemaking, the ICC applied a “fair value” ratemaking methodology. *See Farmers Union Central Exchange v. FERC*, 584 F.2d 408, 411 n.3, 413 (D.C. Cir. 1978) (“*Farmers Union I*”). Under this methodology, the carriers generally received a rate of return of eight percent (if transporting crude oil) or ten percent (if transporting gasoline) applied to a “valuation rate base.” *Id.* at 415, 420 n.31. The valuation rate base consisted chiefly of a weighted average of original and reproduction costs. *See Farmers Union Central Exchange v. FERC*, 734 F.2d 1486, 1495 (D.C. Cir. 1984) (“*Farmers Union II*”).

Farmers Union I was the first judicial review of ICC oil pipeline ratemaking and was pending at the time oil pipeline regulation transferred to FERC. See *Association of Oil Pipelines*, 83 F.3d at 1429. The Court found that the legal and economic conditions pertinent to ratemaking had changed significantly since the 1940s, when the ICC had published most of its oil rate decisions, and that FERC, the agency now responsible for oil rate regulation, should consider the issues anew. Accordingly, the Court remanded the ICC proceeding to FERC. *Farmers Union I*, 584 F.2d at 414-22.

On remand, FERC announced its intent generally to leave rate determinations to market forces, and to apply the valuation rate base method if agency intervention were required. The Court remanded again, emphasizing that the ICA requires rates to be set within a zone of reasonableness, and that rates must be cost-based absent special circumstances. *Farmers Union II*, 734 F.2d at 1530. The Court urged the Commission to consider original cost ratemaking: “In all these respects, the original cost methodology, a proven alternative, enjoys advantages that should not be underestimated. FERC should reexamine this alternative” *Id.*

On remand, FERC found that “[i]t is evident that oil pipeline rates as a general rule must be cost-based.” *Williams Pipe Line Co.*, 31 FERC ¶ 61,377, 61,833 (1985) (“Opinion No. 154-B”), *opinion on reh’g*, 33 FERC ¶ 61,327

(1985); *see Association of Oil Pipelines*, 83 F.3d at 1429. Specifically, the Commission, following the Court’s guidance, adopted: (1) “net depreciated trended original cost” as the model for calculating rate bases; and (2) a rate of return dependent upon a particular pipeline’s risks and corresponding cost of capital. Opinion No. 154-B, 31 FERC at 61,833; *see Association of Oil Pipelines*, 83 F.3d at 1429. FERC described trended original cost as follows:

[Trended original cost,] just like net depreciated original cost, requires the determination of a nominal (inflation-included) rate of return on equity that reflects the pipeline’s risks and its corresponding cost of capital. Next, the inflation component of that rate of return is extracted. This leaves what economists call a “real” rate of return. The real rate of return times the equity share of the rate base yields the yearly allowed equity return in dollars. The inflation factor times the equity rate base yields the equity base write-up. That write-up, like depreciation, is written-off or amortized over the life of the property.
[footnote omitted]

Opinion No. 154-B, 31 FERC at 61,834; *see Association of Oil Pipelines*, 83 F.3d at 1429.

Because the Commission was switching from a valuation rate base to a trended original cost rate base, it also devised “a starting or transition rate base in dollars for existing plant.” Opinion No. 154-B, 31 FERC at 61,835. Adopting a middle ground between the higher rate base sought by pipelines and the lower one sought by shippers, FERC concluded that “the appropriate starting rate base should be the sum of a pipeline’s debt ratio times net depreciated cost and the equity ratio

times the reproduction portion of the valuation rate base depreciated by the same percentage as the book original cost rate base has been depreciated.” *Id.*²

II. The Trans Alaska Pipeline System

The Pipeline’s history is recounted in *Arctic Slope Regional Corp. v. FERC*, 832 F.2d 158 (D.C. Cir. 1987) (“*Arctic Slope*”). In brief, the 1969 discovery of vast oil fields on the North Slope of Alaska led to the joint construction by various oil companies of an 800-mile pipeline from Prudhoe Bay to the port of Valdez. The companies filed rates with the ICC and began flowing oil in 1977. *Id.* at 160.

The Pipeline is jointly owned by the TAPS Carriers, each having an undivided interest, with capacity rights based upon the carrier’s ownership interest. Costs are allocated to the carriers based upon their ownership interests. The Pipeline is operated by the Carriers’ agent, Alyeska Pipeline Service Company (“Alyeska”). Second Rehearing Order P 2, JA 270.

² Congress later passed the Energy Policy Act of 1992 which required the Commission to establish “a simplified and generally applicable ratemaking methodology for oil pipelines.” *See Association of Oil Pipelines*, 83 F.3d at 1429. However, the Alaska Pipeline is excluded from these provisions. Energy Policy Act § 1804(2)(B), 42 U.S.C.A. § 7172 note. Consequently, indexing and other simplified ratemaking methods do not apply here.

A. TAPS Settlement Agreement

Protracted rate litigation ensued at FERC, including hundreds of days of hearings before ALJs. Because the initial shippers on TAPS were Carrier affiliates, the main protagonists were the Carriers on one hand, and Alaska (whose royalties and tax receipts could be affected) and Arctic Slope Regional Corporation (“Arctic Slope”) (a potential shipper) on the other.

Eventually, the TAPS Carriers and Alaska reached a settlement (“TAPS Settlement Agreement” or “TSA”) in 1985. *Arctic Slope*, 832 F.2d at 160-61. The TAPS Settlement Agreement, with a December 31, 2011 ending date, established a comprehensive rate-setting methodology (“TAPS Settlement Methodology” or “TSM”) for determining maximum interstate rates between January 1, 1986 and 2011 (*i.e.*, for the estimated remaining useful life of the Pipeline). The Carriers agreed to file rates each year and Alaska agreed not to protest those rates as long as the rates complied with the Methodology.

The Commission approved the TAPS Settlement Agreement with respect to the settling parties as being “fair and reasonable and in the public interest.” *Trans Alaska Pipeline System*, 33 FERC ¶ 61,064 at 61,140 (“Settlement Order”), *reh’g denied*, 33 FERC ¶ 61,392 (1985). FERC remanded issues related to non-settling parties (including Arctic Slope) to the ALJs for additional proceedings.

Ultimately, the Commission found that the “settlement in no way limits [a shipper’s] legal remedies.” *Trans-Alaska Pipeline System*, 35 FERC ¶ 61,425 at 61,977 (1986) (“Non-Settling Parties Order”). “Arctic, as well as any entity which is not a party to the settlement, may file at any time in the future for an adjudicated rate” *Id.* at 61,982. This Court affirmed. *See Arctic Slope*, 832 F.2d at 166 (“the Commission has made it clear that [the shipper’s] challenges, including its assault on the TSM, are fully preserved and can be advanced in an appropriate proceeding under section 15 or section 13”).

B. TAPS Settlement Methodology

In settlement of construction cost and other issues, the TAPS Settlement Agreement reduced the TAPS investment base by \$450 million as of 1976 with that amount to be amortized from 1978 through 1984. Settlement Order, 33 FERC at 61,138.

Under the TAPS Settlement Methodology, the remaining rate base was divided into an original rate base (essentially pre-1985) and a new rate base. A real (inflation-free) 6.4 rate of return on equity was applied to the original rate base through 1989 and to the new rate base throughout the life of the settlement. Beginning in 1990, the Carriers also collected an allowance per barrel of \$0.35, adjusted for inflation after 1983. *Id.* at 61,139. Returns were further increased by

applying the rate of return to 100 percent of the rate base under the fiction that none of the rate base was debt-financed. *See* Opinion No. 502 P 97, JA 162.

Both rate bases were adjusted for inflation, with the TAPS Carriers recovering the inflation adjustment as deferred return. Settlement Order, 33 FERC at 61,139. Deferred return, depreciation expense, and estimated future dismantling, removal, and restoration expense (“dismantling expense”) were all recovered on heavily front-loaded, accelerated schedules. The dismantling expense was fixed at \$849 million. *Id.*

III. Proceedings On The 2005 And 2006 Interstate Rate Filings

A. The Filings

There were no protests to the TAPS Carriers’ annual interstate rate filings until the 2005 filing. In 1996, shippers protested intrastate rate filings to the Regulatory Commission of Alaska (“Alaska Commission”). *See Amerada Hess Pipeline Co. v. Regulatory Comm’n of Alaska*, 176 P.3d 667, 671 (Alaska 2008). Intrastate shipments constitute approximately ten percent of TAPS oil volumes.

In 2002, the Alaska Commission found that the Carriers’ 1997-2000 intrastate rates were excessive. In particular, the Alaska Commission found that the TAPS Carriers’ rate calculation should take into account the fact that they had already recovered certain costs on an accelerated, rather than straight-line basis. The Alaska Commission ordered the rates to be substantially reduced. *Id.* The

Alaska Commission's decision was affirmed by both the Superior and Supreme Courts of Alaska. *Id.*

In December 2004, the TAPS Carriers filed their interstate rates for 2005 with FERC. Alaska filed a protest of the 2005 filed rates, alleging that the TAPS Carriers' rates were unduly discriminatory and preferential, in violation of ICA §§ 2 and 3(1), and were inconsistent with the terms of the Settlement Agreement. Anadarko Petroleum Company also filed a protest and complaint, contending that the 2005 filed rates were unjust, unreasonable, and otherwise unlawful.

In December 2005, the Carriers filed their 2006 interstate rates. Anadarko (joined by Tesoro Corporation) again filed a protest and complaint, as did Alaska, making the same objections to the 2006 rates as they had to the 2005 rates.

The Commission consolidated the proceedings and set the case for hearing. Various rounds of prepared testimony were filed, a hearing commenced October 31, 2006 and ended on January 11, 2007, initial and reply briefs were filed, and the ALJ issued the initial decision on May 17, 2007. *BP Pipelines (Alaska), Inc.*, 119 FERC ¶ 63,007 (2007) ("ALJ Decision"), JA 1.

B. The ALJ Decision

The ALJ found that *Farmers Union II* and Opinion No. 154-B are the applicable ratemaking standards. ALJ Decision P 43, JA 22. *Farmers Union II* emphasized that the "most useful and reliable starting point for rate regulation is an

inquiry into costs,” and that “departures from cost-based rates must be made, if at all, only when the non-cost factors are clearly identified and the substitute or supplemental ratemaking methods ensure that the resulting rate levels are justified by those factors.” *Id.* P 45-46, JA 23-24 (quoting *Farmers Union II*, 734 F.2d at 1530). Opinion No. 154-B, responding to the Court’s *Farmers Union II* directives, established a cost-based ratemaking methodology for oil pipelines. ALJ Decision P 47, JA 24.

The ALJ rejected TAPS Carriers’ arguments that rate reasonableness should be measured by the TAPS Settlement Methodology. *Id.* P 48, JA 24. “As articulated by the D.C. Circuit, ‘FERC has explicitly stated . . . that its settlement approval in no way establishes the justness or reasonableness of any rates.’” *Id.* P 48, JA 24 (quoting *Arctic Slope*, 832 F.2d at 166). Accordingly, Opinion No. 154-B would “serve as the standard for this inquiry.” ALJ Decision P 48, JA 25.

The ALJ then addressed the cost data to be used in the ratemaking calculations. The Carriers advocated use of account balances from their annual Form 6 reports filed at FERC. Anadarko/Tesoro urged use of balances from the Carriers’ annual rate filings. ALJ Decision P 81, JA 36. The difference was significant because, *inter alia*, the rate filings reflected the Carriers’ previous accelerated recovery of depreciation, deferred return, and dismantling expense over the prior two decades while the Form 6 reports did not. *Id.* P 85, JA 39.

The ALJ rejected the Carriers' theory that Anadarko/Tesoro's reliance on the Carriers' rate filing data represented "cherry picking" from the TAPS Settlement Agreement. *Id.* P 84, JA 37-38. The "mission here is to ensure that the inputs used in the Opinion No. 154-B methodology reflect amounts already recovered." *Id.* Since the Carriers had collected rates pursuant to the TAPS Settlement Methodology, the filings made pursuant to that methodology provided the most accurate picture of the Carriers' current property balances. *Id.* "[T]he Carriers must recognize the previous recoveries of their investment, otherwise there will be an unjust and unreasonable double recovery." *Id.* P 85, JA 39.

The ALJ then resolved issues pertaining to particular costs and determined that the Carriers had not shown that their 2005 and 2006 filed rates were just and reasonable. Refunds were ordered effective January 1, 2005 limited to the difference between the 2004 rate and the rates set forth in the 2005 and 2006 rate filings. ALJ Decision P 243-44, JA 105-06.

The ALJ also addressed Anadarko/Tesoro contentions that the TAPS Carriers should file a uniform rate. ALJ Decision P 251-56, JA 108-10. The ALJ found that Anadarko/Tesoro had met their burden to show that the practice of each TAPS Carrier charging an individual rate resulted in unjust and unreasonable rates, and that requiring the carriers to charge a uniform rate would result in just and reasonable rates. *Id.* P 256, JA 110. Nothing in the ICA prohibits the Carriers

from filing a uniform tariff. *Id.* P 251, JA 108. Moreover, the Carriers' costs of providing service are virtually identical and the service provided is the same. *Id.* P 252, JA 108-09. A uniform rate will require fewer adjustments and rate filings, will be easier to compute, and will better represent the cost to ship a barrel of oil on the TAPS Pipeline. *Id.* P 255-56, JA 109-110.

The ALJ recognized that under either the uniform or individual rate approach, individual carriers may over-collect or under-collect their costs, which are based upon the carrier's ownership share, depending on whether the amount shipped by the carrier is greater or lesser than the ownership share of that carrier. *Id.* P 253, JA 109. The ALJ found, however, that the Carriers could correct this problem by utilizing a pooling mechanism already established in the Transportation Settlement Agreement. *Id.* P 254, JA 109.

The ALJ also considered Alaska's claim that the TAPS Carriers' rates were unduly discriminatory and preferential, in violation of ICA §§ 2 and 3(1), based on the disparity between rates for interstate and intrastate service on the Pipeline. The ALJ, having already found the TAPS Carriers' interstate rates not to be just and reasonable, and thus having ordered new, substantially lower rates that varied only "minimal[ly]" from the intrastate rates, determined that any discrimination "has been alleviated and the State's discrimination claims are rendered moot." ALJ Decision at P 263, JA 112-13.

C. The Challenged Orders

On exceptions, the Commission affirmed the ALJ on all issues. Opinion No. 502 P 2, JA 125. On rehearing, FERC granted in part and denied in part the requests for rehearing and required further action by the TAPS Carriers. First Rehearing Order P 1, JA 232. In particular, the Commission granted BP Pipelines (Alaska) Inc.'s ("BP") request that FERC require the TAPS Carriers to pool all TAPS revenues for any period for which the Carriers calculate a uniform rate.³ Costs are allocated to the Carriers based on ownership share, but (since the Pipeline no longer runs at full capacity) throughput will not necessarily equal that share. *Id.* P 64, JA 250-51. Absent revenue pooling, some carriers (like BP), which ship less than their ownership share, will under-recover their costs. *Id.*

Certain "Indicated" TAPS Carriers sought rehearing of the pooling requirement, which the Commission denied. Second Rehearing Order P 26, JA 278. The Commission found that ordering revenue pooling was a proper use of its ancillary power to satisfy its statutory mandate to ensure just and reasonable rates, and that the action taken was directly and closely tied to that mandate. *Id.* P 32, JA 280.

³ The TAPS Settlement Agreement included a form of pooling, but the Settlement Agreement terminated effective December 31, 2008, when Alaska exercised its right to terminate it early. *See* Second Rehearing Order P 10, JA 273.

With regard to Alaska's claim for additional refunds based on undue discrimination, the Commission affirmed the ALJ's finding that the claim was "mooted" by the Commission's establishment of new, lower interstate rates. Opinion No. 502 P 272, JA 227. But the Commission also considered and rejected Alaska's arguments on the merits.

The Commission first found that the State "has not shown discrimination," because a disparity between interstate and intrastate rates "is not *de facto* discriminatory." *Id.* P 233, JA 218; *see also id.* P 270-71, JA 227. The Commission also found that reparations were not warranted, as no party had attempted to prove damages caused by the allegedly discriminatory rates. *Id.* P 235, 266-68, JA 218, 225-26. Furthermore, the Commission determined that additional relief was not appropriate under the Commission's refund authority because retroactive refunds were properly measured by reference to the pre-existing rate. *Id.* P 230, 235-36, 266, JA 216, 218, 226.

SUMMARY OF ARGUMENT

This case is the first time Alaska Pipeline interstate rates have been challenged since the 1980s. Not surprisingly (considering the large amounts of money involved), the parties have raised numerous, complex cost-of-service issues. In resolving these issues, the Commission properly relied upon fundamental, court-approved cost-based ratemaking principles.

These principles require Alaska Pipeline rates to be based on costs and carriers to recover each cost only once. The Commission, in affirming the ALJ, properly applied these principles when it relied on property balances in TAPS Carriers' 2005 and 2006 rate filings as providing the best evidence as to the costs the Carriers have already recovered. The 1985 TAPS Settlement Agreement, the Commission and the ALJ rightly found, does not act to upset shippers' right to litigate future rates, or serve to allow the Carriers to double-recover their costs or otherwise recover a rate that is not just and reasonable.

The Commission's treatment of particular cost items – accumulated depreciation, deferred return, previously amortized rate base, and starting rate base – was entirely consistent with cost-based ratemaking principles and reasonable in all respects. The Commission's treatment of dismantling, removal, and renovation collections is not ripe for review. Whether the TAPS Carriers must refund past collections associated with future dismantling of the Pipeline, after its useful life ends, depends on whether dismantling collections and earnings ultimately exceed the dismantling expense. In any event, the Commission's requirement that the TAPS Carriers keep an accounting of their collections is not retroactive ratemaking because it applies on a going forward basis. Any refund of any past over-collection is not retroactive ratemaking because the Carriers have known from the

beginning that the purpose of the collections is to create, as nearly as possible, a revenue neutral dismantling fund.

The uniform rate requirement and the pooling requirement are also not ripe for review. Filings have been made at the Commission proposing precise implementation of each requirement in a concrete factual setting, and agency proceedings remain ongoing. In any case, the Commission's requirement that the TAPS Carriers file uniform maximum rates was reasonable. There is only one Pipeline, the Carriers all provide identical service, and the Carriers incur almost identical costs. A uniform maximum rate is necessary to ensure that the maximum rate for each Carrier is cost-based. The pooling requirement is necessary to ensure just and reasonable rates; without it, some carriers would over-recover their costs and some would under-recover their costs, because costs and revenues are not allocated to individual carriers in the same way. The Commission is not acting in an extra-statutory manner. Rather, it is exercising its ICA authority – indeed, carrying out its statutory mandate – to ensure that some carriers not earn returns that exceed a just and reasonable level.

After determining that the 2005 and 2006 filed rates were unjust and unreasonable, the Commission properly ordered refunds. ICA § 15(7) states that when a proposed rate increase is filed, the Commission may require the carrier

after hearing to refund “such portion of such increased rates” that the Commission finds unjustified. This is precisely what the Commission did here.

Finally, the Commission appropriately denied Alaska’s request for additional refunds based on its claim that the rejected rates were also unjustly discriminatory. The Commission reasonably found that Alaska could not obtain such relief under ICA § 13 because it had not proven specific damages. The Commission further declined to grant alternative relief under its ratesetting and refund authority, concluding that its power to prescribe just and reasonable rates under ICA § 15(1) is prospective only and that the only retroactive relief available, in the form of refunds under ICA § 15(7), was properly based on the pre-existing (2004) lawful rates. The Commission also reasonably concluded that Alaska was required to prove that the interstate rates were discriminatory or preferential, in comparison with intrastate rates, and had failed to do so.

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 has “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 United States, 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 Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No. 1*, 128 S. Ct. 2733, 2738 (2008) ("The statutory requirement that rates be 'just and reasonable' is obviously incapable of precise judicial definition, and we afford great deference to the Commission in its rate decisions."); *ExxonMobil Oil Corp. v. FERC*, 487 F.3d 945, 951 (D.C. Cir. 2007) ("In reviewing FERC's orders, we are 'particularly deferential to the Commission's expertise' with respect to ratemaking issues.") (quoting *Association of Oil Pipe Lines*, 83 F.3d at 1431).

The two-step *Chevron* analysis applies to the Commission's interpretation of the Interstate Commerce Act. *See, e.g., Association of Oil Pipe Lines*, 83 F.3d at 1431. If Congress has "directly spoken to the precise question at issue" and its intent is clear, "that is the end of the matter." *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842 (1984). If the statute is silent or ambiguous as to the question, the Court gives deference to the Commission's interpretation if it is a "permissible construction of the statute." *Id.* at 843.

This Court also gives substantial deference to the Commission's interpretation of its own regulations and precedents. *See NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 799 (D.C. Cir. 2007); *Amerada Hess Pipeline Corp. v. FERC*, 117 F.3d 596, 600-01 (D.C. Cir. 1997) (affording deference to FERC's interpretation of Interstate Commerce Commission's regulations with regard to transferred functions).

II. TAPS Carriers Must Base Their Rates On Costs And May Recover Each Cost Only Once.

The TAPS Settlement Agreement established particular rates to be charged for years 1982 through 1985, and rates calculated under the TAPS Settlement Methodology for years beginning January 1, 1986. *See Settlement Order*, 33 FERC at 61,138. Consequently, the TAPS Carriers had been recovering the Alaska Pipeline's costs for more than 20 years before this proceeding began. Moreover, the Carriers had already recovered a much larger portion of Pipeline construction costs and predicted dismantling costs than they would have under Opinion No. 154-B because the Settlement Agreement accelerated the recovery of these costs.

Despite this, the Carriers now contend that they should be treated as if they had filed rates all along under Opinion No. 154-B (rather than the TAPS Settlement Agreement). Their approach would allow double recovery of costs. As the challenged orders demonstrate, this is contrary to well-established ratemaking

principles. Carriers are entitled to an opportunity to recover their costs, investment, and a return on investment, but only once, under the basic principles for balancing investor and customer interests articulated in *FPC v. Hope Natural Gas*, 320 U.S. 591, 602-03 (1944). TAPS Carriers have not demonstrated why they should recover costs more than once, or why such recovery would not deny shippers the just and reasonable rates to which they are entitled.

A. The Commission’s Findings Are Based Upon Fundamental Ratemaking Principles.

There is only one Alaska Pipeline; consequently, its owners have a monopoly on the transportation of oil in Alaska. Under these circumstances, ratemaking should generally be based upon costs. As this Court has emphasized:

Departures from cost-based rates must be made, if at all, only when the non-cost factors are clearly identified and the substitute or supplemental ratemaking methods ensure that the resulting rate levels are justified by those factors. In addition, the rate of return methodology should take account of the risks associated with the regulated enterprise FERC must carefully scrutinize the rate base and rate of return methodologies to see that they will operate together to produce a just and reasonable rate.

Farmers Union II, 734 F.2d at 1530; *see* ALJ Decision P 45-48, JA 23-25

(discussing precedent); Opinion No. 154-B, 31 FERC at 61,833 (oil pipeline rates as a general rule must be cost-based).

When rates are cost-based, carriers should be recompensed for each cost only once. Not surprisingly, this Court and the Commission have affirmed this

principle in a number of cases. *See, e.g., Alabama Power Co. v. FERC*, 220 F.3d 595, 598 (D.C. Cir. 2000) (petitioner’s proposed rate would result in a prohibited double recovery of costs); *Town of Norwood v. FPC*, 546 F.2d 1036, 1038 (D.C. Cir. 1976) (rejecting depreciation method that would allow company to recover depreciation expenses greater than its total investment in the property); *Canyon Creek Compression Co.*, 27 FERC ¶ 61,115 at 61,224 (1984) (revenues retained that are not a reimbursement of out-of-pocket costs would result in an unjust double recovery of costs); ALJ Decision P 82 n.51, JA 37 (citing *Entergy Services, Inc.*, 102 FERC ¶ 63,016 at P 98-100 (2003) (allowing Entergy to recover depreciation expense twice would be unjust and unreasonable)).

In the proceeding here, the Commission relied on the property balances in the TAPS Carriers’ rate filings to determine what costs the Carriers have already recovered. Contrary to the Carriers’ contentions, nothing in the TAPS Settlement Agreement grants them license to recover these costs twice or to deny shippers just and reasonable rates.

B. The Shippers Are Entitled To Just And Reasonable Rates.

The TAPS Carriers contend (Br. 14-22) that in effect FERC has unlawfully rewritten the TAPS Settlement Agreement by selectively relying on TAPS Settlement Methodology elements in calculating the rates “even though the [Agreement] makes clear that individual settlement components would not bind the

Carriers in litigation with third parties” (Br. 15). However, “the use of the amounts in the Carriers’ [rate] filings has nothing to do with [shippers] attempting to enforce rights or provisions of the TSA.” ALJ Decision P 84, JA 38. To the contrary, in determining the just and reasonable rate, FERC simply relied upon the best evidence of record as to the costs for which the Carriers had already been reimbursed.

1. The TAPS Settlement Agreement Did Not Constrain Non-Signatories’ Rights To A Just And Reasonable Rate.

The 1985 TAPS Settlement Agreement was between Alaska and the TAPS Carriers. No shipper was a signatory. Settlement Order, 33 FERC at 61,138. Arctic Slope, a potential royalty recipient holding interests in North Slope oil reserves, objected strenuously, contending that the Agreement resulted in an excessive TAPS Pipeline rate that would reduce the value of its land and its crude oil resources. Non-Settling Parties Order, 35 FERC at 61,981.

The Commission properly rejected TAPS Carriers’ argument that the TAPS Settlement Agreement restricted Arctic Slope’s or any other third party’s legal rights to a just and reasonable rate. Opinion No. 502 P 81, JA 154. The Commission approved the Settlement Agreement “with respect to the settling parties because it was fair and reasonable and in the public interest” under the standard applicable to settlements. Settlement Order, 33 FERC at 61,140. In approving the Settlement Agreement, the Commission “did not rule that either the

settlement rates or the TSM rate methodology were just and reasonable.” Opinion No. 502 P 49, JA 140.

To the contrary, in approving the TAPS Settlement Agreement, the Commission emphasized that the Settlement was not binding on Arctic Slope or any other shipper:

Here, also, we are not imposing the settlement on Arctic. Arctic is not in any way bound by the settlement. *As observed by the six original settling owners in their briefs*, the settlement in no way limits Arctic’s legal remedies. . . .

Non-Settling Parties Order, 35 FERC at 61,976 (emphasis added). The Commission explained further that:

As a non-settling party, Arctic will simply not be bound by the settlement. By approving the settlement, we are making no determinations adverse, prejudicial, or precedential to Arctic’s interests.

Id. at 61,981; *see also id.* at 61,982 (FERC’s approval of the TAPS Settlement Agreement “does not limit or modify any of the rights of Arctic under the Interstate Commerce Act with regard to the terms, conditions and operation of the settlement.”); Opinion No. 502 P 49, JA 140 (same).

This Court similarly recognized that the Settlement was not binding on non-settling parties:

FERC made several things abundantly clear: that the settlement was not being imposed on Arctic and that Arctic therefore retained the right to challenge any future rates; that FERC’s approval of the settlement did not in any manner determine that the rates established

under it are (or will be) just and reasonable; [and] that the settlement would have no precedential value in future rate challenges. . . .

Arctic Slope, 832 F.2d at 163.

Moreover, neither the shippers nor the Commission in fact relied on Settlement Agreement provisions in their rate calculations. Rather, they looked to the Carriers' rate filings to determine the costs that the Carriers had already recovered:

[T]he Commission will not allow an investment to be recovered twice. To that end, the mission here is to ensure that the inputs used in the Opinion No. 154-B methodology reflect amounts already recovered. . . . The use of the amounts in the Carriers' filings has nothing to do with Anadarko/Tesoro . . . attempting to enforce rights or provisions of the TSA . . . The Carriers collected rates pursuant to the TSA/TSM and, therefore, it is the filings made pursuant to the TSA that provide the most accurate picture of the Carriers' current property balances.

ALJ Decision P 84, JA 37-38 (footnote omitted); *see also id.* P 85, JA 39; Opinion No. 502 P 64, 76, 78, 102, JA 144, 151, 153, 164.

The Carriers' reliance on cases such as *Trailblazer Pipeline Co.*, 88 FERC ¶ 61,168 (1999), misses the mark. The Carriers opine (Br. 18) that *Trailblazer* stands for the proposition that FERC cannot "simply take [the pipeline's] [s]ettlement as the starting point and adjust the rates downward based on the [non-settling party's] arguments." However, the Commission did not take the TAPS Settlement Methodology as the starting point "and adjust the rates downward." Instead, the Commission started with Opinion No. 154-B, *see supra* pp. 6-7

(explaining traditional oil pipeline cost-based ratemaking), and used data from the Carriers' rate filings as representing the best evidence as to the costs the Carriers had already recovered. Regardless of whether the Carriers had recovered those costs under the Settlement or under Opinion No. 154-B or pursuant to something else, they are not entitled to recover those costs more than once.

Texaco Refining & Marketing, Inc. v. SFPP, LP, 117 FERC ¶ 61,285 (2006) (“*SFPP*”), is not to the contrary, as TAPS Carriers (Br. 21-22) suggest. In *SFPP*, the carrier had recovered its investment in contract rates collected over a ten-year period. *Id.* P 3, 14-15. The Commission disallowed further recovery of investment in post-contract filed rates because, *inter alia*, to do otherwise “would result in an over-recovery of that investment.” *Id.* P 18.

The Carriers (Br. 22) argue that in *SFPP* the Commission was enforcing a contract between the carrier and the shippers, whereas here the Agreement between Alaska and the Carriers precluded shippers' reliance on the Agreement. However, as the Commission (agreeing with the ALJ) found, the Carriers' contention is immaterial “since what matters is the fact that the money was already collected, and not how the money was collected.” Opinion No. 502 P 80, JA 154; *see also id.* P 81-82, JA 154-55; ALJ Decision P 82-83, JA 36-37, and record items cited therein (staff reply brief, p. 33-34, JA 2060-61; staff initial brief, pp. 35-39, JA 2052-56).

2. The Commission Reasonably Relied Upon The Carriers' Annual Rate Filings As Providing The Best Evidence As To Costs Already Recovered.

In the FERC proceeding, TAPS Carriers relied in part upon their Form 6 balances in lieu of rate filing balances. *See, e.g.*, Opinion No. 502 P 79, JA 153. “Form 6 [however] is an annual report of oil pipeline companies and is designed to collect financial and operational information from oil pipeline companies subject to the jurisdiction of the Commission.” *Id.* n.98, JA 154 (citing 18 C.F.R. § 357.2 (2007)). The TAPS Carriers’ Form 6 property balances reflect nothing more than the straight-line accounting convention required in the Commission’s regulations for general reporting purposes, not ratemaking purposes. Opinion No. 502 P 79, JA 153. When there is a difference between ratemaking books and regulatory accounting books, the ratemaking balances and standards must be used in setting rates. *Virginia State Corp. Comm’n v. FERC*, 468 F.3d 845, 847 (D.C. Cir. 2006) (“Petitioners’ claim of a rate effect is belied by the proposition that ‘[a]ccounting practices are not controlling for ratemaking purposes’” (citation omitted)).

As the ALJ found, “the mission here is to ensure that the inputs used in the Opinion 154-B methodology reflect amounts already recovered. . . . The use of the amounts in the Carriers’ filings has nothing to do with [parties] attempting to enforce rights or provisions of the TSA The Carriers collected rates pursuant to the TSA/TSM and, therefore, it is the filings made pursuant to the TSA that

provide the most accurate picture of the Carriers' current property balances." ALJ Decision P 84, JA 38; *see also id.* P 85, JA 39; Opinion No. 502 P 79, JA 153 (“[T]he TSM filings and the accelerated depreciation pattern reflected in the TSM formula were used to establish the TAPS Carriers’ refund obligations before 1985 and set the TAPS Carriers' rates for the last twenty years, not the Form 6’s or the balances reflected therein”).

III. The Commission’s Treatment Of Particular Cost Elements Accorded With The Principle That Carriers May Not Recover Costs Twice, And Was Reasonable In All Other Respects.

A. Accumulated Depreciation

TAPS Carriers contend (Br. 24-25) that FERC erred in using the Carriers’ rate filings’ depreciation balances because TAPS Settlement Methodology depreciation was “artificially accelerated” while straight-line depreciation is the norm in oil pipeline ratemaking. However, “again, the point of this exercise is to determine what the Carriers actually collected.” ALJ Decision P 98, JA 45. During the term of the Settlement Agreement, TAPS Carriers relied on accelerated depreciation, not Form 6 balances, to set rates. Opinion No. 502 P 79, JA 153; ALJ Decision P 100, JA 46 (citing testimony and exhibits). This reliance accords with statements the Carriers made to FERC at the time the Settlement Agreement was pending approval. ALJ Decision P 99, JA 46 (“In the Explanatory statement

the parties stated that if the TSA is approved accelerated depreciation will be recovered in the rates.”).

Applying straight-line balances now under these circumstances would be unreasonable:

[it] implies that the Commission knowingly and purposely accepted an accelerated depreciation methodology for determining past and current revenue collections from shippers under TSM, but at the same time fully intended to construct future just and reasonable rates for those same shippers by applying a straight-line assumption that ignored actual investment recovered. That argument is an untenable proposition because it would allow the TAPS Carriers to obtain the depreciation benefit not just one time but two times.

Opinion No. 502 P 78, JA 153.

TAPS Carriers also assert (Br. 25-26) that use of the actual depreciation amounts recovered in rates is inconsistent with a Depreciation Stipulation approved by the Commission in 1982 that specified the straight-line methodology, that the 1982 Stipulation remained in effect “until changed by [FERC] order,” and that FERC has not issued such an order. That argument is also without merit. *See* Opinion No. 502 P 67-78, JA 146-53.

In brief, the terms of the TAPS Settlement Agreement rendered the 1982 Stipulation invalid: “Any stipulation or agreement previously entered into in the TAPS proceeding by the parties to this Agreement shall continue to be, to the extent not inconsistent with the Agreement, in full force and effect between the parties to this Agreement.” ALJ Decision, P 101 n.73, JA 47 (quoting Ex. A/T-190

at Section III-5 (p. 26), JA 348); Opinion No. 502 P 78 n.94 (same), JA 152. The 1982 Stipulation is inconsistent with the Settlement Agreement because the former calls for straight-line depreciation and the latter accelerated depreciation.

TAPS Carriers' argument also contradicts their assurances in their Settlement proceeding reply comments that each was consenting to change the 1982 Stipulation depreciation. Opinion No. 502 P 78, JA 152-53. Their argument is also inconsistent with the fact that "shippers have paid approved final rates beginning in 1977 on the basis of the accelerated TSM depreciation factors." *Id.* In sum, FERC properly relied on the plant balances in the TAPS Carriers' annual rate filings, which reflected the accelerated depreciation already recovered.

B. Deferred Return

"Deferred return" refers to the deferral of recovery of the inflation portion of the rate of return. For example, under trended original cost ratemaking:

[T]he portion of the rate of return on equity is extracted, leaving a real rate of return. The real rate of return is applied to the pipeline's equity share of rate base to determine the yearly allowed equity return in dollars. The dollars related to the inflation portion of the equity return, are "deferred" for recovery in future rates. In future rates the deferred amounts are added to rate base as an equity rate base "write-up" (the equity portion of rate base is "trended" up), and amortized as an expense like depreciation over the useful life of the pipeline.

ALJ Decision P 105, JA 59-50 (citing Opinion No. 154-B, 31 FERC at 61,834-45).

The TAPS Settlement Methodology had a similar mechanism. The rate bases (*see discussion supra* at 10) were adjusted for inflation and TAPS Carriers

were entitled to recover the inflation adjustments as deferred return. Settlement Order, 33 FERC at 61,139. Recovery was on an accelerated basis while deferred return is recovered on a straight-line basis under Opinion No. 154-B. ALJ Decision P 102, 105, 107, JA 48, 49, 50; First Rehearing Order P 74, JA 253.

The Commission properly rejected TAPS Carriers' contention that deferred return amounts from 1983 forward should be restated due to the difference in recovery basis under Opinion No. 154-B. As with the other balances, this represents "another attempt by the TAPS Carriers to overstate elements of their cost-based rate filing to justify the recovery of returns more than once." Opinion No. 502 P 96, JA 161.

TAPS Carriers nevertheless argue (Br. 26-28) that *Lakehead Pipe Line Co.*, 75 FERC ¶ 61,181 (1986), requires deferred return to be recovered under Opinion No. 154-B for all pipelines after 1983 "regardless of how the pipeline's rates were established." FERC, however, fully distinguished *Lakehead*.

In *Lakehead*, the pipeline had charged valuation-based rates for many years, including 1983. FERC adopted Opinion No. 154-B ratemaking for the pipeline's future rates and determined that the starting point for trending an oil pipeline's rate base under Opinion No. 154-B was 1983. The *Lakehead* pipeline's valuation-based rates had not included a deferred return component. See Opinion No. 502 P 101, JA 101. In contrast:

[I]n the instant case, the deferred balances and the annual deferred costs for every year of TAPS operation, including 1983, were already accounted for under the TSA as reflected in supporting workpapers for every TSM filing. Therefore, the Commission finds no merit to the TAPS Carriers' claim that their rates were based on a valuation methodology before 1985 and as a result, their situation is comparable to Lakehead, since the TAPS Carriers' rates, beginning in 1977, were based on the TSA, which specifically included a deferred return component.

Id. (footnotes omitted). Moreover, as FERC emphasized, "the TSM calculations, including the calculation of deferred returns, were the basis of the rates actually filed with the Commission, actually paid by the shippers, and actually collected by the TAPS Carriers over the years." *Id.* P 102, 164.

C. Previously Amortized Rate Base

Under the TAPS Settlement Agreement, the Pipeline rate base was reduced by \$450 million as of 1976, with that amount to be amortized from 1978-1984. Settlement Order, 33 FERC at 61,138. The reduction represented settlement of cost of construction and other issues, *id.*, and resulted in reducing the Carriers' refund liability for years 1982-1985. ALJ Decision P 97 n.62, JA 44. TAPS Carriers nevertheless contend (Br. 28) that the \$450 million should be added back to the rate base for determining the rates at issue here.

As the Commission found, this claim represents another effort by the Carriers to double recover cost elements. "The \$450 million has already been fully recovered by the Carriers via amortization from 1978 through 1984 under the

TSM.” ALJ Decision P 97, JA 44; *id.* n.62, JA 44 (citing, *inter alia*, Ex. A/T-33 at 10 (Section II-2(c) of TAPS Settlement Methodology states that the investment base is reduced by \$450 million and that amount is amortized from the period 1978 through 1984)); Opinion No. 502 P 76, JA 151 (affirming ALJ). Since the \$450 million had already been recovered, FERC properly declined to permit the Carriers to add it to the current rate base and thus recover it again.

TAPS Carriers erroneously claim (Br. 28) that the Commission has made an unsupported finding of imprudence. That argument has no relationship to FERC’s actual finding, which was that the amount had already been recovered during the 1978-1984 period by virtue of the TAPS Settlement Agreement. The Carriers argue that this cannot be the case because “[t]he actual rates for those years could not have been retroactively increased” This argument ignores the fact that the rates for that period were collected subject to refund. The Carriers’ refund liabilities were reduced in part due to the \$450 million rate base amortization, and that reduction was the equivalent of a retroactive rate increase. *See* Opinion No. 502 P 86 n.118, JA 157.

D. Starting Rate Base

As discussed *supra* at 7, Opinion No. 154-B permitted carriers to transition from valuation ratemaking to trended original cost ratemaking by calculating a “starting rate base.” Opinion No. 154-B, 31 FERC at 61,835-36. TAPS Carriers

contend (Br. 29-32) that they are entitled to a starting rate base write-up and that FERC erred by relying on rate base balances from their rate filings.

FERC's rejection of these contentions was reasonable. A carrier's right to a starting base write-up was not absolute under Opinion 154-B. Pipeline circumstances can vary, and FERC permitted rate case participants to show that a particular carrier was not entitled to a starting rate base. Opinion No. 154-B, 31 FERC at 61,836. TAPS Carriers are not entitled to a starting rate base write-up because they do not meet the basic qualification. The starting base write-up was intended only for "existing assets [] currently valued under the valuation formula." *Id.* at 61,833. TAPS Carriers' rates were never calculated under the valuation methodology. ALJ Decision P 123, JA 56; Opinion No. 502 P 114, JA 168.

The TAPS Carriers claim (Br. 30) that they did rely on valuation in filing their initial ICC rates. However, their initial rates were not final and were subject to refund, and when the final rates were set, they were based on the TAPS Settlement Methodology, not on valuation. ALJ Decision P 124, JA 56 (citing to record); Opinion No. 502 P 114, JA 169 (citing TAPS Carriers' own witness, Dr. Kalt, as acknowledging that TAPS Carriers' rates were finalized on the basis of the TAPS Settlement Agreement, not on valuation). Accordingly, as FERC found, TAPS Carriers did not meet the prerequisite for a starting base write-up. *See also*

Opinion No. 502 P 115, JA 169 (explaining why TAPS investors could not reasonably have expected a return calculated under the valuation method).

Finally, TAPS Carriers' claims (Br. 31-32) regarding lack of a valuation report miss the point. Presumably, if the Carriers had actually been relying on valuation, a report would have issued. *See* ALJ Decision P 124, JA 56 (finding it "telling" that the Commission never issued the Carriers a valuation report). The Carriers do not deny that they never even petitioned for one. Regardless, since TAPS Carriers did not rely on valuation for any final rates, they are not entitled to a starting rate base. Opinion No. 502 P 114-17, JA 168-70.

IV. The Commission's Treatment Of Dismantling, Removal, And Restoration Expense Was Proper.

A. The Commission's Findings That Past Dismantling, Removal, and Restoration Collections Are Prepayments Subject To Refund Is Not Ripe For Review.

TAPS Carriers contend (Br. 39-41) that the Commission's rulings regarding their dismantling collections are ripe for review because the issues are purely legal and because the Carriers will suffer immediate harm from the rulings. These contentions lack merit, as several events must occur in the future before the Carriers will know whether there will be surplus dismantling funds that could be refunded. Absent a surplus, the Carriers will not be affected by either the Commission's findings or the Court's review of them.

When considering ripeness, the Court must balance “the fitness of the issue for judicial decision” against the “hardship to the parties of withholding court decision.” *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967) (“*Abbott Labs*”). The “question of fitness [for judicial review] does not pivot solely on whether a court is capable of resolving a claim intelligently, but also involves an assessment of whether it is appropriate for the court to undertake the risk.” *Devia v. Nuclear Regulatory Comm’n*, 492 F.3d 421, 424 (D.C. Cir. 2007). In particular, this and other Courts invoke the doctrines of ripeness and finality to avoid “piecemeal review which at the least is inefficient and upon completion might prove to have been unnecessary.” *FTC v. Standard Oil Co.*, 449 U.S. 232, 242 (1980), *quoted in Am. Airlines, Inc. v. Herman*, 176 F.3d 283, 292 (5th Cir. 1999); *accord Toca Producers v. FERC*, 411 F.3d 262, 266 (D.C. Cir. 2005) (deferring judicial review until conclusion of agency proceedings could avoid “piecemeal, duplicative, tactical and unnecessary appeal[s]”) (citation and internal quotation marks omitted); *see also Nat’l Treasury Employees Union v. United States*, 101 F.3d 1423, 1431 (D.C. Cir. 1996) (noting “the usually unspoken element of the rationale underlying the ripeness doctrine: If we do not decide it now, we may never need to.”).

Thus, even where a purely legal issue is presented, this Court has nonetheless found claims unripe where petitioner’s claim rests upon events “that

may not occur as anticipated, or indeed may not occur at all.” *CTIA – The Wireless Ass’n v. FCC*, 530 F.3d 984, 987 (D.C. Cir. 2008) (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998)). *CTIA* concerned challenges to an FCC rulemaking — including the allegation that the FCC lacked statutory authority — where the rule would not become effective until certain provisions were approved by the Office of Management and Budget. *Id.* at 987. In light of this contingency, the Court found the appeal unripe because “[s]omething more must happen before the rule’s ‘effects [are] felt in a concrete way by the challenging parties.’” *Id.* at 988 (quoting *Abbott Labs*, 387 U.S. at 148-49).

Similarly, in the instant case “something more must happen” — namely, the Alaska Pipeline’s useful life must end; federal and state authorities, the Carriers, and private landowners (if any) must decide upon the specific dismantling, recovery, and renovation activities that will be required; and those activities must be completed for the 800-mile Pipeline and related facilities. Only then will the TAPS Carriers know whether or not their dismantling collections exceed their dismantling costs, so as to make refunds more than just a theoretical possibility. Consequently, as the Commission’s orders state, “the question of whether refunds are necessary is premature.” *See* ALJ Decision P 169, JA 74; *see also* Opinion No. 502 P 161-62 (refunds are speculative), JA 189; First Rehearing Order P 29 (final costs and potential refunds are “unsettled”), JA 29.

For their part, the TAPS Carriers contend (Br. 41) that they will suffer immediate harm because “the status of certain revenue collected under the Carriers’ 1977-2004 rates has been altered.” It is difficult, however, to see how this would be the case or would cause immediate harm. In the proceeding below, the Carriers contested shipper requests for immediate refunds of a portion of the dismantling collections. The Carriers claimed that there has been no over-collection of dismantling funds because the Carriers’ “liability for DR&R is unlimited and the ultimate scope and costs of DR&R is uncertain.” ALJ Order P 143, JA 63. Whether or not the Court reviews the Commission’s dismantling findings, the TAPS Carriers will still have to preserve their dismantling collections so as to be prepared for future (and as yet unknown) dismantling expenses.

The TAPS Carriers also state (Br. 41) that the Commission’s order affects their “day-to-day” affairs by requiring them to keep an accounting of their dismantling collections. That might be an argument as to why the accounting requirement is ripe for review, but it does not make ripe the issue of whether past collections are refundable. Regardless of whether the refundability issue is decided now or later when the dismantling, removal, and renovation activities might have actually occurred, the collections were recovered as part of jurisdictional rates. Collections may resume again if estimates of future dismantling costs begin to exceed existing collections and earnings. *See, e.g.*, ALJ

Decision P 160, JA 70 (finding that the Carriers have not cost-justified additional collections of dismantling expense through future rates, and accordingly, may not collect the expense in their 2005 and 2006 rates). Thus, the Commission's imposition of an accounting does not depend upon the refundability of past collections.

Finally, the TAPS Carriers erroneously assert (Br. 40) that the need for timely resolution is confirmed by FERC's prompt consideration (and rejection) of Williams Alaska Petroleum Inc.'s claim for an immediate refund. The Carriers do not explain the significance of this to ripeness, and there is none.

B. The Commission Reasonably Concluded That No Retroactive Ratemaking Is Implicated In Its Dismantling, Removal, And Renovation Findings.

The 1985 TAPS Settlement Methodology fixed the dismantling, removal, and restoration expense at \$849 million (in 1985 dollars). Recovery was based on an accelerated schedule and heavily front-loaded. Settlement Order, 33 FERC at 61,139. Actual collections had totaled over \$1.5 billion by the time this proceeding was initiated. ALJ Decision P 150, JA 65. The amount of the Carriers' earnings attributable to the collections is disputed, but the amount is substantial. TAPS Carriers (Br. 41) estimated that, as of 2006, the collections and assumed earnings totaled approximately \$3 billion, while Anadarko/Tesoro estimated

collections and earnings of \$17.265 billion as of 2005. *See* ALJ Decision P 152, JA 66 (citing Anadarko/Tesoro witness statements).

The Commission affirmed the ALJ's finding that refunding any part of this amount now to the shippers would be premature because the dismantling cost is speculative. Opinion No. 502 P 161, JA 189. The Commission, however, also affirmed the ALJ's requirement of an accounting, and rejected the Carriers' arguments that their dismantling collections are not prepayments and are not subject to refund. *Id.* P 163, JA 189. The TAPS Carriers contend (Br. 45-46) that the accounting and reporting requirements in the challenged orders constitute retroactive ratemaking as would any future FERC order requiring refunds (Br. 41-45).

1. TAPS Carriers' Recovery Of Dismantling Expense Prior To The Pipeline's Actual Dismantling Is A Prepayment Subject To Refund.

The shippers' payment of dismantling expense is a prepayment of an expense that the Carriers have not yet incurred. Accordingly, it "may be refundable in the event that there is a surplus once the [dismantling, removal, and renovation] is completed." ALJ Decision P 165, JA 72 (citing *Kuparuk Transportation Co.*, 55 FERC ¶ 61,122 at 61,382 (1991)); Opinion No. 502 P 163, JA 182 (same); *see Tarpon Transmission Co.*, 57 FERC ¶ 61,371 at 62,245 (1991) (any surplus negative salvage funds must be refunded to ratepayers).

This conclusion accords with fundamental cost-based ratemaking. A carrier is permitted to collect dismantling costs before they are incurred so that over the life of the asset each shipper will pay a share. First Rehearing Order P 27, JA 241. However, if in the end the carrier incurs no dismantling costs or incurs fewer costs than expected, it must return the funds to the shippers or it will have collected more than its lawful costs plus return.

TAPS Carriers erroneously contend (Br. 41-45) that refund of dismantling collections would constitute retroactive ratemaking. The rule against retroactive ratemaking “does not extend to cases in which [the parties] are on adequate notice” of a future rate adjustment. *Exxon Co., U.S.A. v. FERC*, 182 F.3d 30, 49 (D.C. Cir. 1999) (internal quotations omitted); *see also, e.g., OXY USA, Inc. v. FERC*, 64 F.3d 679, 699 (D.C. Cir. 1995) (same).

TAPS Carriers’ argument that there was no notice here because the Commission did not impose a specific condition in the Settlement Order is without merit. The payments were collected for one purpose only: future payment of dismantling expenses. The signatories to the 1985 Settlement Agreement knew the purpose of the funds from the outset, that they were going to be spent in the distant future and thus were contingent on many unknown events, and that the goal was to create, as nearly as possible, a revenue neutral dismantling fund. *See ALJ Decision P 165, JA 72*, and the pleadings cited therein (staff initial brief at 93,

JA 2057; Anadarko/Tesoro initial brief at 71, JA 2044). Accordingly, the TAPS Carriers cannot be said to have lacked adequate notice.

The Carriers' reliance (Br. 42) on *Public Utilities Comm'n of California v. FERC*, 894 F.2d 1372 (D.C. Cir. 1990), is misplaced. In that case, a deferred tax reserve had been collected in jurisdictional rates and the rate base credit would have been to non-jurisdictional assets. The court's concern was that the Commission's credit for the funds collected was "not attached to, derived from, or related to" the service. *Public Utilities*, 894 F.2d at 1379; *see* ALJ Decision P 168 n.125, JA 73; Opinion No. 502 P 163, JA 189 (cases distinguishable for reasons given in the ALJ's Initial Decision).

The Carriers also claim that the Commission acted inconsistently when it denied Williams' request for refunds of dismantling collections on the ground that refunds would "violate[] the rule against retroactive ratemaking" (Br. 42-43, citing First Rehearing Order P 24-25, JA 240). The Carriers mischaracterize the Commission's findings. Williams had requested that the Commission achieve "intergenerational equity" by requiring the Carriers to refund a portion of their dismantling collections to earlier shippers and raising their rates for later shippers. The Commission found that Williams was essentially asserting that the rates for earlier shippers had been unjust and unreasonable. Consequently, refunds to earlier shippers would constitute retroactive ratemaking. *See* First Rehearing

Order P 24, JA 240. Refunds of excess prepayments at the end of the life of the pipeline do not involve similar inter-generational rate adjustments among shippers.

2. The Accounting And Reporting Requirements Do Not Constitute Retroactive Ratemaking.

Accounting for dismantling collections and earnings is consistent with Commission precedent. Opinion No. 502 P 163, JA 189. These requirements do not implicate retroactive ratemaking here because they only concern the 2005 rates forward. *Id.*; ALJ Decision P 168, JA 73-74. Even if the Court were to agree with the TAPS Carriers that a future refund of pre-2005 collections and earnings would be retroactive ratemaking, that conclusion would not affect earnings accumulated on or after January 1, 2005, when the first rate filing at issue here became effective subject to refund pursuant to the Commission's orders accepting the filings.

C. The Commission's Earnings Attributions For Dismantling, Removal, And Renovation Collections Were Reasonable.

The dismantling collections eventually available to pay the TAPS Carriers dismantling costs will consist of funds collected in rates and the earnings on those funds. *See* ALJ Decision P 150-56, JA 65-69. "It is the earnings rate that [caused] the large disparity in the parties' calculations [of the amount of the dismantling collections]." *Id.* P 152, JA 66.

In the Commission proceeding, Anadarko/Tesoro argued that the Carriers' earnings on dismantling, removal, and renovation collections should account for

the fact that the funds were used as unrestricted capital by the Carriers' parents. Accordingly, the actual historic earnings rate of the Carriers' parents, which were as high as 23.29 percent, should be used. ALJ Decision P 152, JA 66 Conversely, the TAPS Carriers proposed using the risk-free earnings rate of United States securities. *Id.* P 154, JA 67. The Commission affirmed the ALJ's determination to use the Moody's Aa bond rate for the years 1977 through 2005 and the TAPS Carriers' weighted average cost of capital for 2006 forward. ALJ Decision P 154-158, JA 67-69; Opinion No. 502 P 138-141, JA 178-80.

On appeal, the TAPS Carriers reiterate their arguments for a risk-free earnings rate (Br. 46-48). However, as the ALJ found, "that rate fails to take into account that the Carriers basically have failed to create a separate DR&R account and, thus, have had free rein to use the funds as they please. Additionally, the Carriers did not invest these funds in these securities." ALJ Decision P 154, JA 67 (record citations omitted). "While the Carriers used the DR&R monies as they pleased, they should be required to recognize a reasonable return on such funds." *Id.*; Opinion No. 502 P 140, JA 179 (same).

The record showed, moreover, that the underlying TAPS Settlement Methodology dismantling allowance schedule "assumed that the revenue stream would earn Moody's Aa bond yield to achieve the desired DR&R expense amount." ALJ Decision P 155, JA 68; Opinion No. 502 P 140, JA 179. In other

words, the TAPS Carriers used Moody's Aa bond yield in their 1985 through 2005 ratemaking models. ALJ Decision P 155-57, JA 67-69. Accordingly, use of the Moody's Aa bond rate for the years 1977 through 2005 "was the most reasonable approach, was consistent with the approach used in the TSA, and was equitable under the circumstances." Opinion No. 502 P 138, JA 178.

The ALJ's adoption of a different earnings rate for post-2005 years was also reasonable. A carrier is presumed to eventually earn the weighted average nominal after tax cost of capital on rate base items (*i.e.*, a figure calculated from the weighted rate of return on equity and the weighted cost of debt). See ALJ Decision P 158, n.115, JA 69, 69. Accordingly, as the ALJ found, calculating earnings on dismantling collections using the weighted average nominal after tax cost of capital is reasonable. *Id.* P 158, JA 69.

V. Challenges To The Uniform Rate Requirement And To The Pooling Requirement Are Not Ripe For Review And, In Any Case, Lack Merit.

A. These Challenges Are Not Ripe For Review.

Indicated TAPS Carriers ⁴ contend that the Commission lacks authority to require pooling (Br. 54-61) and that it unlawfully imposed a uniform rate without adequate explanation (Br. 64-69). Neither issue is ripe for immediate review, as agency proceedings continue as to precise implementation of these requirements.

⁴ Indicated TAPS Carriers are ConocoPhillips Transportation Alaska, Inc.; ExxonMobil Pipeline Company; and Koch Alaska Pipeline Company, LLC.

When considering ripeness, the Court must balance “the fitness of the issue for judicial decision” against the “hardship to the parties of withholding court decision.” *Abbott Labs*, 387 U.S. at 149. Fitness for review depends on “whether the issue is purely legal, whether consideration of the issue would benefit from a more concrete setting, and whether the agency’s action is sufficiently final.” *National Ass’n of Homebuilders v. U.S. Army Corps of Eng’rs*, 440 F.3d 459, 463-64 (D.C. Cir. 2006). When determining hardship to the parties of withholding review, a court considers “not whether [the parties] have suffered any ‘direct hardship,’ but rather whether postponing judicial review would impose an undue burden on them or would benefit the court.” *Id.* (citing *Harris v. FAA*, 353 F.3d 1006, 1012 (D.C. 2004)).

Neither the uniform rate requirement nor the pooling requirement is ripe for review here. The Commission has not yet applied either requirement in a concrete, factual setting. Postponing review will allow the Commission to “crystallize” each policy by actually applying it and will allow the Court to review each requirement in a “more concrete and final form.” *E.g., Eagle-Picher Indust., Inc. v. EPA*, 759 F.2d 905, 915 (D.C. Cir. 1985).

Proceedings providing a “concrete setting” have been initiated at FERC. In 2009, various TAPS Carriers made tariff filings which implemented uniform rates. These rates were calculated on a uniform (system-wide) basis but were not

identical. The Commission issued an order on June 30, 2009, in conjunction with its same day issuance of the Second Rehearing Order, accepting and suspending the filings and consolidating the proceedings for hearing “to determine the just and reasonable uniform rate for TAPS.” *See BP Pipelines (Alaska) Inc.*, Docket No. IS09-348, 129 FERC ¶ 61,316 (2009). Subsequently, other rate filings were made, and in December, 2009, BP filed a tariff proposing a pooling mechanism, which was protested by other carriers. The Commission consolidated these later filings, consolidated them with the existing Docket No. IS09-348 proceeding, and set the proceeding for hearing “to determine a just and reasonable uniform rate for TAPS.” *See Unocal Pipeline Co.*, Docket Nos. IS09-348 *et al.*, 129 FERC ¶ 61,275 P 13 (December 29, 2009). The proceeding is ongoing and implicates issues Indicated Carriers raise here.

Delaying review of these issues will allow the Commission to address and resolve them in a concrete setting. For example, Indicated TAPS Carriers contend (Br. 65) that the Commission “failed to address many practicalities of implementing” the uniform rate requirement. However, the record here does not lend itself to addressing this issue because the TAPS Carriers filed the rates at issue in accordance with the TAPS Settlement Agreement. Carriers have now filed rates intended to comply with Opinion No. 502. The “practicalities” of determining a uniform rate for the TAPS Pipeline can be explored in this concrete

setting. *See* Second Rehearing Order P 42, JA 285 (the Commission did not “dictate the particulars” of the pooling and uniform rate requirements, as the TAPS Carriers are “in a better position to work out the details” themselves, for the Commission’s later review).

Indicated TAPS Carriers also argue (Br. 66-68) that exchanging cost information to the extent necessary to calculate uniform rates could subject them to antitrust claims. However, as noted above, the Carriers have filed rates based on system-wide data, but have not filed identical rates. That their new rates are not the same would appear to undercut the professed concern over antitrust liability. Again, applying the uniform rate requirement in a concrete setting will allow the Commission to crystallize its policies and will assist the Court if the uniform rate issues are raised again.

Similarly, Indicated TAPS Carriers claim (Br. 60-61) that pooling will have an anti-competitive effect. However, the Commission has not yet approved a particular pooling mechanism. That will be addressed in the ongoing Docket Nos. IS09-348, *et al.* proceeding, and postponing review here will allow both the Commission and the Court to address in a concrete setting the effects (if any) of pooling on competition.

The Court addressed a similar situation in *Mississippi Valley Gas Co. v. FERC*, 68 F.3d 503 (D.C. Cir. 1995). In *Mississippi Valley*, the petitioner sought

review of a question of law that would ordinarily be presumed to be ripe for review. However, the Court decided that because FERC was conducting additional hearings on the issue before the Court, the issue was not ripe for review:

Our decision takes into account the fact that FERC perceives a benefit in such a delay, and the possibility that [Mississippi Valley] will obtain relief from the effect of the FERC orders in the pending hearings. We also note that the future impact of the FERC orders is uncertain at present, and will likely be more clear once Southern's actual rates for the period in question have been finalized. The possible benefit to both FERC and this court counsels in favor of a delay in review of the FERC orders.

Id. at 509.

Indicated TAPS Carriers, moreover, will not suffer any hardship if review is postponed. The pooling requirement does not affect the 2005-2006 rates at issue here. Going forward, the Commission has not yet approved a pooling mechanism or ordered pooling payments or resolved particular uniform rate issues. The Carriers may seek whatever relief they deem appropriate upon conclusion of the ongoing proceeding, and the Court can then address the Commission's resolution, in a concrete setting, of the issues raised.

B. Assuming Ripeness, The Commission's Requirement That The TAPS Carriers File Uniform Rates Was Reasonable.

Contrary to Indicated TAPS Carriers' assertion (Br. 64), the Commission fully justified its imposition of a uniform rate. There is only one Pipeline, and no one contests the fact that the TAPS Carriers all provide identical transportation

service over the Pipeline. Moreover, the Pipeline costs are almost all common costs. The direct expenses for all TAPS Carriers together totaled about \$24 million in 2004, “which should have had virtually no effect on the individual rates given that test year throughput was 326.7 million barrels.” Opinion No. 502 P 237, JA 219. Despite these facts, Carrier rates for this service have varied greatly.

As the orders demonstrate, FERC reasonably found that the rate variance resulted from subjective factors rather than cost differences, leading to unjust and unreasonable rates and unnecessarily frequent rate changes. *See* First Rehearing Order P 55-57, JA 248-49. Pipeline costs were allocated to the Carriers in proportion to their ownership shares. Opinion No. 502 P 242, JA 220. Pipeline revenues were allocated to the Carriers in proportion to their usage of the Pipeline. ALJ Decision P 253, JA 109. Individual Carrier per barrel rates were set by dividing each Carrier’s cost of service by its expected throughput. Early on, when the Pipeline operated at capacity, each Carrier’s expected throughput was its ownership share of the Pipeline’s capacity. Subsequently, when throughput fell below capacity, each Carrier estimated its annual throughput (up to its capacity). *Id.* P 252, JA 108-09.

Because rates depended on the Carriers’ individual estimates of throughput, TAPS Carriers’ rates for interstate service varied significantly among the Carriers for a given year and varied unpredictably from year to year. *Id.* (citing testimony

of shipper witness Brown at 45-47, JA 882-84). These differences were based on subjective factors:

These variances in rates are not attributable to differences in the cost of providing service because the Carriers all have essentially the same cost of service. Rather, the differences in rates among the TAPS Carriers are due primarily to the highly subjective manner in which each individual Carrier determines an annual revenue requirement and rates under the TSM

Brown testimony at p. 45, JA 882; *see* ALJ Decision P 252, JA 108; First Rehearing Order P 55-57, JA 248-49.

There was another problem as well. To the extent a carrier transported a greater or lesser volume than it had estimated, it would over- or under-recover its costs. Moreover, if one carrier were under-recovering or over-recovering its costs, then at least one other would be as well. Accordingly, numerous rate changes could result depending on how shippers allocated their shipments from month to month. ALJ Decision P 255, JA 109-10; Brown testimony at p. 46-47, JA 883-84.

For their part, the Carriers did not provide a convincing explanation as to why their rates should vary significantly when their costs are virtually identical. ALJ Decision P 252, JA 109; Opinion No. 502 P 242, JA 220 (agreeing with ALJ); First Rehearing Order P 56, JA 348 (same). Accordingly, as the Commission found, the Carriers' individual rate filings resulted in unjust and unreasonable rates.

On the other hand, as the Commission found, the use of uniform rates is reasonable. ALJ Decision P 256, JA 110; First Rehearing Order P 31-32, JA 242. A uniform rate better represents the cost to ship a barrel of oil on the Pipeline. ALJ Decision P 255, JA 109-110; First Rehearing Order P 57, JA 249. It is also consistent with the practice of other pipelines with joint ownership. ALJ Decision P 255, JA 110. Rates would require adjustment only when total throughput on the Pipeline changes, there would be fewer rate filings, and the rate calculation would be simpler. *Id.* P 255-56, JA 109-110. Also, a uniform rate would be consistent with the Alaska Commission's requirement that the Carriers file uniform rates. *Id.* P 256, JA 110.

Indicated TAPS Carriers' contention (Br. 65) that the Commission failed to address the practicalities of implementing a uniform rate also lacks merit. Carriers have managed to file rates despite Indicated TAPS Carriers' misgivings about the practicalities, and, in any event, as discussed above, those practicalities will be addressed in the ongoing FERC proceeding.

Indicated TAPS Carriers' concern (Br. 64-69) that a uniform rate requirement creates a risk of anti-trust liability also appears to be belied by the fact that the filings giving rise to Docket Nos. IS09-348, *et al.* (the ongoing FERC implementation proceeding) did not contain identical rates despite the use of system-wide data. In any event, the information the Carriers must exchange "is

only that which is needed to calculate the ‘just and reasonable’ rate, which is the permissible maximum rate.” Opinion No. 502 P 250, JA 222. “Any TAPS Carrier is free to charge less than the maximum rate.” *Id.*

The TAPS Carriers, moreover, already exchange information on costs through the Owners’ Committee for Alyeska in order to operate the Pipeline. First Rehearing Order P 61, JA 250. The Carriers can continue to do so under the uniform rate requirement. The bulk of the costs, moreover, are those incurred by Alyeska on behalf of all of the Carriers.

Additionally, the Alaska Commission established a single rate for intrastate movements beginning in 2003. *See Amerada Hess v. Alaska Comm’n*, 176 P.3 at 688. Indicated TAPS Carriers do not contend that they have experienced any difficulty (anti-trust or otherwise) operating under that uniform rate regime. *See also*, Carriers’ witness Mitchell, Tr. 17/1888-89, JA 1258-59 (stating that he knew of no difficulties incurred by the Carriers in operating under that requirement).

Finally, most cases cited by the TAPS Carriers (Br. 66-68) stand only for general anti-trust principles and are not particularly relevant to the facts here. *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1 (1958), which did pertain to a regulated industry, did not involve an order of the regulatory agency. Here the Commission has set the requirement for the uniform rate. As the ongoing

proceeding in Docket Nos. IS09-348, *et al.* demonstrates, such rates must be filed and are subject to Commission review for justness and reasonableness.

C. Assuming Ripeness, The Commission Properly Ordered Pooling Under Its Authority To Ensure Just And Reasonable Rates.

In the FERC proceeding, TAPS Carriers asserted that, with a uniform rate, some carriers will over-recover their costs and some will under-recover because costs are allocated on ownership, but throughput is not necessarily equal to that share. In Opinion No. 502, the Commission, agreeing with the ALJ, determined that the problem could be addressed by the revenue pooling mechanism in section II-2(f)(ii)(B) of the TAPS Settlement Agreement. That section provided:

(B) If a TAPS Carrier's Composite Ownership Share for a year exceeds its Barrel-Mile Share for a year, that TAPS Carrier shall be entitled to receive from the Agent an amount determined by multiplying (1) the difference between the TAPS Carrier's Composite Ownership Share and its Barrel-Mile by (2) the sum of the costs in subparagraphs (A)(1) through (A)(4) above.

See Second Rehearing Order P 4, JA 271.

On rehearing, after a carrier argued that the existing pooling in the Settlement Agreement would not address the problem, the Commission concluded that this existing pooling mechanism was inadequate both because the TAPS Settlement Agreement was about to expire⁵ and because the mechanism was not extensive enough. First Rehearing Order P 63-64, JA 250-51; Second Rehearing

⁵ As noted above, Alaska exercised its right to terminate the Settlement Agreement effective December 31, 2008.

Order P 7-8, 31-36, JA 271-72, 280-82. The Commission therefore directed the TAPS Carriers to “develop a pooling mechanism that reallocates all of TAPS Carriers’ costs based on throughput or usage, so that the allocation of costs matches the allocation of revenues on [the TAPS Pipeline].” Second Rehearing Order P 42, JA 285.

Indicated Carriers contend (Br. 54-58) that the pooling requirement cannot stand because the Commission failed to meet the requirements for pooling (including unanimous carrier assent) under ICA § 5(1). However, the Commission did not act under ICA § 5(1). Rather, the Commission ordered pooling as a necessary incident to establishing a just and reasonable rate pursuant to its ancillary authority under other ICA sections. First Rehearing Order P 67, JA 252; Second Rehearing Order P 27, JA 278.

In the Second Rehearing Order, the Commission fully explained the legal and factual underpinnings for this exercise of its ancillary authority. *See* Second Rehearing Order P 27-42, JA 278-85. The courts have recognized that a regulatory agency may exercise its ancillary authority when necessary to accomplish its statutory responsibilities:

The Commission’s authority under the Interstate Commerce Act is not bounded by the powers expressly enumerated in the Act. As we have held in the past, the Commission also has discretion to take actions that are “legitimate, reasonable, and direct[ly] adjunct to the Commission’s explicit statutory power.” We have recognized that the

Commission may elaborate upon its express statutory remedies when necessary to achieve specific goals.

ICC v. American Trucking Ass'n, Inc., 467 U.S. 354, 364-65 (1984) (citations omitted); *accord, Trans Alaska Pipeline Rate Cases*, 436 U.S. 531, 636-38 (1977) (finding that the ICC could set maximum initial rates that would be allowed to go into effect without suspension, but subject to refund, despite the lack of an express grant in the ICA to do so, because “the [ICC]’s refund conditions are a ‘legitimate, reasonable, and direct adjunct to the [ICC]’s explicit statutory power’” [citation omitted]); *see also* Second Rehearing Order P 28, 38, JA 278-79, 282-83 (relying on these decisions).

To lie within an agency’s discretionary power, the proposed remedy must satisfy two criteria. First, the power must further a specific statutory mandate of the agency. Second, the exercise of power must be directly and closely tied to that mandate. *American Trucking*, 467 U.S. at 367; *accord Shell Oil Co. v. FERC*, 47 F.3d 1186 n.30 (D.C. Cir. 1995) (an “agency’s discretion to fashion remedies is legitimate provided it furthers the statutory mandate and is closely tied to that mandate”); *Comcast Corp. v. FCC*, 600 F.3d 642, 646 (D.C. Cir. Apr. 6, 2010) (an agency may exercise ancillary authority if it demonstrates that its action is “reasonably ancillary to the . . . effective performance of its statutorily mandated responsibilities” [citation omitted]).

These criteria were satisfied here. The Commission's statutory responsibility under ICA § 15(7) was to determine whether the rates filed by the TAPS Carriers were just and reasonable. The Commission determined that the Carriers' practice of charging individual rates resulted in unjust and unreasonable rates because the differences in rates were based on subjective factors and not on the cost of providing service. A uniform rate, however, would lead to under- or over-recovery of costs when a carrier's throughput differed from its ownership share. Therefore, as the Commission found:

[The Commission] was thus in a unique situation where neither permitting the TAPS Carriers to charge individual rates, nor imposing a uniform rate without conditions, would result in a just and reasonable rate for TAPS. Accordingly, the Commission determined that it was a necessary incident to establishing a just and reasonable uniform rate on TAPS to order the TAPS carriers to develop a pooling mechanism that would continue after the expiration of the TSA.

Second Rehearing Order P 31, JA 280.

Indicated TAPS Carriers -- presumably that subset of Carriers that otherwise would over-recover their costs -- argue (Br. 58) that because ICA § 5(1) grants the Commission express authority to approve a pooling agreement, the Commission may not exercise its ancillary authority to require pooling under any other ICA provisions. However, while ICA § 5(1) permits carriers to agree to enter into a pooling arrangement if the Commission approves it, ICA § 5(1) does not limit the Commission's authority to order pooling under other circumstances, such as here,

where such action is necessary and incident to establishing a just and reasonable uniform rate. Second Rehearing Order P 37, JA 282.

An argument similar to Indicated TAPS Carriers' was made and rejected in *Trans Alaska Pipeline Cases*, 436 U.S. 631 (1978). There, the Commission had suspended the Carriers' initial filed rates for the maximum seven months, but permitted the Carriers to file for interim rates with the proviso that those rates would have to be subject to refund. The TAPS Carriers contended that the Commission could not impose a refund condition because the ICA provided no express authority for it, but did provide for refunds in certain circumstances.

The Court rejected this argument, holding that the existence of an express refund authority was no bar to the Commission exercising its ancillary authority to order refunds of interim rates despite the lack of any express statutory authority to do so. *Trans Alaska Pipeline Cases*, 436 U.S. at 655-66. Here, the fact that ICA § 5(1) allows FERC to approve pooling when proposed by carriers does not mean that FERC cannot require pooling when necessary to accomplish its statutory mandate to establish just and reasonable rates.

Finally, Indicated TAPS Carriers claim (Br. 61-63) that no nexus exists between FERC's statutory authority to order just and reasonable rates and its order requiring pooling, and that the ICA does not guarantee a carrier a particular level of cost recovery. These claims also lack merit. The point of the cases on which

Indicated TAPS Carriers rely is that the Commission is not obligated to ensure that a carrier achieves a return regardless of its competitive circumstances. Here, in contrast, all parties concede that with uniform rates, but absent pooling, some TAPS Carriers will over-recover their costs, *i.e.*, will earn returns that exceed a just and reasonable level. In fact, the TAPS Carriers in opposing the uniform rate requirement, argued that a uniform rate will result “in certain carriers over-recovering their costs and other carriers under-recovering.” *See* First Rehearing Order P 37, JA 244. They will do so because of TAPS’ unique cost allocation methodology, not because of competitive considerations. *See* Second Rehearing Order P 33, JA 280.

This potential for under- or over-recovery as a result of the cost allocation method was recognized by the TAPS Carriers in 1985 and resulted in the pooling agreement in the TAPS Settlement Agreement. *Id.* Moreover, in developing cost-of-service evidence for 2005 and 2006, the TAPS Carriers’ witness relied in part on cost allocations using that pooling arrangement. This suggests that the Carriers expected that the pooling arrangement, or something like it, would continue. *Id.* P 34, JA 281. In sum, given this history with pooling, “it is unlikely that the Commission’s decision to order the continuation of such a mechanism in this proceeding will result in the adverse consequences the Indicated TAPS Carriers now suggest could result from pooling.” *Id.*

VI. The Commission's Reliance On TAPS Settlement Methodology Balances To Set 2006 Rates Was Reasonable.

The TAPS Carriers contend (Br. 32-33) that the Commission's 2006 rate calculation erred in relying on property balances derived from the TAPS Carriers' December 2005 TAPS Settlement Methodology filing. The Carriers assert (Br. 33 n.12) that the "error" is important because it will carry forward to future rates.

This issue is essentially moot and, in any case, the Commission's resolution of it was reasonable. The Carriers did not dispute the fact that "which data parties use to calculate the rates for 2005 and 2006 is irrelevant because both calculations produce rates for 2005 and 2006 that are below the 2004 refund floor." First Rehearing Order P 83, JA 256. With regard to rates after 2006, the Commission has issued final orders (which are under appeal in D.C. Cir. Nos. 09-1078, *et al.*) with regard to the 2007 rates, and the parties have reached a settlement on the 2008 rates. *See Oil Pipelines -- Unocal Pipeline Co.*, 131 FERC ¶ 61,003 P 1 & n.3 (Apr. 1, 2010).

Accordingly, as the Commission found, it was "premature for the Commission to prescribe here, in the proceeding for the TAPS Carriers' 2005 and 2006 rates, how the TAPS Carriers' rates for 2007 and 2008 will be calculated. Questions concerning the TAPS Carriers' rates commencing in 2007 will be resolved in the pending proceedings concerning those rates." First Rehearing Order P 83, JA 256. *Cf. Mobil Oil Exploration & Producing Southeast, Inc. v.*

United Distribution Cos., 498 U.S. 211, 231 (1991) (“[A]n agency need not solve every problem before it in the same proceeding.”).

VII. The Commission Properly Ordered Refunds After Determining That The Rates The TAPS Carriers Filed And Charged For 2005 And 2006 Were Unjust And Unreasonable.

All TAPS Carriers (Br. 33-38) challenge the Commission’s ordering of refunds back to the dates the rate increases went into effect. Their theory is that FERC ordered a change in ratemaking methodology and, accordingly, any refunds must be prospective only from the date of the Commission’s final order. To the contrary, ordered refunds fully accord with the ICA.

In the first place, as explained *supra* at 25-27, the Commission never approved the 1985 TAPS Settlement Agreement as establishing just and reasonable rates. To the contrary, the Commission evaluated the Agreement under the standard applicable to settlements and emphasized that the carriers could not rely on the Agreement to establish the justness and reasonableness of the rates. Opinion No. 502 P 49, JA 140.

ICA § 15(7), moreover, states that in the “case of a proposed increased rate or charge,” the Commission may require the carrier to keep account of “all amounts received by reason of such increase” and may after hearing require a refund of “such portion of such increased rates . . . as by its decision shall be found not justified.” In this case, the Commission accepted the Carriers’ filed 2005 and

2006 rates and made them effective beginning January 1, 2005 and January 1, 2006, respectively, subject to refund and further order of the Commission. The Carriers failed to show that their proposed rate increases were just and reasonable. Accordingly, pursuant to ICA § 15(7), the Commission properly ordered refunds effective January 1, 2005.⁶ Opinion No. 502 P 226-230, JA 215-17.

The TAPS Carriers' reliance on *Sea Robin Pipeline Co. v. FERC*, 795 F.2d 182 (D.C. Cir. 1986), and similar cases is misplaced. *Sea Robin* concerned cost allocation matters, *i.e.*, how costs are allocated among the pipeline's customers, while the case here involves an increase in the TAPS Carriers' overall cost of service. Opinion No. 502 P 46, JA 139. The filing of an overall rate increase subjects the entirety of the filed rate to scrutiny. The burden is on the pipeline to show the justness and reasonableness of its rates, and "to the extent the pipeline fails to sustain that burden, the Commission may order refunds of the overall increase in the cost of service." Opinion No. 502 P 227, JA 215-16 (citing *Northern Border Pipeline Co.*, 89 FERC ¶ 61,185 at 61,575-76 (1999) and *Williston Basin Interstate Pipeline Co.*, 107 FERC ¶ 61,164 P 21-26 (2004)).

⁶ As is its policy, FERC limited refunds to the difference between the 2004 rate and the 2005 and 2006 rates filed. FERC rejected proposals that it order refunds back to the just and reasonable level. ALJ Decision P 244, JA 106.

In *Northern Border*, the Commission addressed an overall rate increase filed by Northern Border pursuant to Natural Gas Act § 4 (“NGA”), 15 U.S.C. § 717d.⁷ The rate increase included, *inter alia*, an increase in Northern Border’s rate of return but did not propose to change its current depreciation schedule. Northern Border claimed that all unchanged components of rates, including the depreciation schedule, are litigated under NGA § 5, 15 U.S.C. § 717e, so that the proponent of change in the depreciation schedule had the burden of proving that the existing depreciation schedules are unjust and unreasonable and refunds must be prospective only. *Northern Border*, 89 FERC at 61,574.

The Commission in *Northern Border* recognized that, as a general matter, if the pipeline has not proposed a change in its rates, the burden of showing that the existing rate is unjust and unreasonable is upon the proponents of a change. However, NGA § 4 requires the pipeline to show the justness and reasonableness of any rate increase it proposes. If the increase is based upon an increase in the overall cost of service, the pipeline’s required showing “includes both the individual cost of service components the pipeline proposed to increase and those that it left unchanged [E]ach component of the pipeline’s cost of service is an integral part of the pipeline’s proposed overall rate increase.” *Northern Border*, 89

⁷ This Court has recognized that the operative language of ICA §§ 15(7) and 15(1) is the same as NGA §§ 4 and 5, respectively, and has relied on cases interpreting one act to decide cases under the other. *See Tennessee Gas Pipeline Co. v. FERC*, 860 F.2d 446, 454-56 (D.C. Cir. 1988).

FERC at 61,575. If the pipeline fails to sustain its burden, the Commission may order refunds of the overall increase in the cost of service. *Id.*; *see also Williston Basin*, 107 FERC at P 21-26 (since each item in the pipeline's proposed cost of service is a part of the pipeline's proposed rate increase, the pipeline's burden to support the proposed general rate increase includes the burden of supporting the dollar amount of each item in the cost of service, including unchanged items).

VIII. The Commission Appropriately Denied The State Of Alaska's Request For Additional Refunds.

While the TAPS Carriers challenge the Commission's ordering of refunds back to January 1, 2005, Alaska seeks further refunds for 2005 and 2006. The Commission (affirming the ALJ) had already found the TAPS Carriers' proposed interstate rates for 2005 and 2006 unjust and unreasonable under ICA § 15(7), and established the new just and reasonable replacement rates to apply going forward. For that reason, the Commission properly affirmed the ALJ in concluding that Alaska's claim that the proposed rates were unjustly discriminatory was effectively "mooted" by the Commission's establishment of lower just and reasonable rates. Opinion No. 502 P 272, JA 227; ALJ Decision P 263, JA 113. In any event, Alaska does not challenge the prospective effects of the Commission's order.

The ALJ and the Commission also ordered TAPS Carriers to pay refunds back to January 2005, but limited the amount to the difference between the unlawful rates that had been proposed for 2005 and 2006 and the pre-existing

(2004) rates. ALJ Decision P 244, JA 106; Opinion No. 502 P 226, JA 215.

Alaska, however, sought additional relief based on a claim of undue discrimination or preference. Because the Alaska Commission had previously ordered the TAPS Carriers to lower their rates for intrastate service on the Pipeline, Alaska sought payment from the Carriers of the entire difference between the proposed rates and the lower intrastate rate. The Commission denied Alaska's request for additional recovery, finding both that Alaska had failed to prove a claim for damages under the reparations provision of ICA § 13 and that alternative relief was not available under the ratesetting and refund provisions of ICA § 15, and that, in any event, Alaska had not established that the interstate rates were unjustly discriminatory.

A. The Commission Reasonably Concluded That Alaska Was Not Entitled To Further Relief.

1. Reparations For Discrimination Under The Interstate Commerce Act Are Not Automatic.

Alaska wrongly assumes that its discrimination claim, if proven (*but see* Part VIII.C, *infra*), would entitle it automatically to collect the entire difference between the higher interstate rates and the lower intrastate rate. *See* Br. 40-43. But the Supreme Court has long rejected that measure of damages: “When discrimination and that alone is the gist of the offense, the difference between one rate and another is not the measure of the damages suffered by the shipper.” *ICC v. United States ex rel. Campbell*, 289 U.S. 385, 389 (1933). The Court contrasted

refunds of overcharges, which can be recovered without other evidence of loss — as with the refunds of unjust and unreasonable rates ordered in the instant case — with damages for discrimination:

Overcharge and discrimination have very different consequences, and must be kept distinct in thought. . . . But a different measure of recovery is applicable “where a party that has paid only the reasonable rate sues upon a discrimination because some other has paid less.” . . . Such a one is not to recover as of course a payment reasonable in amount for a service given and accepted. *He is to recover the damages that he has suffered, which may be more than the preference or less . . . but which, whether more or less, is something to be proved and not presumed.*

Id. at 390 (emphasis added) (citing, *inter alia*, *Pa. R.R. Co. v. Int’l Coal Mining Co.*, 230 U.S. 184, 204, 206-07 (1913)); *see also* 289 U.S. at 390 (“The question is not how much better off the complainant would be today if it had paid a lower rate. The question is how much worse off it is because others have paid less”).

This Court has likewise rejected the theory of recovery on which Alaska depends, holding that, “if the ICC in a Section 15(1) proceeding finds a rate discriminatory, the successful claimant is *not automatically entitled to a refund of ‘overpayments’* but may recover only the actual damages it has suffered in the marketplace as a result of the discriminatory rate.” *Council of Forest Indus. v. ICC*, 570 F.2d 1056, 1060 & n.10 (D.C. Cir. 1978) (emphasis added) (citing, *inter alia*, *Campbell*, 289 U.S. at 389-90), *quoted in* Opinion No. 502 P 267, JA 226.

Even the early ICC precedents that Alaska now invokes on appeal (Br. 26-28) recognized that damages are “something to be proved and not presumed” (289 U.S. at 390). *See, e.g., Colonial Salt Co. v. Chicago, Burlington & Quincy R.R. Co.*, 31 ICC 559, 570 (1914) (“Although the complainants herein have asked for reparation, they offered no proof of damages and the petitions, in so far as they refer to the reparation claim, will be denied.”); *cf. Iola Cement Mills Traffic Ass’n v. Atchison, Topeka & Santa Fe Ry. Co.*, 169 ICC 367, 383 (1930) (noting that, “[i]n respect of damage under [ICA § 3],” complainants’ failure “to introduce testimony of sales, or to show the effect of the lower intrastate rates on their competitive situation,” had led examiner to find no proof of damage sufficient to justify award of reparations).

Accordingly, the Commission adhered to longstanding precedent in noting that “[u]nder the ICA refunds are not automatic when rates are found to be unduly discriminatory; rather damages for discrimination[] must be specifically proved by the complainant.” Opinion No. 502 P 267, JA 226; *see also id.* P 235 (“[a] complainant has the burden under section 13 to prove that it has suffered damages and to quantify the amount of its damages”), JA 218; *id.* P 268 (noting that ICA §§ 8, 9, 13(1), and 16(1) likewise require reparations or damages to be proven), JA 226. The Commission found that Alaska had not even attempted to make a case for damages. Opinion No. 502 P 266 (“the State chose not to prove actual

damages”), JA 226; *id.* P 235 (“here no party undertook” to prove or quantify damages), JA 218.

Alaska does not dispute that finding. Indeed, Alaska does not even address the Commission’s holding that such proof is necessary to obtain relief for past discrimination, including its express reliance on this Court’s holding in *Council of Forest Industries* (based in turn on *Campbell*). (Alaska has therefore waived any such argument on appeal. *See, e.g., Power Co. of Am., L.P. v. FERC*, 245 F.3d 839, 845 (D.C. Cir. 2001) (argument not raised in opening brief was waived).) Rather, Alaska ignores the question of damages entirely, arguing that the Commission could (and must) provide the same monetary benefit under its refund authority. *See, e.g., Br.* 31-43. As set forth in the next section, however, the Commission appropriately rejected Alaska’s alternative theory of recovery.

2. The Commission Reasonably Rejected The State’s Arguments For Lowering The Refund Floor As An Alternative To Proven Damages.

Having found that Alaska did not prove any damages from discrimination to justify an award of reparations under ICA § 13 (and also that Alaska had not even established undue discrimination, *see* next section), the Commission found no statutory basis for the alternative relief that Alaska sought. *See* Opinion No. 502 P 266 (“Nothing in the ICA or decisions there under support the State’s contention

that because it is seeking equitable relief against discriminatory rates, it need not prove actual damages on its complaint under ICA section 13(1).”), JA 225-26.

First, the Commission reasonably construed the language of ICA § 15(1) as empowering the agency to set lawful rates only prospectively: “A prospective remedy reforming rates is provided under ICA section 15(1) which authorizes the Commission to prescribe rates, but only prospectively, by prescribing the rates ‘to be thereafter observed.’” Opinion No. 502 P 266 (quoting § 15(1)), JA 226; *accord* P 235, JA 218. As noted above, the Commission had already exercised its authority to prescribe just and reasonable rates going forward, in place of the proposed rates that it had found unjust and unreasonable. ICA § 15(1) also empowers the Commission to prescribe rates in place of discriminatory rates — but any need to do so in this case had been effectively mooted by the substitution of the new lawful rates on other grounds. Opinion No. 502 P 255, 272, JA 223, 227. And Alaska has not challenged those rates on a prospective basis — indeed, Alaska notes that the just and reasonable rates prescribed by the Commission are similar to the intrastate rate. Br. 13.

Second, the Commission explained that, absent a showing of damages under ICA § 13, any backward-looking relief was limited to refunds available under ICA § 15(7):

Because the State chose not to prove actual damages, however, its sole retroactive remedy lies in ICA section 15(7) which authorizes the

Commission to suspend rate increases (or initial rates) to allow such suspended increases to become effective subject to refund, to prescribe rates for the future, and to order refunds on [] the portion of such increases found not to be justified.

Opinion No. 502 P 266, JA 226. The Commission also interpreted ICA § 15(7) as establishing a “floor” for refunds based on the pre-existing rates, which had been placed into effect without challenge in 2004. *See* Opinion No. 502 P 230 (construing § 15(7) and corresponding FERC regulations to authorize refunds of all or part of increase over previous rate), JA 216; *accord id.* P 266 (same), JA 226; *see also* P 233 (characterizing previous rate as “refund floor”), JA 217-18.

As discussed *supra* in Part VII, the Commission’s ordering of refunds of the contested 2005 and 2006 rates was appropriate because the FERC proceeding arose from and focused on the rate increases for those years, over the pre-existing 2004 rate. Though Alaska disputes the relevance of that *status quo ante* rate to its discrimination claim (Br. 41-43), it raised that claim only in challenging the 2005 and 2006 rate increases, and never challenged that pre-existing rate as discriminatory, even though it too exceeded the intrastate rates. Moreover, as the Commission noted, Alaska “has not cited a single example under the ICA in which refunds below the pre-existing rate were awarded as a remedy for claimed discrimination.” Opinion No. 502 P 235, JA 218.

Alaska contends that the Commission’s interpretation of the ICA leaves the agency “powerless” to order refunds for discrimination unless there is also a rate

increase. Br. 19, 38. Alaska therefore argues that the Commission should — indeed, must — assert extra-statutory powers under the TAPS Settlement Agreement (Br. 31-35) or some theory of ancillary authority (Br. 37-40).⁸

But Alaska again ignores FERC’s conclusion that the appropriate retroactive remedy for discrimination — that is, the statutory means to obtain monetary recovery of past payments of discriminatory rates (in contrast to eliminating the disparity by prescribing nondiscriminatory rates going forward) — is an award of reparations. And again (as explored in the previous section), reparations must be based on specific damages proven by the party claiming discrimination. In contrast to its finding that a pooling requirement was necessary to ensure just and reasonable rates (*see supra* Part V.C), here the Commission concluded that it did not need to invoke its ancillary authority to craft alternative relief because the statutory remedies available were well-established, adequate, and appropriate — Alaska benefited from the substitution of lower, lawful rates on a prospective basis, but as to retroactive relief it simply failed to meet its burden for one remedy (reparations) and was dissatisfied with the other (refunds). *See* Opinion No. 502 P 235, 266, JA 218, 225-26.

⁸ The Commission did not address Alaska’s dubious analogy to the Federal Communications Commission’s ancillary authority under a telecommunications statute in *New England Telephone & Telegraph Co. v. FCC*, 826 F.2d 1101 (D.C. Cir. 1987), *cited in* Br. 39-40, because Alaska never raised it before the agency.

B. Alaska Did Not Show That The TAPS Carriers' Interstate Rates Were Unduly Discriminatory Or Preferential

As discussed above, the Commission had already rejected the TAPS Carriers' interstate rates as unjust and unreasonable, turning the focus of the proceeding to (1) the development of replacement rates (which Alaska does not challenge), and (2) the amount and time period of refunds. Nevertheless, the Commission also found that Alaska had not, in any event, made the requisite showing that the interstate rates were unjustly discriminatory or preferential under ICA § 2 or § 3: "The State has not shown discrimination, but only that there would be different interstate and intrastate rates for a certain period." Opinion No. 502 P 233, JA 218. The mere existence of a disparity, however, is not enough: "Simply put, having different interstate and intrastate rates is not *de facto* discriminatory." *Id.*

1. A Difference In Rates Does Not Prove Unjust Discrimination.

The Commission's earlier order in *Cook Inlet Pipe Line Co.*, 47 FERC ¶ 61,057 (1989), is not to the contrary, as Alaska suggests (Br. 28-29). *Cf.* Opinion No. 502 P 270 ("the State's reliance on *Cook Inlet* as an authority that disparate rates constitute discrimination is misplaced"), JA 227. In that case, the Commission did indicate that charging different rates for substantially similar interstate and intrastate service could be discriminatory, but declined to determine

whether the rates at issue were unlawful absent a sufficient factual record. *Id.* at 61,173-74. (Notably, in contrast to this case, *Cook Inlet* addressed a pipeline’s request that the Commission invalidate a lower intrastate rate set by Alaska regulators, and declare the lawful rate to be equal to the higher interstate rate. *See id.* at 61,172-73.)

On rehearing, the Commission clarified that it had not intended “to suggest that the ICA requires absolute rate parity . . . between rates for similar intra/interstate services.” *Cook Inlet Pipe Line Co.*, 47 FERC ¶ 61,393 at 62,306 (1989). Responding to concerns raised by the Alaska Commission’s predecessor and other state regulators, who opposed an interpretation of ICA § 2 that would preclude disparities between intrastate and interstate rates — even for substantially similar services (*see id.* at 62,305) — the Commission explained that it:

did not intend to adopt a *per se* rule with respect to rate disparity or indicate that any rate disparities are impermissible under the ICA. Rather, as stated, the Commission only intended to emphasize that as a general matter under the ICA, it is impermissible for an interstate carrier to charge different rates for identical services. Whether such practices take place in any given set of circumstances is a factual matter to be determined under the appropriate section of the ICA.

Id. at 62,306-07. The Commission also reiterated that it had not made a finding of discrimination, which must rest on factual questions that the Commission had declined to undertake on an insufficient record. *Id.* at 62,305; *see also* Opinion No. 502 P 270, JA 227. *Cf. Harborlite Corp. v. ICC*, 613 F.2d 1088, 1097-98

(D.C. Cir. 1979) (reversing ICC for inadequate explanation in case where complainant presented “forceful” and “one-sided” evidence of competitive injury to support claim of undue preference under ICA § 3), *cited* in Br. 23, 25, 38.

Having failed to establish discrimination in this case, Alaska on appeal advocates directly for a *per se* rule under the ICA, relying on a number of ICC orders issued from 1912 to 1915 and from 1930 to 1932 and faulting the Commission for failing to address those decisions. *See* Br. 26-28 & n.6; Br. 28 (“FERC gave no reason for deviating from those seminal ICC decisions, and that alone requires vacatur of FERC’s determination of no violation.”). Alaska, however, never cited any of those cases to the Commission — so their absence from the Commission’s 279-paragraph Opinion No. 502 (as well as from the 277-paragraph ALJ Decision) is neither a surprise nor a basis for reversal. *See ExxonMobil Oil Corp. v. FERC*, 487 F.3d 945, 962 (D.C. Cir. 2007) (“A party must first raise an issue with an agency before seeking judicial review.”); *accord SFPP, L.P. v. FERC*, 592 F.3d 189, 195 (D.C. Cir. 2010).

In any event, those early ICC cases do not support a *per se* rule that any rate disparity constitutes unlawful discrimination; to the contrary, in each case the finding of discrimination depended on a detailed analysis of facts presented in the record. *See, e.g., Keogh v. Minneapolis, St. Paul & Sault Ste. Marie Ry. Co.*, 26 ICC 73, 77 (1913) (considering evidence, including carriers’ justifications of

disparate rates, and finding “[u]pon consideration of all the facts” that interstate rates were “unreasonable and unduly discriminatory”); *Colonial Salt Co. v. Chicago, Burlington & Quincy R.R. Co.*, 31 ICC 559, 569 (1914) (basing findings “[u]pon full consideration of all the facts of record” and “[u]nder all the circumstances”); *Class Rates Between Stations in La.*, 33 ICC 302, 304-06 (1915) (rejecting interstate tariff based on record but finding insufficient evidence to determine lawfulness of other rates); *Interstate Amiesite Co. v. Akron, Canton & Youngstown Ry. Co.*, 173 ICC 456, 466 (1931) (based upon record and particular “circumstances and conditions,” finding intrastate rates unduly preferential to Ohio shippers but not unjustly discriminatory against interstate commerce); *Sand, Gravel & Crushed Stone*, 181 ICC 373, 394 (1932) (describing “an abundance” of record evidence that “directly established” facts and “abundantly meets the requirements” for finding of undue prejudice).

Indeed, nearly 60 years before FERC’s similar decision in *Cook Inlet*, the ICC flatly disavowed a bright-line approach:

Whether a preference is undue is a question of fact to be determined by the matters proved in the particular case. . . . [Our precedents] lay down the principle that disparity of rates does not necessarily result in undue prejudice but that it must appear that shipments are made or prevented because of the rate relationship. . . . We have repeatedly held that undue prejudice within the meaning of the [Interstate Commerce Act] ordinarily requires the prejudice suffered by one party to be the source of positive advantage to the one alleged to be preferred and that a competitive relationship exists between the parties concerned.

Sand, Gravel & Crushed Stone, 181 ICC at 393. Moreover, the Supreme Court has agreed. See *King v. United States*, 344 U.S. 254, 270 (1952) (Court had held “that the mere disparity between the rates for comparable intrastate and interstate service was not enough *per se* to establish the requisite unjust discrimination”) (discussing *N. Carolina v. United States*, 325 U.S. 507, 514 (1945)).

2. The Commission’s Interstate Ratemaking Is Not Bound By Intrastate Rates.

In Opinion No. 502, the Commission again rejected a *per se* rule as contrary to the statute, as well as to the constitutional principle of federal supremacy:

Indeed, interpreting [ICA § 2] as the State proposes would fatally undermine the Commission’s regulation of interstate rates, contrary to the ICA and the federal Supremacy Clause. Where it applies, section 2 generally requires identical rates for similarly situated shippers receiving the same service. If that principle were applied to differences between interstate and intrastate rates as the State proposes, the state regulators could determine what rates this Commission could set, which clearly cannot be the rule.

Opinion No. 502 P 271, JA 227. *Cf., e.g., Entergy La. Inc. v. La. Pub. Serv.*

Comm’n, 539 U.S. 39, 47 (2003) (federal presumption requires state regulators to give binding effect to FERC’s interstate ratemaking in determining intrastate rates).

Put differently, just as Alaska and other state regulators worried in *Cook Inlet* that a *per se* rule could give FERC unfettered control over intrastate rates, FERC here understood that a *per se* rule could empower states to dictate FERC-

jurisdictional interstate rates. In both instances, the Commission was appropriately mindful that the relationship between interstate and intrastate rates, and the “necessary . . . assertion of the supreme authority of the national government,” pose “the most delicate problem arising under our dual system of government.” *R.R. Comm’n of La. v. St. Louis Sw. Ry. Co.*, 23 ICC 31, 39 (1912), *aff’d in Houston, E. & W. Tex. Ry. Co. v. United States*, 234 U.S. 342 (1914).

Thus, the Commission’s interpretation of the ICA is not only reasonable in itself but also reflective of concerns raised by the Supreme Court and the ICC nearly a century ago:

It is also clear that, in removing the injurious discriminations against interstate traffic arising from the relation of intrastate to interstate rates, Congress is not bound to reduce the latter below what it may deem to be a proper standard fair to the carrier and to the public. *Otherwise, it could prevent the injury to interstate commerce only by the sacrifice of its judgment as to interstate rates.* Congress is entitled to maintain its own standard as to these rates and to forbid any discriminatory action by interstate carriers which will obstruct the freedom of movement of interstate traffic over their lines in accordance with the terms it establishes.

Houston, 234 U.S. at 355 (emphasis added); *see also R.R. Comm’n of La.*, 23 ICC at 45 (“[I]t certainly may not be truthfully said that Congress intended that its own act should be set at naught by an interstate carrier upon the ground that the discrimination effected against interstate commerce arose out of the rates and practices in effect on commerce wholly within a state.”).

Alaska downplays such concerns because the TAPS Carriers' proposed interstate rates in this case were not just and reasonable; thus, in Alaska's view, only the intrastate rate was relevant, the Commission's discretion to adjust either or both the interstate and intrastate rates was inoperative, and failure to award Alaska the entire difference between the rejected interstate rates and the intrastate rate automatically was error. *See* Br. 17-18, 29-30. Alaska misreads the Supreme Court's decision in *New York v. United States*, 331 U.S. 284 (1947), as *requiring* the Commission to "lower the interstate rates." Br. 30. (Indeed, Alaska claims that *New York* would compel that result even where both the interstate and intrastate rates were within the zone of reasonableness. Br. 18, 30.)

But Alaska's reliance on *New York* is misplaced in several respects. First, that decision did not endorse, or even address, a *per se* approach to finding rates unjustly discriminatory or preferential. Second, *New York* did not address the relationship between interstate and intrastate rates; all rates at issue in that case were interstate rates subject to the ICC's jurisdiction. *See* 331 U.S. at 289. Third, *New York* involved only prospective changes in rates pursuant to ICA § 15(1) and did not even consider refunds or reparations. *See id.* at 289, 295 (ICC proceedings began in 1939 and resulted in new rates to become effective in 1946). And fourth, notwithstanding Alaska's claim that the Commission "must lower" the higher of two rates (Br. 18, 30), *New York* did not so constrain the agency's discretion. To

the contrary, that decision affirmed an ICC order that raised some rates and lowered others. *See id.* at 345 (“The Commission has the power to adjust the rates upwards *and* downwards, within that zone, in order to eradicate the discrimination.”) (emphasis added); *cf. id.* at 341 (to remedy discrimination under ICA § 3, carriers may “‘abate the discrimination by raising one rate, lowering the other, or altering both’”) (quoting *Tex. & Pac. Ry. Co. v. United States*, 289 U.S. 627, 650 (1933)).

Indeed, in the very section of the opinion to which Alaska points, the Supreme Court upheld the ICC’s decision to *raise* the lower of two rates to eliminate a discriminatory disparity going forward. 331 U.S. at 344 (“A different problem is presented when we turn to the 10 per cent increase in class rates which the Commission prescribed”); *cf. Houston*, 234 at 354-55, 360 (1914) (holding that ICC acted within its statutory authority in directing carriers to eliminate disparity in rates, even if by raising intrastate rates). The Court vindicated the ICC’s authority to raise the lower rate even though it had not been found noncompensatory or otherwise unreasonable. 331 U.S. at 345; *cf. Opinion No. 502* at P 234 (“the issue of discrimination is separate and distinct from the issue of the justness and reasonableness of rates”), JA 218.⁹

⁹ Notably, in Opinion No. 502 the Commission observed that the Intrastate Settlement Agreement between Alaska and the TAPS Carriers appears to support just such an outcome; section II-2(e) of that Agreement states that, in the event of

In sum, the Commission, having rejected and replaced the unreasonable interstate rates proposed by the TAPS Carriers, and having ordered refunds to the level of the pre-existing, unchallenged interstate rates, reasonably denied Alaska's request for additional refunds. The Commission's determinations that a rate disparity is not *per se* discriminatory and that a complainant is not automatically entitled to collect the entire difference between the rates — and thus that Alaska bore, and failed to meet, the burden of proving its case for further relief — were reasonable, well within its statutory authority, and consistent with the purposes and structure of the Interstate Commerce Act and with a century of precedent.

unjust discrimination or undue preference, a TAPS Carrier shall raise its intrastate rates to equal the interstate rates for equivalent services. *See* Opinion No. 502 at P 269 (quoting Intrastate Settlement Agreement), JA 226. Thus, the Commission concluded, “even if the State's discrimination claim were upheld the net result would be the increase of intrastate rates to match the applicable TAPS interstate rate” (*id.*) — the inverse of the relief that Alaska here insists is required.

CONCLUSION

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

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July 21, 2010

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. 32(a)(7)(C)(i), I certify that the Final Brief of Respondent Federal Energy Regulatory Commission contains 19,659 words, not including the tables of contents and authorities, the certificates of counsel and the addendum.

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July 21, 2010

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TITLE 49, APPENDIX—TRANSPORTATION

This Appendix consists of sections of former Title 49 that were not included in Title 49 as enacted by Pub. L. 95-473 and Pub. L. 97-449, and certain laws related to transportation that were enacted after Pub. L. 95-473. Sections from former Title 49 retain the same section numbers in this Appendix. For disposition of all sections of former Title 49, see Table at beginning of Title 49, Transportation.

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20.	Federal Aviation Program.....	1201	§ 1. Repealed. Pub. L. 95-473, § 4(b), (c), Oct. 17, 1978, 92 Stat. 1466, 1470; Pub. L. 96-258, § 3(b), June 3, 1980, 94 Stat. 427.
21.	Urban Mass Transportation	1211	Section repealed subject to an exception related to transportation of oil by pipeline. Section 402 of Pub. L. 95-607, which amended par. (14) of this section by adding subdiv. (b) and redesignating existing subdiv. (b) as (c) subsequent to the repeal of this section by Pub. L. 95-473, was repealed by Pub. L. 96-258. For disposition of this section in revised Title 49, Transportation, see Table at beginning of Title 49. See, also, notes following Table.
22.	High-Speed Ground Transportation [Omitted or Repealed]	1231	Prior to repeal, section read as follows:
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26.	Hazardous Materials Transportation Control [Repealed]	1651	(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or
27.	Hazardous Materials Transportation.....	1671	(b) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water; or
28.	National Transportation Safety Board.	1701	(c) Repealed. June 19, 1934, ch. 652, title VI, § 602(b), 48 Stat. 1102;
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(b) The Commission shall not issue a certificate of abandonment or discontinuance with respect to a line of railroad if such abandonment or discontinuance is opposed by—

(i) a shipper or any other person who has made significant use (as determined by the Commission in its discretion) of such line of railroad during the 12-month period preceding the submission of an applicable application under paragraph (1) of this section; or

(ii) a State, or any political subdivision of a State, if such line of railroad is located, in whole or in part, within such State or political subdivision; unless such line or railroad has been identified and described in a diagram or in an amended diagram which was submitted to the Commission under subdivision (a) of this paragraph at least 4 months prior to the date of submission of an application for such certificate.

(6) Findings by Commission of public convenience and necessity permitting abandonment or discontinuance; publication in Federal Register; further findings of offers of financial assistance postponing issuance of certificate of abandonment or discontinuance; duration of postponement

(a) Whenever the Commission makes a finding, in accordance with this section, that the public convenience and necessity permit the abandonment or discontinuance of a line or railroad, it shall cause such finding to be published in the Federal Register. If, within 30 days of such publication, the Commission further finds that—

(i) a financially responsible person (including a government entity) has offered financial assistance (in the form of a rail service continuation payment) to enable the rail service involved to be continued; and

(ii) it is likely that such proffered assistance would—

(A) cover the difference between the revenues which are attributable to such line of railroad and the avoidable cost of providing rail freight service on such line, together with a reasonable return on the value of such line; or

(B) cover the acquisition cost of all or any portion of such line of railroad;

the Commission shall postpone the issuance of a certificate of abandonment or discontinuance for such reasonable time, not to exceed 6 months, as is necessary to enable such person or entity to enter into a binding agreement, with the carrier seeking such abandonment or discontinuance, to provide such assistance or to purchase such line and to provide for the continued operation of rail services over such line. Upon notification to the Commission of the execution of such an assistance or acquisition and operating agreement, the Commission shall postpone the issuance of such a certificate for such period of time as such an agreement (including any extensions or modifications) is in effect.

(b) A carrier by railroad subject to this chapter shall promptly make available, to any party considering offering financial assistance in accordance with subdivision (a) of this paragraph, its most recent reports on the physical condition of any line of railroad with respect to which it seeks a certificate of abandonment or discontinuance, together with such traffic, revenue, and other data as is necessary to determine the amount of assistance that would be required to continue rail service.

(7) Determination by Commission subsequent to findings of offers of financial assistance of extent avoidable costs of rail service and reasonable return on rail properties exceed operating revenues

Whenever the Commission finds, under paragraph (6)(a) of this section, that an offer of financial assistance has been made, the Commission shall determine the extent to which the avoidable cost of providing rail service plus a reasonable return on the value of

the rail properties involved exceed the revenues attributable to the line of railroad or the rail service involved.

(8) Statutory provisions applicable to petitions filed and pending prior to February 5, 1976, or prior to promulgation of regulations by Commission

Petitions for abandonment or discontinuance which were filed and pending before the Commission as of February 5, 1976, or prior to the promulgation by the Commission of regulations required under this section shall be governed by the provisions of section 1 of this title which were in effect on February 5, 1976, except that paragraphs (6) and (7) of this section shall be applicable to such petitions.

(9) Injunctive relief; jurisdiction; parties; civil penalty

Any abandonment or discontinuance which is contrary to any provision of this section, or of any regulation promulgated under this section, or of any terms and conditions of an applicable certificate, may be enjoined by an appropriate district court of the United States in a civil action commenced and maintained by the United States, the Commission, or the attorney general or the transportation regulatory body of an affected State or area. Such a court may impose a civil penalty of not to exceed \$5,000 on each person who knowingly authorizes, consents to, or permits any violation of this section or of any regulation under this section.

(10) Further findings by Commission of suitability of abandoned or discontinued properties for use for other public purposes; limitations on disposal subsequent to finding

In any instance in which the Commission finds that the present or future public convenience and necessity permit abandonment or discontinuance, the Commission shall make a further finding whether such properties are suitable for use for other public purposes, including roads or highways, other forms of mass transportation, conservation, energy production or transmission, or recreation. If the Commission finds that the properties proposed to be abandoned are suitable for other public purposes, it shall order that such rail properties not be sold, leased, exchanged, or otherwise disposed of except in accordance with such reasonable terms and conditions as are prescribed by the Commission, including, but not limited to, a prohibition on any such disposal, for a period not to exceed 180 days after the effective date of the order permitting abandonment unless such properties have first been offered, upon reasonable terms, for acquisition for public purposes.

(11) "Avoidable cost" and "reasonable return" defined

As used in this section:

(a) The term "avoidable cost" means all expenses which would be incurred by a carrier in providing a service which would not be incurred, in the case of discontinuance, if such service were discontinued or, in the case of abandonment, if the line over which such service was provided were abandoned. Such expenses shall include but are not limited to all cash inflows which are foregone and all cash outflows which are incurred by such carrier as a result of not discontinuing or not abandoning such service. Such foregone cash inflows and incurred outflows shall include (i) working capital and required capital expenditures, (ii) expenditures to eliminate deferred maintenance, (iii) the current cost of freight cars, locomotives and other equipment, and (iv) the foregone tax benefits from not retiring properties from rail service and other effects of applicable Federal and State income taxes.

(b) The term "reasonable return" shall, in the case of a railroad not in reorganization, be the cost of capital to such railroad (as determined by the Commission), and, in the case of a railroad in reorganization, shall be the mean cost of capital of railroads

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

rate, or charge docketed with such organization within 120 days after such proposal is docketed.

(Feb. 4, 1887, ch. 104, part I, § 5b, as added Feb. 5, 1976, Pub. L. 94-210, title II, § 208(b), 90 Stat. 42, and amended Oct. 19, 1976, Pub. L. 94-555, title II, § 220(k), 90 Stat. 2630.)

§ 6. 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:

§ 6. Schedules and statements of rates, etc., joint rail and water transportation

(1) **Schedule of rates, fares, and charges; filing and posting**

Every common carrier subject to the provisions of this chapter shall file with the Commission created by this chapter and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print, and keep open to public inspection, as aforesaid, the separately established rates, fares, and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed, and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this chapter.

(2) **Schedule of rates through foreign country**

Any common carrier subject to the provisions of this chapter receiving freight in the United States to be carried through a foreign country to any place in the United States shall also in like manner print and keep open to public inspection, at every depot or office where such freight is received for shipment, schedules showing the through rates established and charged by such common carrier to all points in the United States beyond the foreign country to which it accepts freight for shipment; and any freight shipped from the United States through a foreign country into the United States the through rate on which shall not have been made public, as required by this chapter, shall, before it is admitted into the United States from said foreign country, be subject to customs duties as if said freight were of foreign production.

(3) **Change in rates, fares, etc.; notice required; simplification of schedules**

No change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the Commission and

to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection: *Provided*, That the Commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified, or modify the requirements of this section in respect to publishing, posting, and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions: *Provided further*, That the Commission is authorized to make suitable rules and regulations for the simplification of schedules of rates, fares, charges, and classifications and to permit in such rules and regulations the filing of an amendment of or change in any rate, fare, charge, or classification without filing complete schedules covering rates, fares, charges, or classifications not changed if, in its judgment, not inconsistent with the public interest.

(4) **Joint tariffs**

The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the Commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the Commission, and where such evidence of concurrence or acceptance is filed it shall not be necessary for the carriers filing the same to also file copies of the tariffs in which they are named as parties.

(5) **Copies of traffic contracts to be filed**

Every common carrier subject to this chapter shall also file with said Commission copies of all contracts, agreements, or arrangements, with other common carriers in relation to any traffic affected by the provisions of this chapter to which it may be a party: *Provided, however*, That the Commission, by regulations, may provide for exceptions from the requirements of this paragraph in the case of any class or classes of contracts, agreements, or arrangements, the filing of which, in its opinion, is not necessary in the public interest.

(6) **Form and manner of publishing, filing, and posting schedules; incorporation of rates into individual tariffs; time for incorporation; rejection of schedules; unlawful use**

The schedules required by this section to be filed shall be published, filed, and posted in such form and manner as the Commission by regulation shall prescribe. The Commission shall, beginning 2 years after February 5, 1976, require (a) that all rates shall be incorporated into the individual tariffs of each common carrier by railroad subject to this chapter or rail rate-making association within 2 years after the initial publication of the rate, or within 2 years after a change in any rate is approved by the Commission, whichever is later, and (b) that any rate shall be null and void with respect to any such carrier or association which does not so incorporate such rate into its individual tariff. The Commission may, upon good cause shown, extend such period of time. Notice of any such extension and a statement of the reasons therefor shall be promptly transmitted to the Congress. The Commission is authorized to reject any schedule filed with it which is not in accordance with this section and with such regulations. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

(7) **Transportation without filing and publishing rates forbidden; rebates; privileges**

No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter,

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 pleas 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.

§ 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 cancellation 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.

(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

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SCHEDULE OF RECORDS AND PERIODS OF RETENTION—Continued

Item No. and description	Retention period
(c) Statements of oil and oil products consumed as fuel including quantity value, and where consumed.	3 years.
(d) Statement of oil and other products lost by line breaks and leaks including quantity, value, and location of breaks and leaks.	3 years.
(e) Reports of power furnished by producers: monthly reports of the quantity of oil run in connection with which power was furnished by producers, and records of payment for such power.	3 years.
(f) Records of producers' property identifying ownership and location for producers' tanks or wells to which carrier's lines are connected.	3 years after disconnection.
(g) Division or other periodical inventory reports of oil and other products on hand.	3 years.
(h) Division orders: Directions received by carrier as to the division of interest and to whose account transported oil should be credited.	3 years after discontinuance.
(i) Directions received by the carrier for the transfer of division order interests from one interest owner to another.	3 years after discontinuance.
(j) Transfer orders for the transfer of ownership of oil or other products in carrier's custody.	3 years.
Tariffs and Rates	
20. Official file copies of tariffs, classifications, division sheets, and circulars relative to the transportation of property.	3 years after expiration or cancellation.
21. Authorities and supporting papers for transportation of property for free or at reduced rates.	3 years.
22. Copies of concurrences and powers of attorney	2 years after expiration or cancellation.
23. Correspondence and working papers in connection with the making of rates and compliance of tariffs, classifications, division sheets, and circulars affecting the transportation of property.	2 years after cancellation of tariff.
Reports and Statistics	
24. Reports to Federal Energy Regulatory Commission and other regulatory bodies, annual financial, operating and statistical reports, file copies, and supporting data.	5 years.

PART 357—ANNUAL SPECIAL OR PERIODIC REPORTS: CARRIERS SUBJECT TO PART I OF THE INTERSTATE COMMERCE ACT

Sec.

357.1 Common carriers.

357.2 FERC Form No. 6, Annual Report of Oil Pipeline Companies.

357.3 FERC Form No. 73, Oil Pipeline Data for Depreciation Analysis.

357.4 FERC Form No. 6-Q, Quarterly report of oil pipeline companies.

357.5 Cash management programs.

AUTHORITY: 42 U.S.C. 7101–7352; 49 U.S.C. 60502; 49 App. U.S.C. 1–85 (1988).

§357.1 Common carriers.

All common carriers by pipeline subject to the provisions of Part I of Interstate Commerce Act, as amended, are hereby required hereinafter to file in the office of the Commission on or before the 31st day of March in each year,

reports covering the period of 12 months ending with the 31st day of December preceding said date, giving the particulars heretofore called for in the annual reports required by the Commission of said carriers.

[Order 119, 46 FR 9051, Jan. 28, 1981]

§357.2 FERC Form No. 6, Annual Report of Oil Pipeline Companies.

(a) *Who must file.* (1) Each pipeline carrier subject to the provisions of section 20 of the Interstate Commerce Act whose annual jurisdictional operating revenues has been \$500,000 or more for each of the three previous calendar years must prepare and file with the Commission copies of FERC Form No. 6, “Annual Report of Oil Pipeline Companies,” pursuant to the General Instructions set out in that form. Newly established entities must use projected

Federal Energy Regulatory Commission

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data to determine whether FERC Form No. 6 must be filed.

(2) Oil pipeline carriers exempt from filing Form No. 6 whose annual jurisdictional operating revenues have been more than \$350,000 but less than \$500,000 for each of the three previous calendar years must prepare and file pages 301, "Operating Revenue Accounts (Account 600)," and 700, "Annual Cost of Service Based Analysis Schedule," of FERC Form No. 6. When submitting pages 301 and 700, each exempt oil pipeline carrier must include page 1 of Form No. 6, the Identification and Attestation schedules.

(3) Oil pipeline carriers exempt from filing Form No. 6 and pages 301 and whose annual jurisdictional operating revenues were \$350,000 or less for each of the three previous calendar years must prepare and file page 700, "Annual Cost of Service Based Analysis Schedule," of FERC Form No. 6. When submitting page 700, each exempt oil pipeline carrier must include page 1 of Form No. 6, the Identification and Attestation schedules.

(b) *When to file.* (1) The annual report for the year ending December 31, 2004, must be filed on April 25, 2005.

(2) The annual report for each year thereafter must be filed on April 18 of the subsequent year.

(c) *What to submit.* (1) This report form must be filed as prescribed in §385.2011 of this chapter and as indicated in the General Instructions set out in the report form, and must be properly completed and verified.

(2) A copy of the report must be retained by the pipeline carrier in its files. The conformed copies may be produced by any legible means of reproduction.

(3) The form must be filed in electronic format only pursuant to §385.2011 of this chapter, beginning with report year 2002, due on or before March 31, 2003.

[Order 620, 65 FR 81344, Dec. 26, 2000, as amended by Order 628, 68 FR 269, Jan. 3, 2003; 69 FR 9044, Feb. 26, 2004]

§ 357.3 FERC Form No. 73, Oil Pipeline Data for Depreciation Analysis.

(a) *Who must file.* Any oil pipeline company requesting new or changed depreciation rates pursuant to part 347

of this title if the proposed depreciation rates are based on the remaining physical life of the properties or if directed by the Commission to file service life data during an investigation of its book depreciation rates.

(b) *When to submit.* Service life data is reported to the Commission by an oil pipeline company, as necessary, concurrently with a filing made pursuant to part 347 of this title or as directed during a depreciation rate investigation.

(c) *What to submit.* The format and data which must be submitted are prescribed in FERC Form No. 73, Oil Pipeline Data for Depreciation Analysis, available for review at the Commission's Public Reference Section, Room 2A, 888 First Street, NE., Washington, DC 20426.

[Order 606, 64 FR 44405, Aug. 16, 1999]

§ 357.4 FERC Form No. 6-Q, Quarterly report of oil pipeline companies.

(a) *Prescription.* The quarterly financial report form of oil pipeline companies, designated as FERC Form No. 6-Q, is prescribed for the reporting quarter ending March 31, 2004, and each quarter thereafter.

(b) *Filing requirements—(1) Who must file.* Each oil pipeline company, subject to the provisions of section 20 of the Interstate Commerce Act, must prepare and file with the Commission FERC Form No. 6-Q.

(2) *When to file and what to file.* This quarterly financial report form must be filed as follows:

(i) The quarterly financial report for the period January 1 through March 31, 2004, must be filed on or before July 23, 2004.

(ii) The quarterly financial report for the period April 1 through June 30, 2004, must be filed on or before September 22, 2004.

(iii) The quarterly financial report for the period July 1 through September 30, 2004, must be filed on or before December 23, 2004.

(iv) The quarterly financial report for the period January 1 through March 31, 2005, must be filed on or before June 13, 2005.

(v) This report must be filed as prescribed in §385.2011 of this chapter and

Flint Hills Resources Alaska, LLC,
et al. v. FERC,
D.C. Cir. No. 08-1270, et al.

Docket: IS05-82, et al.

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 21st day of July 2010, served the following 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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