ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

Nos. 13-1248 and 13-1249

TESORO ALASKA COMPANY AND
ANADARKO PETROLEUM CORPORATION,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION AND
THE UNITED STATES OF AMERICA,
Respondents.

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

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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September 11, 2014

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and Amici

The parties before this Court are identified in Petitioners' brief.

B. Ruling Under Review

BP Pipelines (Alaska) Inc., 144 FERC ¶ 61,025 (2013), JA 1005.

C. Related Cases

This case has not previously been before this Court or any other court. There are no related cases pending judicial review. In *Flint Hills Res. Alaska, LLC*, 627 F.3d 881, 890 (D.C. Cir. 2010), on review of orders addressing Trans Alaska Pipeline System Carriers' 2005 and 2006 rate filings, the Court found the Carriers' challenges to the Federal Energy Regulatory Commission's uniform rate and pooling determinations unripe for review.

/s/ Beth G. Pacella
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Deputy Solicitor

September 11, 2014

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502 First Rehearing Order	*BP Pipelines (Alaska), Inc*., 125 FERC ¶ 61,215 (2008)
502 Second Rehearing Order	*BP Pipelines (Alaska), Inc*., 127 FERC ¶ 61,317 at PP 26-42 (2009)
1985 Settlement Agreement	1985 Settlement entered into by the TAPS Carriers and the State of Alaska
1985 Settlement Order	*Trans Alaska Pipeline System*, 33 FERC ¶ 61,064 at 61,140 (FERC Order approving 1985 Settlement)
2002 Alaska Order	*In re Amerada Hess Pipeline Corp.*, 2002 WL 31953784 (RCA Nov. 27, 2002)
2004 Alaska Order	*In re Amerada Hess Pipeline Corp.*, 2004 WL 1896911 (RCA June 10, 2004)
2010 Alaska Order	*In re Tariff Rate Revision, Designated as TL131-301*, 2010 WL 3934590, at *6 (RCA Oct. 1, 2010)
Act	Interstate Commerce Act
Administrative Judge Decision	*BP Pipelines (Alaska) Inc.*, 134 FERC ¶ 63,020 (2011)
Alyeska	Alyeska Pipeline Service Company
Anadarko	Petitioner Anadarko Petroleum Corporation
BP	BP Pipelines (Alaska) Inc.
Br.	Tesoro and Anadarko's Brief
Commission	Federal Energy Regulatory Commission

Conoco Phillips	Conoco Phillips Transportation Alaska Inc.
FERC	Federal Energy Regulatory Commission
ICA	Interstate Commerce Act
Opinion No. 502	*BP Pipelines (Alaska), Inc.*, 123 FERC ¶ 61,287 (2008)
Order	*BP Pipelines (Alaska) Inc.*, 144 FERC ¶ 61,025 (2013)
Order Setting Hearing	*BP Pipelines (Alaska) Inc.*, 127 FERC ¶ 61,316 at P 13 (2009)
Pipeline	Trans Alaska Pipeline System
Pooling Settlement	Prospective settlement proposal on appeal
TAPS	Trans Alaska Pipeline System
Tesoro	Petitioner Tesoro Alaska Company

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TESORO ALASKA COMPANY AND ANADARKO PETROLEUM CORPORATION, PETITIONERS,

v.

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

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

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUES

In this proceeding, the Federal Energy Regulatory Commission ("FERC" or "Commission") approved a settlement agreement that resolved lengthy proceedings regarding a contentious matter – the establishment of a mechanism to pool the costs and revenues of the Trans Alaska Pipeline System ("TAPS" or "Pipeline") so that shippers on TAPS do not over-recover or under-recover their

costs. The Commission approved the pooling settlement after determining that it met the requirements of the Interstate Commerce Act and the Commission's contested settlement standards. *BP Pipelines (Alaska) Inc.*, 144 FERC ¶ 61,025 (2013) ("Order").

The issues on appeal are:

1. Whether petitioners Tesoro Alaska Company ("Tesoro") and Anadarko Petroleum Corporation ("Anadarko") have established that they are aggrieved by, and have standing to challenge, the Commission's approval of the pooling settlement; and

2. Whether, assuming jurisdiction, the Commission appropriately approved the pooling settlement as satisfying the requirements of the Interstate Commerce Act and the Commission's contested settlement standards.

STATUTES AND REGULATIONS

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

COUNTERSTATEMENT OF JURISDICTION

As is discussed more fully in Argument Section I, Tesoro and Anadarko have not, and cannot, establish that they are aggrieved by, and have standing to challenge, the Order. *See Shell Oil Co. v. FERC*, 47 F.3d 1186, 1200 (D.C. Cir. 1995) (parties seeking review of a FERC order under the ICA must demonstrate

both aggrievement and standing). Their purported injury is neither fairly traceable to, nor redressable by, a favorable ruling regarding the Order they challenge here. *See Clapper v. Amnesty Int'l USA*, 133 S.Ct. 1138, 1147 (2013); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Thus, the petitions for review should be dismissed.

STATEMENT OF FACTS

I. Statutory And Regulatory Background

In 1977, in conjunction with formation of the Department of Energy, Congress transferred regulatory authority over oil pipelines under the Interstate Commerce Act ("ICA" or "Act") from the Interstate Commerce Commission to the newly-created FERC. *See Resolute Natural Res. Co. v. FERC*, 596 F.3d 840, 841 (D.C. Cir. 2010) (explaining history of oil pipeline regulation under, and citation to, the ICA); *Frontier Pipeline Co. v. FERC*, 452 F.3d 774, 776 (D.C. Cir. 2006) (same). In 1978, Congress repealed much of the Interstate Commerce Act, and provided that oil pipelines were to be regulated under the version of that Act as it existed on October 1, 1977, 49 U.S.C. §§ 1-15 (1976), *reprinted in* 49 U.S.C. app. §§ 1-15 (1988). *See id.*

The Interstate Commerce Act requires oil pipelines to file all rates and charges. ICA § 6(1), 49 U.S.C. app. § 6(1). Section 1(5)(a) of the Act, 49 U.S.C. app. § 1(5)(a), requires that all rates charged for oil pipeline transportation be just

and reasonable. Furthermore, ICA section 5(1), 49 U.S.C. app. § 5(1), permits the pooling of costs or revenues if authorized by the Commission upon a finding that such pooling "will be in the interest of better service to the public or of economy of operation, and will not unduly restrain competition . . . ."

II. The Trans Alaska Pipeline System

After vast oil fields were discovered on the North Slope of Alaska in 1969, various oil companies jointly constructed TAPS, an 800-mile pipeline from Prudhoe Bay to the port of Valdez. *See Arctic Slope Regional Corp. v. FERC*, 832 F.2d 158, 160 (D.C. Cir. 1987). Oil transportation on TAPS began in 1977. *Id.*

The Pipeline is jointly owned by the TAPS Carriers, with each having an undivided interest. *See Exxon Pipeline Co. v. U.S.*, 725 F.2d 1467, 1468 (D.C. Cir. 1984). The number of TAPS Carriers has varied over time. Originally, there were eight, *see Arctic Slope*, 832 F.2d at 160 n.1; now there are three: BP Pipelines (Alaska) Inc. ("BP"), Conoco Phillips Transportation Alaska Inc. ("Conoco Phillips"), and ExxonMobil Pipeline Company. *See* Order at n.2, JA 1006. The Pipeline is operated by the Carriers' agent, Alyeska Pipeline Service Company ("Alyeska"). *BP Pipelines (Alaska), Inc.*, 127 FERC ¶ 61,317 at P 2 (2009); R. 686 (Settlement Proposal) at 9, JA 587 (describing Alyeska's role).

III. The 1985 TAPS Settlement Agreement

The original TAPS Carriers filed their rates in 1977, which led to protracted litigation at the Commission. *See Arctic Slope*, 832 F.2d at 160. In 1985, the TAPS Carriers and Alaska reached a settlement ("1985 Settlement Agreement"), which established a comprehensive rate-setting methodology for determining maximum interstate rates through 2011 (the then-projected remaining useful life of the Pipeline), and provided, among other things, that TAPS rates would be set on an annual basis. *Id.* at 160-61. In addition, Section II-2(f) of the 1985 Settlement Agreement permitted the TAPS Carriers to pool, i.e., reallocate, certain costs (fixed costs incurred by Alyeska on behalf of all TAPS Carriers; ad valorem taxes; dismantling, removal and restoration allowance; and depreciation) among themselves. 1985 Settlement Agreement (Attachment E to the Settlement Proposal) at 12, JA 709. It is uncontested that Section II-2(f) pooled both interstate and intrastate TAPS costs. *See, e.g.*, Order at P 48, JA 1023 (noting that Anadarko acknowledges that intrastate costs were pooled under Section II-2(f)).

The Commission approved the 1985 Settlement Agreement. *Trans Alaska Pipeline System*, 33 FERC ¶ 61,064 at 61,140 ("1985 Settlement Order"), *reh'g denied*, 33 FERC ¶ 61,392 (1985). In doing so, the Commission found the pooling proposal was in the interest of better service to the public and economy of operation because the rate certainty it provided would enable shippers to plan more

efficiently for the exploration and production of Alaskan oil and should encourage the quest for and production of new oil reservoirs. 1985 Settlement Order, 33 FERC at 61,140. The Commission further found the proposed pooling would not unduly restrain competition because it excluded sufficient return-related costs (i.e., recovery of deferred return, after-tax allowance, return on new rate base, and the associated income tax allowance) to provide TAPS Carriers an incentive to compete to earn their return. *Id.*; *see also id.* at n.22 (explaining that because each owner retains its own return revenues and is at risk as to whether it will earn those revenues there is an incentive to compete). Accordingly, the Commission determined the pooling proposal satisfied ICA section 5(1), 49 U.S.C. app. § 5(1), requirements.

This Court affirmed the Commission's approval of the 1985 Settlement Agreement in *Arctic Slope*, 832 F.2d 158. The 1985 Settlement Agreement, including Section II-2(f), remained in effect through 2008. Order P 5, JA 1008.

IV. The Opinion No. 502 Proceedings (Regarding 2005 And 2006 TAPS Carriers' Rate Filings)

A. TAPS Carriers' 2005 And 2006 Rate Filings

The TAPS Carriers' annual interstate rates were filed without protest until Alaska and Petitioners Anadarko and Tesoro protested the 2005 and 2006 rate filings. *See Flint Hills Res. Alaska, LLC*, 627 F.3d 881, 884 (D.C. Cir. 2010). Alaska contended that the proposed rates were unduly discriminatory and

preferential and were inconsistent with the terms of the 1985 Settlement Agreement. *See id.* Anadarko and Tesoro contended that the proposed rates were unjust, unreasonable, and otherwise unlawful, and asserted that the TAPS Carriers should be required to file a uniform (i.e., the same) rate because each TAPS Carrier provides the same service based on essentially the same costs. *See id.*; *BP Pipelines (Alaska), Inc.*, 119 FERC ¶ 63,007 at PP 247-48 (2007).

B. The Administrative Judge's Findings

After a trial-type hearing, the Administrative Judge found, as pertinent here, that Tesoro and Anadarko had met their burden to show that it was unjust and unreasonable for each TAPS Carrier to charge an individual rate, and that it would be just and reasonable to require the carriers to charge a uniform rate. *Id*. at PP 251-56. As the Administrative Judge noted, the TAPS Carriers provide the same service, and their costs of providing that service are virtually identical. *Id*. at P 252.

The Administrative Judge recognized that, because TAPS Carriers' costs are allocated based upon their ownership shares but their revenues are allocated based upon their throughput (i.e., the amounts they actually ship), individual carriers will over-collect or under-collect their costs if they ship more or less than their ownership shares. *Id*. at P 253. As Anadarko, Tesoro, and Commission Trial Staff pointed out, and the Administrative Judge found, this could be resolved through a

cost and revenue pooling mechanism, such as the one in section II-2(f) of the 1985 Settlement Agreement. *Id*. P 254.

C. Opinion No. 502

The Commission affirmed the Administrative Judge's determinations. *BP Pipelines (Alaska), Inc*., 123 FERC ¶ 61,287 at PP 242-51 ("Opinion No. 502"), *on reh'g*, 125 FERC ¶ 61,215 at PP 55-68 (2008) ("502 First Rehearing Order"), *on reh'g*, 127 FERC ¶ 61,317 at PP 26-42 (2009) ("502 Second Rehearing Order"), *pets. denied in part, dismissed in part sub nom. Flint Hills Res. Alaska, LLC v. FERC*, 627 F.3d 881 (D.C. Cir. 2010). The Commission agreed with the Administrative Judge that, since the TAPS Carriers use the same operator to provide the same service through the same pipeline, it was not just and reasonable for them to charge individual rates. 502 First Rehearing Order, 125 FERC ¶ 61,215 at P 56; *see also* Tesoro/Anadarko Br. ("Br.") at 10 (noting that "Opinion No. 502 required a uniform TAPS rate because the costs of operating TAPS do not vary significantly by Carrier"). Instead, the Commission found that it would be just and reasonable for the TAPS Carriers to charge a uniform rate for this identical transportation service,[1] provided there is also a pooling mechanism to prevent carriers from over-recovering or -under-recovering their costs. 502 First Rehearing

[1] The Commission clarified that the uniform rate constitutes a maximum rate for TAPS, and that TAPS Carriers may file for and charge a lower rate. *BP Pipelines (Alaska), Inc*., 129 FERC ¶ 61,211 at P 31 (2009).

Order, 125 FERC ¶ 61,215 at PP 57, 62-68; 502 Second Rehearing Order, 127 FERC ¶ 61,317 at PP 30-41; Opinion No. 502 at PP 242, 244, 247, 248.

D. *Flint Hills*

Alaska and the TAPS Carriers petitioned for review of Opinion No. 502. In addition to finding no merit in the petitioners' claims asserting methodological errors and price discrimination, the Court found the Carriers' challenges to the uniform rate and pooling determinations were unripe for review. *Flint Hills*, 627 F.3d at 884-90.

V. The 2007 And 2008 Rate Filings

After Opinion No. 502 issued, the TAPS Carriers submitted a compliance filing establishing uniform rates for 2007 and 2008. *See BP Pipelines (Alaska) Inc.*, 127 FERC ¶ 61,316 at P 14 (2009) ("Order Setting Hearing"), JA 5. The Commission accepted the proposed 2007 uniform rate because it fell below the refund floor (i.e., the last clean rates, which were the 2004 TAPS rates). *See id.* Because the proposed 2008 uniform rate was higher than the refund floor, however, the Commission established hearing and settlement procedures, which resulted in an uncontested settlement. *See id.*; *BP Pipelines (Alaska) Inc.*, 131 FERC ¶ 61,003 (2010).

VI. The 2009 Rate Filing Proceedings (Underlying The Instant Petitions For Review)

A. The Rate Filings And Protests

Despite Opinion No. 502's ruling that the TAPS Carriers should file a uniform rate, several of the TAPS Carriers' 2009 rate filings proposed an individual, rather than a uniform, rate. *See* Order Setting Hearing, 127 FERC ¶ 61,316 at PP 17-21, 28, JA 7-9, 11. Alaska and Anadarko protested the rate filings, arguing that they had not been shown to be just and reasonable and urging the Commission to set them for hearing. *See id.* at P 22, JA 9.

B. The Order Setting Hearing

The Commission determined that the tariff filings raised a number of issues of material fact that could not be resolved on the record before it and would be addressed more appropriately through hearing and settlement procedures. *Id.* at PP 25-26, JA 10. Accordingly, the Commission established hearing procedures to examine the varying data submitted by the Carriers and to determine, based on the ratemaking methodology set out in Opinion No. 502, one rate for transportation service on TAPS. *Id.* at PP 26, 28, 32, JA 10, 11, 13. In addition, the Commission established formal settlement procedures. *Id.* at P 30, JA 13.

C. The Hearing And Administrative Judge Decision

After a first attempt at settlement failed, a trial-type hearing regarding pooling, the uniform rate implementation process, and return on equity issues was

held from October 28 through November 5, 2010.[2] *See* Administrative Judge Decision at PP 38-41, JA 160-61. Eleven witnesses testified at the hearing, and more than 250 exhibits were admitted into evidence. *Id.* at P 41, JA 161.

The parties agreed to a stipulation resolving the return on equity issues, and the Administrative Judge established the procedures to be used by the TAPS Carriers in setting their uniform rate. *Id.* at PP 819, 822-29, 923-34, JA 339, 341-43, 372-76.

As to pooling, all parties agreed that State ad valorem (i.e., property) taxes, depreciation costs, and the interstate portion of fixed operating expenses incurred by Alyeska on behalf of the TAPS Carriers, should be pooled. *See id.* at PP 831, 836, JA 344, 345. There was disagreement, however, regarding the remaining TAPS costs: Carrier-direct costs (i.e., costs incurred by the TAPS Carriers themselves rather than incurred in the first instance by Alyeska and then allocated to the Carriers, *id.* at P 898, JA 365); return on investment (i.e., debt cost, return on equity, amortization of Allowance for Funds Used During Construction, deferred return, and related income taxes, *id.* at P 850, JA 349); and intrastate TAPS costs. *See id.* at PP 832-33, 850, JA 344, 349. BP proposed pooling of return on

[2] A separate hearing regarding the other TAPS Carriers' 2009 rate filing issues (such as prudence and related cost of service issues) was held before a different Administrative Judge. *See BP Pipelines (Alaska) Inc.*, 134 FERC ¶ 63,020 at P 38, (2011) ("Administrative Judge Decision"), JA 160. An Administrative Judge decision on those matters was issued on February 27, 2014 (*BP Pipelines (Alaska) Inc.*, 146 FERC ¶ 63,019 (2014)).

investment and intrastate TAPS costs, but not of Carrier-direct costs. *See id.* at P 850, JA 350. ConocoPhillips proposed pooling of Carrier-direct costs, but not of return on investment or intrastate TAPS costs. *See id.* Anadarko proposed pooling of intrastate TAPS costs, but not of return on investment or Carrier-direct costs. *See id.*[3]

After considering the testimony, briefing and argument presented during the hearing, the Administrative Judge determined that Carrier-direct costs should be pooled. *Id.* at PP 896-917, JA 364-71. Otherwise, TAPS Carriers would over-collect or under-collect their costs. *Id.* at PP 898-905, JA 365-67.

The Administrative Judge also determined that both the interstate and intrastate portions of pooled TAPS costs should be pooled to prevent TAPS Carriers from over- or under-recovering their costs. *Id.* at PP 889-95, JA 362-64. The Administrative Judge found that this was consistent with Section II-2(f) of the 1985 Settlement Agreement, which also pooled both interstate and intrastate costs, and would not involve the setting of intrastate rates or otherwise affect the State's authority. *Id.* at PP 891-92, JA 362-63.

Finally, the Administrative Judge found return on investment costs should be pooled as well. *Id.* at PP 860, 882, JA 352, 360. To provide TAPS Carriers an incentive to compete, however, the Administrative Judge determined that 100

[3] Anadarko later changed its position, arguing that intrastate TAPS costs should not be pooled. *See* Administrative Judge Decision at P 833, n.67, JA 344, 349.

percent of some return on investment costs (debt and amortization of Allowance for Funds Used During Construction) should be pooled, but only 50 percent of the remaining return on investment costs (deferred return, return on equity, and income allowance) should be pooled. *Id.* at PP 860-88, JA 352-62.

D. The Settlement Proceedings

1. The Pooling Settlement

On September 25, 2012, the TAPS Carriers filed two proposed settlements, one retrospective and one prospective, to fully resolve the pooling issues pending before the Commission. R. 686 at 1-2, 37, JA 579-80, 615. The retrospective settlement proposal (which is not at issue in this appeal) provided for the payment of settlement amounts among the TAPS Carriers to cover the period through August 1, 2012. *Id.* at 4, 21-22, JA 582, 599-60. The prospective settlement proposal (on appeal here) set forth a voluntary pooling agreement among the TAPS Carriers ("Pooling Settlement") to be implemented beginning August 1, 2012. *Id.* at 1-2, 36, JA 579-80, 614.

The TAPS Carriers explained that, "to preserve the incentive for Carriers to compete for additional throughput," they proposed to pool only some of the TAPS costs: fixed operating expenses incurred by Alyeska, ad valorem taxes, depreciation, and interest (to account for the time between when these costs are incurred and when they are pooled). *Id.* at 23, 35, JA 601, 613. The following

costs are excluded from pooling under the settlement: return on investment (including return on equity, cost of debt, deferred return and amortization of Allowance for Funds Used During Construction), income tax allowance, and Carrier-direct costs. *Id.* Moreover, like the uniform rate, the proposed pooling is calculated based on system-wide costs and, therefore, does not distinguish between interstate and intrastate costs. *Id.* at 23, JA 601.

The TAPS Carriers pointed out that the Pooling Settlement hewed closely to the prior TAPS pooling agreement (1985 Settlement Agreement Section II-2(f), JA 708). *Id.* at 7, 10-11 (citing 1985 Settlement Agreement Orders, 33 FERC ¶ 61,064, *reh'g denied*, 33 FERC ¶ 61,392), 21, JA 585, 588-89, 599; *see also* R. 714 (Anadarko's Reply Comments) at 11, JA 892 (acknowledging that the Pooling Settlement "resembles the prior Section II-2(f) pooling mechanism"); R. 718 (Anadarko's Answer to TAPS Carriers' Reply Comments) at 13-14, JA 915-16 (same). Under Section II-2(f), the fixed operating costs incurred by Alyeska, ad valorem taxes, depreciation, and amounts collected in anticipation of performing dismantlement, removal and restoration work on TAPS were pooled; carrier-direct, return on investment, and income tax allowance costs were not pooled. Pooling Settlement at 10-11, JA 588-89. In addition, consistent with the system-wide basis on which TAPS costs are incurred and funded, Section II-2(f) provided for the

pooling of all fixed operating costs, whether associated with intrastate or interstate throughput. *Id.* at 11, JA 589.

2. Parties' Comments

Alaska did not oppose the proposed settlements "conditioned on the understanding that any approval of the [settlements] by [FERC] will not affect in any way the authority of the Regulatory Commission of Alaska ('RCA') (1) to determine the validity or application of the [settlements] under the laws or regulations of the State of Alaska to the extent that they affect or relate to tariff rates under the jurisdiction of the RCA, and (2) to continue to set intrastate rates within its jurisdiction pursuant to applicable Alaska laws and regulations." R. 699 at 1-2, JA 719-20.

Likewise, FERC Trial Staff did not oppose the Pooling Settlement. R. 706 at 3, JA 816. Trial Staff explained that the Pooling Settlement "would resolve particularly difficult issues of law and policy concerning the implementation of a uniform rate and the structure of a pooling mechanism on TAPS that have been pending at the Commission since 2008." *Id.* at 15, JA 828. Moreover, Trial Staff pointed out, the Pooling Settlement excludes return on equity and Carrier-direct costs from pooling, which provides a meaningful incentive for TAPS Carriers to compete. *Id.* at 17-18, JA 830-31. Trial Staff further noted that the proposed pooling agreement is similar to that adopted by the Commission in section II-2(f)

of the 1985 Settlement Agreement. *Id.* at 19, JA 832. Thus, Trial Staff concluded that the Pooling Settlement was an acceptable resolution of the matters here. *Id.* at 3, JA 816.

Tesoro opposed the Pooling Settlement. R. 703, JA 723. Tesoro contended that pooling of TAPS intrastate costs and revenues would intrude into intrastate matters and would devastate intrastate competition. *Id.* at 2-14, JA 724-36. In addition, Tesoro argued that the Pooling Settlement should be rejected or limited to five years because certain events that might occur might increase interstate competition. *Id.* at 15-17, JA 737-39.

Anadarko also opposed the Pooling Settlement. Anadarko argued that: the Pooling Settlement would unduly burden competition (R. 705 (Anadarko Settlement Comments) at 3-5, 24-29, 32-34, JA 745-47, 766-71, 774-76; R. 714 (Anadarko Reply Comments) at 13, JA 894); Opinion No. 502's uniform rate requirement does not necessitate pooling (Anadarko Settlement Comments at 9, JA 751); the Commission does not have jurisdiction to approve pooling of intrastate costs (*id.* at 14-18, 22-23, JA 756-60, 764-65); and the Pooling Settlement should be limited to a term of five years so the Commission and parties can revisit the merits of the Pooling Settlement in light of future changes in TAPS markets (*id.* at 5, 13, 35-36, JA 747, 755, 777-78; Anadarko Reply Comments at 14-15, JA 895-96). Anadarko further argued that the Commission should review the Pooling

Settlement under the first approach set out in *Trailblazer Pipeline Co.*, 85 FERC ¶ 61,345 at 62,341-42 (1998), *order on reh'g*, 87 FERC ¶ 61,110, *order on reh'g*, 88 FERC ¶ 61,168 (1999), which enables the Commission to rule on material issues of fact regarding a contested settlement if there is an adequate record on which to base a decision (Anadarko Settlement Comments at 37, JA 779).

The TAPS Carriers responded to Anadarko's and Tesoro's comments. R. 711 (Reply Comments), JA 838; R. 723 (Answer), JA 954. TAPS Carriers explained that omitting intrastate costs from pooling would cause TAPS Carriers to over- or under-recover their costs. Reply Comments at 25, JA 862; Answer at 10, JA 963. Moreover, they pointed out, Section II-2(f) of the 1985 Settlement Agreement pooled both intrastate and interstate costs, Interstate Commerce Act section 5(1) permits the Commission to approve pooling of TAPS costs without regard to whether they are interstate or intrastate, and approving the Pooling Settlement would not interfere with Alaska's jurisdiction. Reply Comments at 22-25, JA 859-62; Answer at 6, 9; JA 959, 962. TAPS Carriers further explained that the Commission should not limit the proposed pooling to five years because the bases on which Anadarko and Tesoro requested this modification were speculative, and limiting the Pooling Settlement to five years would likely ensure the issue was

constantly relitigated, creating instability and uncertainty. Reply Comments at 26-28, JA 863-65.

VII. The Challenged Order

The Commission found that the voluntary pooling proposal met the requirements of ICA section 5(1). Order P 55, JA 1024. The proposal was in the interest of better service to the public or economy of operation and would not unduly restrain competition because it would minimize over- or under-recovery of costs (which is critical to the future, long-term operation of TAPS), while also providing ample incentive for the TAPS Carriers to discount their rates and compete for volumes. *Id.* at PP 55-56, 59-62, 67, 69, JA 1024-1025, 1026-27, 1029, 1030.

Furthermore, the Commission found that approving the Pooling Settlement would not interfere with Alaska's jurisdiction. *Id.* at PP 55, 59, 66, JA 1024, 1026, 1029. Alaska will continue to have jurisdiction over, and will continue to set, TAPS Carriers' intrastate rates. *Id.* at PP 59, 65, 66, JA 1026, 1029. It is only after intrastate volumes are shipped under Alaska-authorized intrastate rates that the Pooling Settlement reallocates some intrastate (and interstate) costs to ensure that no TAPS Carrier will bear a disproportionate share of TAPS costs. *Id.* at PP 65, 66, JA 1029. And, the Commission noted, Alaska neither challenged the

specifics of the Pooling Settlement nor claimed that it would infringe upon its intrastate authority. *Id.* at P 66, JA 1029.

In addition, the Commission found speculative Anadarko and Tesoro's claim that intrastate TAPS rates will increase as a result of the Pooling Settlement. *Id.* at P 59, JA 1026. Likewise, their claim that potential future events might change the competitive circumstances on TAPS was speculative and inconsistent with other publicly-available information. *Id.* at PP 63-64, JA 1028.

Thus, having resolved the merits of the contested settlement issues based upon substantial record evidence, the Commission approved the Pooling Settlement as just and reasonable under the first *Trailblazer* approach and in accordance with section 602(h)(1) of its Rules, 18 C.F.R. § 385.602(h)(1). *Id.* at n.56, PP 77-78, JA 1031, 1033.

SUMMARY OF ARGUMENT

In the Order, the Commission reasonably approved the TAPS Carriers' settlement of a contentious issue -- i.e., which TAPS costs and revenues should be included in a pooling mechanism so that the TAPS Carriers do not over-recover or under-recover their costs. Tesoro and Anadarko's petitions challenging that Order should be dismissed for lack of jurisdiction because they have not established that they are aggrieved by, and have standing to challenge, the Order. In any event, Tesoro and Anadarko's challenges to the Order lack merit.

Tesoro and Anadarko's claimed injury -- that one of the TAPS Carriers (BP) has filed to increase its intrastate rates -- is neither fairly traceable to FERC's Order nor redressable by a favorable ruling regarding that Order. BP filed to increase its intrastate rates because those rates are based on outdated data and no longer compensatory, a matter unrelated to the Order on review here.

Tesoro and Anadarko's petitions fail on their merits as well. The Commission's determination that the Pooling Settlement satisfied the requirements of Interstate Commerce Act section 5(1) was reasoned and supported by substantial evidence. First, the Pooling Settlement was "in the interest of better service to the public or economy in operation" because it would help prevent TAPS Carriers from over- or under-recovering their costs, which is critical to the future, long-term operation of TAPS and necessary to ensure just and reasonable rates. Second, by excluding a substantial percentage of TAPS costs (25.1 percent) from pooling, the Pooling Settlement would provide TAPS Carriers ample incentive to discount their rates to compete for volumes. Accordingly, the Commission found, the Pooling Settlement "will not unduly restrain competition." This predictive judgment was within the Commission's scope of expertise, is due deference, and should be upheld.

In addition, the Commission reasonably determined that its approval of the Pooling Settlement does not affect State authority. While intrastate TAPS costs

and revenues are included in the pooling so that TAPS Carriers do not over- or under-recover their costs, this does not affect Alaska's authority over the rates at which intrastate volumes are shipped. Pooling does not occur until after intrastate volumes ship at Alaska Commission-authorized intrastate rates. Moreover, as the Commission pointed out, Alaska filed comments "in non-opposition" to the settlement, which neither challenged its specifics nor argued that it infringes on State authority. The Commission found its jurisdictional limitations under the Interstate Commerce Act honored here, as its approval of the Pooling Settlement would not cause it to regulate intrastate commerce in any respect.

ARGUMENT

I. Petitioners Have Not Established Standing Or Aggrievement

"A party seeking review of a final Commission order under the ICA must demonstrate that it has been 'aggrieved' by the order." *Shell Oil*, 47 F.3d at 1200 (quoting 28 U.S.C. § 2344). Moreover, "[l]ike all parties seeking access to the federal courts, petitioners are held to the constitutional requirement of standing." *Id.* Thus, petitioners' "injury must be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Clapper*, 133 S.Ct. at 1147 (internal quotation marks omitted); *see also Lujan*, 504 U.S. at 560-61. Petitioners bear the burden to establish their

aggrievement and standing. *Id.* at 1148; *Oxy USA, Inc. v. FERC*, 64 F.3d 679, 696 (D.C. Cir. 1995).

Tesoro and Anadarko claim they are aggrieved by, and have standing to challenge, the Order because it "approved pooling of interstate and intrastate TAPS costs, thereby inhibiting competition among the TAPS Carriers and resulting in a more than tripling of the intrastate rate under which Anadarko and Tesoro ship oil on TAPS." Br. 18; *see also* Br. 36-37 (noting that BP has filed with the Alaska Commission to increase its intrastate TAPS rate). Tesoro and Anadarko's claim that BP filed to increase its intrastate rates as a result of the Order challenged here is unfounded.

BP's filing explains that it is seeking an intrastate rate increase because its current rates are based upon year 2000 costs and throughput, but ad valorem taxes have dramatically increased (from $57 million to $237 million annually) and throughput on TAPS has substantially declined (from one million barrels per day to less than 550 thousand barrels per day) since then. Tesoro/Anadarko Br. Addendum Tab A (BP's Alaska rate filing) at 2. As a result, BP explains, its existing intrastate tariff rates do not provide BP with an opportunity to recover its revenue requirement and, therefore, are not compensatory. *Id.* BP's filing further requests that the Alaska Commission "adopt simplified tariff procedures that will enable the TAPS Carriers to file discounted rates, below the ceiling level

established by formal adjudication, for intrastate transportation on TAPS" because "[s]implified tariff procedures would promote and facilitate competition among the TAPS Carriers." *Id.* at 5.

The Alaska Commission suspended BP's proposed rates, finding that "they have not been shown to be just and reasonable and may be unjust and unreasonable." *Id.* at Addendum Tab C (Alaska Order) at 6. Additionally, the Alaska Commission directed that "BP shall collect the temporary rates established by this order subject to refund of the difference between the temporary rates and the rates [it] establish[es] at the conclusion of this proceeding plus interest . . . ." *Id.* at 6. The Alaska Commission also held BP's tariff proceeding in abeyance pending a final order in proceedings regarding other TAPS Carriers' earlier rate filings. *Id.* at 3-4, 7.

Tesoro and Anadarko have not established that they have suffered, or imminently will suffer, any concrete injury. The Supreme Court has "repeatedly reiterated that 'threatened injury must be *certainly impending* to constitute injury in fact,' and that '[a]llegations of *possible* future injury' are not sufficient." *Clapper*, 133 S.Ct. at 1147 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)) (emphases and alteration by Court). Moreover, the Alaska Commission has not, and may never, approve BP's proposed rate increase. Courts understandably are "reluctant to endorse standing theories that require guesswork as to how

independent decisionmakers will exercise their judgment." *Id.* at 1150; *see also id.* at 1150 & n.5 ("Plaintiffs cannot rely on speculation about the unfettered choices made by independent actors not before the court.") (citing *Lujan*, 504 U.S. at 562 (internal quotation marks omitted)). *See* Order at P 59, JA 1026 (noting that TAPS Carriers' intrastate rates are subject to the Alaska State Commission's finding that such rates are just and reasonable).

Furthermore, Tesoro and Anadarko have failed to establish that their claimed injury is fairly traceable to the challenged FERC Order or redressable by a favorable ruling regarding that Order. Although Tesoro and Anadarko assert that BP filed to increase its intrastate rates as a result of FERC's approval of the Pooling Settlement, the filing establishes that BP filed for an intrastate rate increase because its current intrastate rates are based on outdated year 2000 costs and throughput and are no longer compensatory. Tesoro/Anadarko Br. Addendum Tabs A & C. The challenged FERC Order is unrelated to whether BP's intrastate rates are compensatory.

Accordingly, Tesoro and Anadarko have not established aggrievement or standing to challenge the FERC Order under review here, and their petitions for review should be dismissed.

II. Standard of Review

Assuming jurisdiction, the Court reviews FERC orders under the Administrative Procedure Act's arbitrary and capricious standard, and upholds FERC's factual findings if they are supported by substantial evidence. *See, e.g.*, *Freeport-McMoRan Corp. v. FERC*, 669 F.3d 302, 308 (D.C. Cir. 2012). More specifically, "[w]hen reviewing FERC's approval of a contested settlement, [the Court] must determine whether FERC has supplied a 'reasoned decision' that is supported by 'substantial evidence.'" *NRG Power Mktg., LLC v. FERC*, 718 F.3d 947, 953 (D.C. Cir. 2013) (quoting 18 C.F.R. § 385.602(h)(1)(i)). The Court is "'particularly deferential to the Commission's expertise' with respect to ratemaking issues." *ExxonMobil Oil Corp. v. FERC*, 487 F.3d 945, 951 (D.C. Cir. 2007) (quoting *Ass'n of Oil Pipe Lines v. FERC*, 83 F.3d 1424, 1431 (D.C. Cir. 1996)); *see also Morgan Stanley Capital Grp., Inc. v. Pub. Util. Dist. No. 1*, 128 S. Ct. 2733, 2738 (2008) ("we afford the Commission great deference in its rate decisions.").

An agency's construction of the statute it administers is reviewed under well-settled principles. If Congress has directly spoken to the precise question at issue, the Court "must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). If the statute is silent or ambiguous, the Court "must defer to a

'reasonable interpretation made by the [agency].'" *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 481 (2001) (quoting *Chevron*, 467 U.S. at 844). "Such deference . . . extends to the agency's interpretation of statutory ambiguity that concerns the scope of the agency's jurisdiction." *Helicopter Ass'n Int'l, Inc. v. FAA*, 722 F.3d 430, 433 (D.C. Cir. 2013) (citing *City of Arlington, Tex. v. FCC*, 133 S.Ct. 1863 (2013)).

III. The Commission Appropriately Approved The TAPS Carriers' Voluntary Pooling Settlement

A. The Commission Reasonably Determined That The Pooling Settlement Satisfied ICA Section 5(1) Requirements

Tesoro and Anadarko assert that the Commission's ICA section 5(1) determinations are conclusory and unsupported. Br. 33-35, 46-47. To the contrary, the Commission's determination that the proposed Pooling Settlement satisfied ICA section 5(1) requirements was reasoned and supported by substantial evidence in the record.

ICA section 5(1) requires the Commission to determine whether the TAPS Carriers' voluntary pooling proposal was "in the interest of better service to the public or of economy in operation," and would not "unduly restrain competition." The Commission found these requirements satisfied here. Order at PP 55-56, 59-62, 67, 69, JA 1024-27, 1029-30.

First, the Pooling Settlement was "in the interest of better service to the public or of economy in operation" because it would help prevent TAPS Carriers from over-recovering or under-recovering their costs. *Id.* at PP 56, 60, 61, JA 1024, 1026, 1027; *see also id.* at P 60, JA 1026 (noting that Opinion No. 502 found that it is in the public interest for TAPS Carriers to charge a uniform rate for their identical transportation service and, in order for this to occur without some carriers over- or under-recovering, there must be a pooling mechanism). As the Commission explained, preventing over-recovery or under-recovery of costs is both critical to the future, long-term operation of TAPS, *id.* at P 61, JA 1027, and necessary to ensure just and reasonable rates, *id.* at P 60, JA 1026 (citing 502 Second Rehearing Order, 127 FERC ¶ 61,317 P 40). Moreover, the Commission pointed out, the Pooling Settlement appropriately would "allocate TAPS costs in the same manner as revenues are allocated among the TAPS owners." Order at P 61, JA 1027; *see also id.* at P 60, JA 1027 (same).

Tesoro and Anadarko argue that the Pooling Settlement was not "in the interest of better service to the public or of economy in operation" because competition leads to greater efficiency. Br. 38-39. The Commission found, however, that the Pooling Settlement would not "unduly restrain competition." Order at PP 59, 62, 69, JA 1026, 1027, 1030. The TAPS Carriers' proposal would exclude from the pool all return on equity, cost of debt, deferred return, Allowance

for Funds Used During Construction, income tax allowance, and Carrier-direct costs. Order at P 62, JA 1027. The record established (and it is uncontested) that these costs equal 25.1 percent of the total TAPS cost of service. *Id.* (citing R. 711 (TAPS Carriers Reply Comments) at 15-17, JA 852-54). The Commission determined that excluding such a substantial portion of TAPS costs from the pool will give TAPS Carriers ample incentive to discount their rates and compete for volumes. *Id.* at P 62, JA 1027; *see also id.* at P 59, JA 1026 ("by excluding a high percentage of the [TAPS Carriers'] costs from the pool, the [Pooling Settlement] will not unduly restrain competition among those carriers."); *id.* at P 69, JA 1030 ("the level of the costs to be pooled under the [Pooling Settlement] (including intrastate costs) is sufficient to maintain competition among the [TAPS] Carriers.").

Tesoro and Anadarko argue that the Commission should have cited evidence supporting its conclusion that excluding 25 percent of TAPS costs from pooling will provide the TAPS Carriers an incentive to compete. Br. 34. As this Court has recognized, however, it is within the scope of the Commission's expertise to make predictive judgments about the future behavior of the entities and markets it regulates, and the Commission's reasonable predictive judgments are entitled to particularly deferential review. *E.g.*, *Sacramento Mun. Util. Dist. v. FERC*, 616 F.3d 520, 542 (D.C. Cir. 2010); *Wis. Pub. Power, Inc. v. FERC*, 493 F.3d 239,

260-61 (D.C. Cir. 2007). Here, the Commission made a reasonable predictive judgment that excluding 25.1 percent of TAPS costs from pooling would provide the TAPS Carriers ample incentive to compete and, therefore, that the pool would not unduly restrain competition. Order at PP 59, 62, 69, JA 1026, 1027, 1030.

Next, Tesoro and Anadarko point to witness testimony that pooling all TAPS costs would eliminate incentives to compete. Br. 36. As already discussed, however, the Pooling Settlement would not pool all TAPS costs; 25.1 percent of TAPS costs would be excluded from the pool to provide the TAPS Carriers an incentive to compete for additional throughput. Order at P 62, JA 1027; Pooling Settlement at 23, 35, JA 601, 613.

Tesoro and Anadarko also contend that, "[e]ven when some portion of costs remains un-pooled, competition continues to be constrained." Br. 36; *see also id.* at 47, 48 (same); *id.* at 37 (contending that reducing incentives for competition through pooling could prevent development of competition in the interstate market). But the Interstate Commerce Act does not require that pooling have no effect on competition. Rather, it requires only that pooling "not unduly restrain competition," ICA section 5(1), as the Commission found to be the case here. Order at PP 59, 62, 69, JA 1026, 1027, 1030.

Moreover, as the Commission found, there was no merit to Tesoro and Anadarko's claim that the Pooling Settlement would eliminate competition and,

therefore, that BP's intrastate TAPS rates would increase. Br. 7-8, 36-37, 47, 48. Not only would the Pooling Settlement preserve competition on TAPS, but the TAPS Carriers' ability to increase their intrastate rates remains subject to the Alaska State Commission's approval of those rates as just and reasonable. Order at PP 59, 62, 69, JA 1026, 1027, 1030.

Tesoro and Anadarko's reference to a post-record filing by BP to increase its intrastate TAPS rates (Br. 36-37, citing Br. Addendum Tabs A-C) does not help them either. It is well settled that "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973); *see also Brooklyn Union Gas Co. v. FERC*, 409 F.3d 404, 407 (D.C. Cir. 2005) (Court will not reach out to post-record evidence).

Even if it were appropriate to consider these post-record documents, they do not support Tesoro and Anadarko's concern that BP's rates will increase due to the Pooling Settlement. As already discussed, *supra* Argument Section I, BP filed for an intrastate rate increase because it claims its current rates are no longer compensatory. Tesoro/Anadarko Br. Addendum Tab A at 2.

Tesoro and Anadarko contend "that the evidence developed subsequent to Opinion No. 502 show[s] that the harms of pooling significantly outweigh the modest benefits of the uniform rate," and, therefore, that the Commission should

have reconsidered its adoption of the uniform rate requirement. Br. 54; *see also* Br. 52-55 (same). The Commission reasonably found based upon the record, however, that the voluntary pooling proposed here is in the interest of better service to the public or of economy in operation and would not unduly restrain competition. Order at PP 55-56, 59-62, 67, 69, JA 1024-25, 1026-27, 1029, 1030. Thus, the Commission appropriately rejected Tesoro and Anadarko's collateral attack on Opinion No. 502's uniform rate requirement. *Id.* at P 77, JA 1033; *see also* R. 705 (Anadarko's Comments) at 8, JA 750 (acknowledging that "the uniform rate requirement was litigated in the Opinion No. 502 proceeding"); *id.* at 10, JA 752 (acknowledging that "Anadarko originally advocated for the uniform rate in the Opinion No. 502 proceeding").

Tesoro and Anadarko also argue that there is no need to pool intrastate costs because the Alaska Commission does not require the TAPS Carriers to have uniform intrastate rates. Br. 28, 48, 52-53. As the Alaska Commission has explained, however, it "set uniform intrastate rates[[4]] on TAPS in [*In re Amerada Hess Pipeline Corp.*, 2002 WL 31953784 (RCA Nov. 27, 2002) ("2002 Alaska Order")] for the years 1997 to 2000." 2010 Alaska Order at *6. Then, in *In re Amerada Hess Pipeline Corp.*, 2004 WL 1896911 (RCA June 10, 2004) ("2004

[4] "By uniform rates [the Alaska Commission] mean[s] identical rates for each TAPS Carrier." *In re Tariff Rate Revision, Designated as TL131-301*, 2010 WL 3934590, at *6 n.25 (RCA Oct. 1, 2010) ("2010 Alaska Order").

Alaska Order"), the Alaska Commission "made [those] rates permanent for the post-2000 year period, until [it] approve[s] revised rates." 2010 Alaska Order at *6. Furthermore, the Alaska Commission has explained that it will allow TAPS Carriers to file individual rates only "if the sum of the individual annual revenue requirements does not exceed the composite revenue requirement" approved by that Commission. 2002 Alaska Order at *66; *see also id.* at 91-93 (same).

FERC did not reject Tesoro and Anadarko's proposal to limit pooling to five-years simply "because it was not agreed to by the settling parties." Br. 38 (citing Order at P 78, JA 1033). Rather, the Commission reasonably found that it would not be "in the interest of better service to the public or of economy in operation" to limit the pooling agreement to 5 years because: a pooling mechanism will be necessary to ensure that no TAPS Carrier will bear a disproportionate share of TAPS costs as long as the TAPS Carriers charge a uniform interstate rate; the previous pooling arrangement worked effectively for more than 20 years; the problems predicted by Tesoro and Anadarko were speculative; and modifying the Pooling Settlement would change the expectations of the settling parties, prevent closure of this proceeding, and provoke additional litigation. Order at PP 63-65, 78, JA 1028-29, 1033. If Tesoro and Anadarko believe experience shows that the Pooling Settlement unduly restrains competition, they can file an ICA section 13, 49 U.S.C. app. § 13, complaint raising that claim

at that time. *See La. Energy and Power Auth. v. FERC*, 141 F.3d 364, 370-71 (D.C. Cir. 1998) (ability to file a complaint if FERC's prediction turns out to be incorrect is sufficient protection unless petitioner shows it is likely FERC's prediction will prove incorrect).

Finally on this point, Tesoro and Anadarko contend that the Commission had an independent duty, aside from ICA section 5(1)'s requirements, to evaluate the competitive impacts of its rulings and to encourage competition. Br. 39-41, 56. Even if this were true, Tesoro and Anadarko do not specify how the Commission failed in this duty. And, as already addressed, the Commission determined that, because 25.1 percent of TAPS costs will be excluded from pooling, there will continue to be competition on TAPS.

B. The Commission Reasonably Determined It Had Authority To Approve The Pooling Settlement

Tesoro and Anadarko argue that approving pooling that includes intrastate transportation costs exceeds the Commission's Interstate Commerce Act authority. Br. 18-33. The Commission reasonably found otherwise. Order at PP 55, 59, 66, JA 1024, 1026, 1029.

While intrastate TAPS costs and revenues are included in the pooling so that TAPS Carriers do not over- or under-recover their costs and revenues, this has no effect on the Alaska Commission's authority over the rates at which intrastate volumes are shipped. *Id.* at P 66, JA 1029. Intrastate TAPS costs and revenues are

included in pooling only "after intrastate volumes have been shipped under [Alaska Commission]-authorized intrastate rates." *Id.* Moreover, Alaska's Settlement Comments neither challenged the specifics of the Pooling Settlement nor argued that it infringes upon State authority. *Id.* Accordingly, the Commission reasonably determined that approving the Pooling Settlement did not involve the setting of intrastate rates or otherwise interfere with State jurisdiction. *Id.* at PP 55, 66, JA 1024, 1029.

Tesoro and Anadarko point out that Interstate Commerce Act section 1, 49 U.S.C. app. § 1, provides FERC with jurisdiction over the transportation of oil in interstate, but not intrastate, commerce. Br. 19-21, 28, 30, 31-33, 47; *see also* Br. 28-30, 55-56 (arguing that, by assuming jurisdiction over intrastate service, the Commission departed, without explanation, from its "essential character" precedent). The Commission recognized this jurisdictional limitation, and found it was honored here. Order at P 66, JA 1029. As the Commission explained, it "will not regulate intrastate commerce in any respect" as a result of its approval of the Pooling Settlement. *Id.*

Next, Tesoro and Anadarko contend that approving the Pooling Settlement has "impacted the intrastate transportation market and rates subject to the jurisdiction of the [Alaska Commission]." Br. 27; *see also* Br. 27-28 (same). As has already been shown, Tesoro and Anadarko's claim that the Order caused BP to

file to increase its intrastate rates is unfounded and speculative. *See supra* Argument Section I.

Even assuming the Order did impact BP's decision to file to increase its intrastate rates, that would not mean the Commission encroached on State jurisdiction. *See* Br. at 24 (citing *Texas v. E. Tex. R.R.*, 258 U.S. 204, 217 (1922), for the proposition that, under the ICA "what is intended is to regulate interstate . . . commerce and to affect intrastate commerce only as that may be incidental to the effective regulation and protection of commerce of the other class."); *see also*, *e.g.*, *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 482 (D.C. Cir. 2009) (incidental effect on non-jurisdictional activity permissible in regulating jurisdictional activity); *Nat'l Assn. of Regul. Util. Comm'rs v. FERC*, 475 F.3d 1277, 1280-83 (D.C. Cir. 2007) (same). BP's (and the other TAPS Carriers') intrastate rates remain subject to the Alaska Commission's jurisdiction. Order at PP 59, 66, JA 1026, 1029. Accordingly, just as the Alaska Commission determined that intrastate rates pooled under section II-2(f) of the 1985 Settlement Agreement should not be included in the cost of service for intrastate rates, *id.* at P 66, JA 1029 (citing 2004 Alaska Order), the Alaska Commission will determine whether BP's proposed intrastate rates are just and reasonable and should be approved, *id.* at PP 59, 66, JA 1026, 1029.

Tesoro and Anadarko also contend that the Commission overstated the State's non-opposition to the Pooling Settlement. Br. at 44-45. To the contrary, Alaska's comments show that it understood the Pooling Settlement would not affect State authority. R. 699 (Alaska Comments) at 1-2, JA 719-20.

Next, Tesoro and Anadarko challenge the Commission's reliance on the fact that section 5(1) of the Act does not limit the costs the Commission may consider in approving a pooling arrangement, Order at P 66, JA 1029. Br. at 20-26. Tesoro and Anadarko argue that "FERC's ICA authority is limited to its affirmative grant," Br. 21 (capitalization in heading altered). Their argument ignores that ICA section 5(1) affirmatively grants the Commission authority to approve pooling of "gross or net earnings, or of any portion thereof[.]"

It also seems that Tesoro and Anadarko might be challenging the Commission's interpretation of its authority under ICA section 5(1) on the basis of the argument that "carriers engaged in *intra*state transportation are not 'common carriers subject to this chapter,' for purposes of their intrastate movements." Br. at 20 (quoting ICA section 5(1)). If so, that challenge is not properly before the Court because it was not first raised to the Commission. *See ExxonMobil*, 487 F.3d at 962; *Tesoro Ref. and Mktg. Co v. FERC*, 552 F.3d 868, 872 (D.C. Cir.

2009).[5] In any event, this challenge has no merit. ICA section 5(1) provides the Commission authority to approve the pooling of the "gross or net earnings, or of any portion thereof" of "any common carrier subject to this chapter," which is reasonably interpreted as including intrastate costs and revenues.

C. The Remaining Arguments Are Not Properly Before The Court

1. An Issue Must Be Raised With FERC Before It Can Be Raised To The Court

"A party must first raise an issue with an agency before seeking judicial review." *ExxonMobil*, 487 F.3d at 962. As this Court has explained, "[t]his requirement serves at least two purposes. It ensures simple fairness to the agency and other affected litigants." *Id.* (internal quotation omitted). "It also provides this Court with a record to evaluate complex regulatory issues; after all, the scope of judicial review under the [Administrative Procedure Act] would be significantly expanded if courts were to adjudicate administrative action without the benefit of a full airing of the issue before the agency." *Id.* (citing *Advocates for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1150 (D.C. Cir. 2005)).

Furthermore, this Court has determined that the absence of a rehearing requirement in the Interstate Commerce Act does not excuse petitioners from the

[5] The requirement that arguments first be raised to the Commission, even absent a mandatory rehearing requirement, is addressed more fully immediately below in Argument Section III.C.1.

requirement to first raise their complaints with FERC. *Tesoro Ref. and Mktg*, 552 F.3d at 872; *ExxonMobil*, 487 F.3d at 962.

Nonetheless, Tesoro and Anadarko raise a number of issues on appeal that were not raised in the proceedings before the Commission. Specifically, the brief argues that the Order: (1) misapplied the standards for contested settlements (Argument Section II.B., Br. 41-45); (2) misapplied the just and reasonable standard (Argument Section II.C., Br. 45-46; Argument Section III.G., Br. 58-59); (3) improperly relied on findings in a non-final Administrative Judge decision as a benchmark for reasonableness of the settlement (Argument Section III.C., Br. 49-52); and (4) improperly relied on extra-record evidence (Argument Section III.F., Br. 56-58).

None of the circumstances in which the exhaustion requirement may be waived (i.e., "delay that either is excessive or leads to irreparable injury; inability of the agency to grant effective relief; and bias within or predetermination by the agency," *Tesoro Ref. and Mktg.*, 552 F.3d at 872 (citing *McCarthy v. Madigan*, 503 U.S. 140, 146 (1992)) applies here. *See also Tesoro Ref. and Mktg.*, 552 F.3d at 872 (waiver is permitted "in only the most exceptional circumstances") (internal quotation omitted). As in *Tesoro Ref. and Mktg.*, 552 F.3d at 875, permitting Tesoro and Anadarko "to avoid agency adjudication, when [they] had no good reason to do so, would surely undermine [FERC's] authority."

Tesoro and Anadarko could have raised these issues to FERC on rehearing of the Order. By choosing not to do so, Tesoro and Anadarko waived their opportunity to raise these issues on appeal. *ExxonMobil*, 487 F.3d at 962; *Tesoro Ref. and Mktg.*, 552 F.3d at 872, 875. Accordingly, the issues Tesoro and Anadarko raise for the first time on appeal should be dismissed.

2. The Issues Raised For The First Time On Appeal Lack Merit

a. The Commission Appropriately Applied Its Contested Settlement Standards

Tesoro and Anadarko acknowledge that the Commission "'may decide the merits of the contested settlement issues, if the record contains substantial evidence upon which to base a reasoned decision or the Commission determines there is no genuine issue of material fact.'" Br. 41 (quoting 18 C.F.R. § 385.602(h)(1)(i)).

Tesoro and Anadarko contend, however, that the Order improperly applied the Commission's contested settlement standards. Br. 41-45. Specifically, they argue that the Order's ICA "section 5(1) findings are merely conclusory statements unsupported by a single citation to record evidence," failed to support dismissal of opposing evidence, and relied too heavily on the fact that the Pooling Settlement will resolve lengthy proceedings. Br. 42 (citing Br. Argument Section II.A and Order at PP 55-69, JA 1024-30).

Tesoro and Anadarko never argued to the Commission that the Order misapplied the contested settlement standards. Because they never gave the Commission the opportunity to consider and address this argument, it cannot be considered on appeal.

In any event, as already discussed, *supra* Argument Section III.A, the Commission's determination that ICA section 5(1)'s requirements were satisfied was reasonable. Consistent with Rule 602(h)(1)(i) and *Trailblazer*, the Commission approved the Pooling Settlement only after it determined, based on substantial record evidence, that the contentions raised by Tesoro and Anadarko (including those regarding "opposing" evidence) lacked merit. Order at PP 69, 77, JA 1030, 1033.

Moreover, the Commission did not rely heavily on the fact that the settlement will resolve lengthy proceedings. Rather, after addressing and finding no merit in Tesoro and Anadarko's contentions, the Commission appropriately considered the additional fact that the settlement would resolve lengthy proceedings. Order at PP 68, 78, JA 1030, 1033. As this Court has found, it is "perfectly appropriate" for FERC to consider the prospect for protracted litigation in determining whether to approve a settlement offer as long as FERC explains why the interest in avoiding lengthy and difficult litigation proceedings warrants acceptance of the particular settlement before it. *Laclede Gas Co. v. FERC*, 997

F.2d 936, 947 (D.C. Cir. 1993); *see also, e.g.*, *Arctic Slope*, 832 F.2d at 167-68 (upholding FERC's determination that terminating lengthy litigation by approving the 1985 Settlement Agreement served the public interest). The Commission did that here.

The instant case is not like those cited in Tesoro and Anadarko's Brief at 42-45. As the Order establishes, the Commission did not simply take a head count and approve the settlement because more parties supported it than opposed it. *See* Br. 42, 44, 45. Rather, the Commission appropriately made an independent judgment based on the record that the Pooling Settlement met the Commission's settlement standards and, therefore, should be approved.

b. The Commission Appropriately Applied The Just And Reasonable Standard

Next, Tesoro and Anadarko argue for the first time that the Order misapplied the just and reasonable standard. Br. 45-46, 58-59. In Tesoro and Anadarko's view, "the 'just and reasonable standard' is not part of the ICA § 5(1) standards that govern the approval of pooling agreements and cannot substitute for 5(1) standards." Br. 45.

ICA section 5(1) provides, however, that the Commission shall approve a pooling agreement "upon such terms and conditions, as shall be found by the Commission to be just and reasonable . . . ." Consistent with this, the Commission found that the Pooling Settlement, without modification, was just and reasonable.

Order at PP 56, 69, 77, JA 1024, 1030, 1033. The Commission did not substitute the just and reasonable standard for the other ICA section 5(1) standards. Instead, the Commission appropriately found that all of that provision's standards were met. *Id.* at PP 55-56, 59-62, 67, 69, JA 1024-25, 1026-27, 1029, 1030.[6]

In doing so, the Commission did not misallocate the burden of proof, as Tesoro and Anadarko assert (Br. at 45, 58-59). Rather, the Commission "'properly placed the initial burden'" of meeting ICA section 5(1)'s requirements on the TAPS Carriers and then, after finding that the TAPS Carriers had met that burden, the Commission "'simply found [Tesoro and Anadarko] had failed to controvert that conclusion.'" *Transm. Agency of N. Cal. v. FERC*, 628 F.3d 538, 549 (D.C. Cir. 2010) (quoting *Sacramento*, 616 F.3d at 537-38).

c. The Order Did Not Rely On The Administrative Judge Decision As A Benchmark

Next, Tesoro and Anadarko claim, for the first time, that the Order should not have relied on the Administrative Judge Decision as a benchmark for whether the Pooling Settlement would unduly restrain competition because the Commission

[6] In addition, as Tesoro and Anadarko recognize, the Commission can approve a contested settlement if it determines that each of the contentions of the contesting party lacks merit. Br. 41 n. 33. Thus, after finding no merit to Tesoro and Anadarko's contentions, the Commission properly approved the Pooling Settlement as just and reasonable on the merits. Order at PP 69, 77, JA 1030, 1033.

never acted on exceptions to that decision and, therefore, it was non-final.[7] Br. at 49-52.

The Order, however, did not rely on the Administrative Judge Decision as a benchmark. Instead, the Commission found that the Pooling Settlement would not unduly restrain competition because it would exclude 25.1 percent -- a "substantial portion" -- of total TAPS cost from the pool and, therefore, would provide the TAPS Carriers "ample incentive" to discount their rates and compete for volumes. Order at P 62, JA 1027; *see also id.* at PP 59, 69, JA 1026, 1030 (same). While the Commission noted that the Administrative Judge determined that pooling even more TAPS costs would not unduly restrain competition, that does not change the fact that the Commission independently found, based on record evidence, that, "by excluding a high percentage of the [TAPS] Carriers costs from the pool, the Pooling [Settlement] will not unduly restrain competition among those carriers." Order P 59, JA 1026; *see also id.* at P 69, JA 1030 ("the level of the costs to be pooled under the Pooling [Settlement] (including intrastate costs) is sufficient to maintain competition among the [TAPS] Carriers.").

[7] Anadarko's Settlement Comments at 26-28, JA 768-70 (cited Br. at 50 n.36), argued a different point -- that the Commission could not rely on the Administrative Judge's finding because he did not analyze the Pooling Settlement under ICA section 5(1). Anadarko's Comments at 27, JA 769.

d. The Commission Appropriately Cited To Publicly-Available Information To Address Extra-Record Materials Cited By Tesoro And Anadarko

Finally, Tesoro and Anadarko contend for the first time that the Order improperly relied on extra-record evidence. Br. 56-58. Even if that contention were properly before the Court, it lacks merit.

Tesoro and Anadarko claimed that the Pooling Settlement should be rejected or limited to five years because they believed several potential future events might lead to more price-sensitive volumes on TAPS. *See* Order at P 63, JA 1028; R. 705 (Anadarko Comments) at 5-6, JA 747-48. In response, the Commission noted that Tesoro and Anadarko's argument was speculative, both because it was couched in speculative language and because other publicly-available information, cited by the Commission, was inconsistent with their claim. *Id.* at PP 63-64, JA 1028.

Tesoro and Anadarko could have filed for rehearing to challenge the Commission's reliance on this information. Although parties are not required to seek rehearing of Commission orders under the Interstate Commerce Act, they are permitted to (and in fact often) do so. *See* ICA section 17(6), 49 U.S.C. app. § 17(6) (any party may apply for rehearing of any matter determined in a Commission order); 18 C.F.R. § 385.713(b) (providing that a party may file a request for rehearing of a Commission order within 30 days after issuance of the

order). Moreover, as this Court has found, rehearing provides parties a meaningful opportunity to challenge new information. *E.g.*, *Blumenthal v. FERC*, 613 F.3d 1142, 1146 (D.C. Cir. 2010); *BNSF Ry. Co. v. Surface Transp. Bd.*, 453 F.3d 473, 486 (D.C. Cir. 2006).

Thus, Tesoro and Anadarko were not denied due process. Rather, they chose not to take the opportunity provided by the Act and the Commission's regulations to explain on rehearing why the Commission should not have relied on this information.[8]

[8] Tesoro and Anadarko's Brief does not explain why the Commission should not have relied on this information. Instead, they state only that "[g]iven the opportunity, Anadarko/Tesoro would show that such evidence was not properly used by FERC." Br. at 58 n.41.

CONCLUSION

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

Respectfully submitted,

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September 11, 2014

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C), I hereby certify that this brief contains 10,080 words, not including the tables of contents and authorities, the glossary, the certificate of counsel and this certificate.

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September 11, 2014

ADDENDUM
STATUTES AND REGULATIONS

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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.

CHAPTER 1—INTERSTATE COMMERCE ACT, PART I; GENERAL PROVISIONS AND RAILROAD AND PIPE LINE CARRIERS

§ 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

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.

Prior to repeal, section read as follows:

§ 1. Regulation in general; car service; alteration of line

(1) Carriers subject to regulation

The provisions of this chapter shall apply to common carriers engaged in—

(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

(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

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

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

(2) Transportation subject to regulation

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

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

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

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

(3) Definitions

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

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

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

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

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

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

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

(c) As used in this chapter, the terms—

(i) "market dominance" refers to an absence of effective competition from other carriers or modes of transportation, for the traffic or movement to which a rate applies; and

(ii) "rate" means any rate or charge for the transportation of persons or property.

(d) Within 240 days after February 5, 1976, the Commission shall establish, by rule, standards and procedures for determining, in accordance with section 15(9) of this Appendix, whether and when a carrier possesses market dominance over a service rendered or to be rendered at a particular rate or rates. Such rules shall be designed to provide for a practical determination without administrative delay. The Commission shall solicit and consider the recommendations of the Attorney General and of the Federal Trade Commission in the course of establishing such rules.

(5½) Exchange of services

Nothing in this Act shall be construed to prevent any common carrier subject to this Act from entering into or operating under any contract with any telephone, telegraph, or cable company, for the exchange of their services.

(6) Classification of property for transportation; regulations and practices; demurrage charges

It is made the duty of all common carriers subject to the provisions of this chapter to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this chapter which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this chapter upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful. Demurrage charges shall be computed, and rules and regulations relating to such charges shall be established, in such a manner as to fulfill the national needs with respect to (a) freight car utilization and distribution, and (b) maintenance of an adequate freight car supply available for transportation of property.

(7) Free transportation for passengers prohibited; exceptions; penalty

No common carrier subject to the provisions of this chapter, shall, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees, its officers, time inspectors, surgeons, physicians, and attorneys at law, and the families of any of the foregoing; to the executive officers, general chairmen, and counsel of employees' organizations when such organizations are authorized and designated to represent employees in accordance with the provisions of the Railway Labor Act [45 U.S.C. 151 et seq.]; to ministers of religion, traveling secretaries of railroad Young Men's Christian Associations, inmates of hospitals and charitable and eleemosynary institutions, and persons exclusively engaged in charitable and eleemosynary work; to indigent, destitute and homeless persons, and to such persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation; to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Homes, including those about to enter and those returning home after discharge; to necessary caretakers of livestock, poultry, milk, and fruit; to employees on sleeping cars, express cars, and to linemen of telegraph and telephone companies; to railway mail-service employees and persons in charge of the mails when on duty and traveling to and from duty, and all duly accredited agents and officers of the United States Postal Service and the Railway Mail Service and post-office inspectors while traveling on official business, upon the exhibition of their credentials; to customs inspectors, and immigration officers; to newsboys on trains, baggage agents, witnesses attending any legal investigation in which the common carrier is interested, persons injured in wrecks and physicians and nurses attending such persons: *Provided*, That this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers, and their families; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation: *And provided further*, That this provision shall not be construed to prohibit the privilege of passes or franks, or the exchange thereof with each other, for the officers, agents, employees, and their families of such telegraph, telephone, and cable lines, and the officers, agents, employees and their families of other common carriers subject to the provisions of this chapter: *Provided further*, That the term "employees" as used in this paragraph shall include furloughed, pensioned, and superannuated employees, persons who have become disabled or infirm in the service of any such common carrier, and the remains of a person killed in the employment of a carrier and exemployees traveling for the purpose of entering the service of any such common carrier; and the term "families" as used in this paragraph shall include the families of those persons named in this proviso, also the families of persons killed, and the widows during widowhood and minor children during minority of persons who died, while in the service of any such common carrier. Any common carrier violating this provision shall be deemed guilty of a misdemeanor and for each offense, on conviction, shall pay to the United States a penalty of not less than $100 nor more than $2,000, and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass, or free transportation shall be subject to a like penalty. Jurisdiction of offenses under this provision shall be the same as that provided for offenses in sections 41 to 43 of this Appendix.

(8) Transportation of commodity manufactured or produced by railroad forbidden

It shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier.

(9) Switch connections and tracks

Any common carrier subject to the provisions of this chapter, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on

application therefor in writing by any shipper or owner of such lateral, branch line railroad, such shipper or owner of such lateral branch line of railroad, may make complaint to the Commission, as provided in section 13 of this Appendix, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the Commission may make an order, as provided in section 15 of this Appendix, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the Commission, other than orders for the payment of money.

(10) "Car service" defined

The term "car service" in this chapter shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this chapter.

(11) Duty to furnish car service; rules and regulations

It shall be the duty of every carrier by railroad subject to this chapter to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful.

(12) Distribution of coal cars; failure to prorate; penalty; applicability of unit-train and non-unit-train service; definition

It shall also be the duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line or lines or customarily dependent upon it for car supply. During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine. Failure or refusal so to do shall be unlawful, and in respect of each car not so counted shall be deemed a separate offense, and the carrier, receiver, or operating trustee so failing or refusing shall forfeit to the United States the sum of $100 for each offense, which may be recovered in a civil action brought by the United States. In applying the provisions of this paragraph, unit-train service and non-unit-train service shall be considered separate and distinct classes of service, and a distinction shall be made between these two classes of service and between the cars used in each class of service; questions of the justness and reasonableness of, or discrimination or preference or prejudice or advantage or disadvantage in, the distribution of cars shall be determined within each such class and not between them, notwithstanding any other provision of section 1, 2, or 3 of this Appendix, and of section 41, 42, or 43 of this Appendix. Coal cars supplied by shippers or receivers shall not be considered a part of such carrier's fleet or otherwise counted in determining questions of distribution or car count under this paragraph or any provision of law referred to in this section. As used in this paragraph, the term "unit-train service", means the movement of a single shipment of coal of not less than 4,500 tons, tendered to one carrier, on one bill of lading, at one origin, on one day, and destined to one consignee, at one plant, at one destination, via one route.

(13) Rules and regulations as to car service to be filed, etc.

The Commission is authorized by general or special orders to require all carriers by railroad subject to this chapter, or any of them, to file with it from time to time their rules and regulations with respect to car service, and the Commission may, in its discretion, direct that such rules and regulations shall be incorporated in their schedules showing rates, fares, and charges for transportation, and be subject to any or all of the provisions of this chapter relating thereto.

(14) Establishment by Commission of rules, etc., as to car service; procedures applicable

(a) It is the intent of the Congress to encourage the purchase, acquisition, and efficient utilization of freight cars. In order to carry out such intent, the Commission may, upon complaint of an interested party or upon its own initiative without complaint, and after notice and an opportunity for a hearing, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this chapter, including (i) the compensation to be paid for the use of any locomotive, freight car, or other vehicle, (ii) the other terms of any contract, agreement, or arrangement for the use of any locomotive or other vehicle not owned by the carrier by which it is used (and whether or not owned by another carrier, shipper, or third party), and (iii) the penalties or other sanctions for nonobservance of such rules, regulations, or practices. In determining the rates of compensation to be paid for each type of freight car, the Commission shall give consideration to the transportation use of each type of freight car, to the national level of ownership of each such type of freight car, and to other factors affecting the adequacy of the national freight car supply. Such compensation shall be fixed on the basis of the elements of ownership expense involved in owning and maintaining each such type of freight car, including a fair return on the cost of such type of freight car (giving due consideration to current costs of capital, repairs, materials, parts, and labor). Such compensation may be increased by any incentive element which will, in the judgment of the Commission, provide just and reasonable compensation to freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense. The Commission shall not make any incentive element applicable to any type of freight car if the Commission finds that the supply of such type of freight car is adequate. The Commission may exempt such incentive element from the compensation to be paid by any carrier or group of carriers if the Commission finds that such an exemption is in the national interest.

(b) If the Commission finds, upon the petition of an interested party and after notice and a hearing on the record, that a common carrier by railroad subject to this part has materially failed to furnish safe and adequate car service as required by paragraph (11) of this section, the Commission may require such carrier to provide itself with such facilities and equipment as may be reasonably necessary to furnish such service, if the evidence of record establishes, and the Commission affirmatively finds, that—

(i) the provision of such facilities or equipment will not materially and adversely affect the ability of such carrier to otherwise provide safe and adequate transportation services;

(ii) the expenditure required for such facilities or equipment, including a return which equals such carrier's current cost of capital, will be recovered; and

(iii) the provision of such facilities or equipment will not impair the ability of such carrier to attract adequate capital.

(c) It shall be unlawful for any common carrier by railroad or express company, subject to this chapter, to make or enter into any contract, agreement, or arrangement with any person for the furnishing to or on behalf of such carrier or express company of protective service against heat or cold to property transport-

ed or to be transported in interstate or foreign commerce, or for any such carrier or express company to continue after April 1, 1941, as a party to any such contract, agreement, or arrangement unless and until such contract, agreement, or arrangement has been submitted to and approved by the Commission as just, reasonable, and consistent with the public interest: *Provided*, That if the Commission is unable to make its determination with respect to any such contract, agreement, or arrangement prior to said date, it may extend it to not later than October 1, 1941.

(15) Powers of Commission in case of emergency

Whenever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the Commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading 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: (a) to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the Commission; (b) to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars, and other vehicles, during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people, upon such terms of compensation as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; (c) to require such joint or common use of terminals, including main-line track or tracks for a reasonable distance outside of such terminals, as in its opinion will best meet the emergency and serve the public interest, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; and (d) to give directions for preference or priority in transportation, embargoes, or movement of traffic under permits, at such time and for such periods as it may determine, and to modify, change, suspend, or annul them. In time of war or threatened war the President may certify to the Commission that it is essential to the national defense and security that certain traffic shall have preference or priority in transportation, and the Commission shall, under the power herein conferred, direct that such preference or priority be afforded.

(16) Rerouting of traffic on failure of initial carrier to serve public

(a) Whenever the Commission is of opinion that any carrier by railroad subject to this chapter is for any reason unable to transport the traffic offered it so as properly to serve the public, it may, upon the same procedure as provided in paragraph (15) of this section, make such just and reasonable directions with respect to the handling, routing, and movement of the traffic of such carrier and its distribution over other lines of roads, as in the opinion of the Commission will best promote the service in the interest of the public and the commerce of the people, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable.

(b) Whenever any carrier by railroad is unable to transport the traffic offered it because—

(1) its cash position makes its continuing operation impossible;

(2) it has been ordered to discontinue any service by a court; or

(3) it has abandoned service without obtaining a certificate from the Commission pursuant to this section;

the Commission may, upon the same procedure as provided in paragraph (15) of this section, make such just and reasonable directions with respect to the handling, routing, and movement of the traffic available to such carrier and its distribution over such carrier's lines, as in the opinion of the Commission will best promote the service in the interest of the public and the commerce of the people subject to the following conditions:

(A) Such direction shall be effective for no longer than 60 days unless extended by the Commission for cause shown for an additional designated period not to exceed 180 days.

(B) No such directions shall be issued that would cause a carrier to operate in violation of the Federal Railroad Safety Act of 1970 [45 U.S.C. 431 et seq.] or that would substantially impair the ability of the carrier so directed to serve adequately its own patrons or to meet its outstanding common carrier obligations.

(C) The directed carrier shall not, by reason of such Commission direction, be deemed to have assumed or to become responsible for the debts of the other carrier.

(D) The directed carrier shall hire employees of the other carrier to the extent such employees had previously performed the directed service for the other carrier, and, as to such employees as shall be so hired, the directed carrier shall be deemed to have assumed all existing employment obligations and practices of the other carrier relating thereto, including, but not limited to, agreements governing rate of pay, rules and working conditions, and all employee protective conditions commencing with and for the duration of the direction.

(E) Any order of the Commission entered pursuant to this paragraph shall provide that if, for the period of its effectiveness, the cost, as hereinafter defined, of handling, routing, and moving the traffic of another carrier over the other carrier's lines of road shall exceed the direct revenues therefor, then upon request, payment shall be made to the directed carrier, in the manner hereinafter provided and within 90 days after expiration of such order, of a sum equal to the amount by which such cost has exceeded said revenues. The term "cost" shall mean those expenditures made or incurred in or attributable to the operations as directed, including the rental or lease of necessary equipment, plus an appropriate allocation of common expenses, overheads, and a reasonable profit. Such cost shall be then currently recorded by the carrier or carriers in such manner and on such forms as by general order may be prescribed by the Commission and shall be submitted to and subject to audit by the Commission. The Commission shall certify promptly to the Secretary of the Treasury the amount of payment to be made to said carrier or carriers under the provisions of this paragraph. Payments required to be made to a carrier under the provisions of this paragraph shall be made by the Secretary of the Treasury from funds hereby authorized to be appropriated in such amounts as may be necessary for the purpose of carrying out the provisions hereof.

(17) Directions of Commission as to car service; disobedience; rights of States; bribery

(a) The directions of the Commission as to car service and to the matters referred to in paragraphs (15) and (16) of this section may be made through and by such agents or agencies as the Commission shall designate and appoint for that purpose. It shall be the duty of all carriers by railroad subject to this chapter, and of their officers, agents, and employees, to obey strictly and conform promptly to such orders or directions of the Commission, and in case of failure or refusal on the part of any carrier, receiver, or operating trustee to comply with any such order or direction such carrier, receiver, or trustee shall be liable to a penalty of

not less than $100 nor more than $500 for each such offense and $50 for each and every day of the continuance of such offense, which shall accrue to the United States and may be recovered in a civil action brought by the United States: *Provided, however,* That nothing in this chapter shall impair or affect the right of a State, in the exercise of its police power, to require just and reasonable freight and passenger service for intrastate business, except insofar as such requirement is inconsistent with any lawful order of the Commission made under the provisions of this chapter and except as otherwise provided in this chapter.

(b) It shall be unlawful for any person to offer or give or cause or procure to be offered or given, directly or indirectly, any money, property, or thing of value, or bribe in any other form whatsoever, to any person acting for or employed by any carrier by railroad subject to this part with intent to influence his decision or action, or because of his decision or action, with respect to the supply, distribution, or movement of cars or other vehicles, or vessels, used in the transportation of property. It shall be unlawful for any person acting for or employed by any carrier by railroad subject to this chapter to solicit, accept, or receive, directly or indirectly, any money, property, or thing of value, or bribe in any other form whatsoever, with intent to be influenced thereby in his decision or action, or because of his decision or action, with respect to the supply, distribution, or movement of cars or other vehicles, or vessels, used in the transportation of property. Any person who violates the provisions of this subparagraph shall be deemed guilty of a misdemeanor and be subject for each offense to a fine of not more than $1,000, or imprisonment in the penitentiary for a term of not more than two years, or both such fine and imprisonment.

(18) Extension or addition of lines; certificate required; procedures applicable to application for certificate; petition or initiative of Commission; agreements for ownership or use of spur, etc., tracks; limitations on authority of Commission; injunctions and penalty for violations

(a) No carrier by railroad subject to this chapter shall—

(i) undertake the extension of any of its lines of railroad or the construction of any additional line of railroad;

(ii) acquire or operate any such extension or any such additional line; or

(iii) engage in transportation over, or by means of, any such extended or additional line of railroad,

unless such extension or additional line of railroad is described in and covered by a certificate which is issued by the Commission and which declares that the present or future public convenience and necessity require or will be enhanced by the construction and operation of such extended or additional line of railroad. Upon receipt of an application for such a certificate, the Commission shall (A) send a copy of the application to the chief executive officer of each State that would be directly affected by the construction or operation of such extended or additional line, (B) send an accurate and understandable summary of such application to a newspaper of general circulation in such affected area or areas with a request that such information be made available to the general public, (C) cause a copy of such summary to be published in the Federal Register, (D) take such other steps as it deems reasonable and effective to publicize such application, and (E) indicate in such transmissions and publications that each interested person is entitled to recommend to the Commission that it approve, disapprove, or take any other specified action with respect to such application.

(b) The Commission shall establish, and may from time to time amend, rules and regulations (as to hearings and other matters) to govern applications for, and the issuance of, any certificate required by subdivision (a). An application for such a certificate shall be submitted to the Commission in such form and manner and with such documentation as the Commission shall prescribe. The Commission may—

(i) issue such a certificate in the form requested by the applicant;

(ii) issue such a certificate with modifications in such form and subject to such terms and conditions as are necessary in the public interest; or

(iii) refuse to issue such a certificate.

(c) Upon petition or upon its own initiative, the Commission may authorize any carrier by railroad subject to this chapter to extend any of its lines of railroad or to take any other action necessary for the provision of adequate, efficient, and safe facilities for the performance of such carrier's obligations under this chapter. No authorization shall be made unless the Commission finds that the expense thereof will not impair the ability of such carrier to perform its obligations to the public.

(d) Carriers by railroad subject to this chapter may, notwithstanding this paragraph and section 5 of this Appendix, and without the approval of the Commission, enter into contracts, agreements, or other arrangements for the point [joint] ownership or joint use of spur, industrial, team, switching, or side tracks. The authority granted to the Commission under this paragraph shall not extend to the construction, acquisition, or operation of spur, industrial, team, switching, or side tracks if such tracks are located or intended to be located entirely within one State, and shall not apply to any street, suburban, or interurban electric railway which is not operated as part of a general system of rail transportation.

(e) Any construction or operation which is contrary to any provision of this paragraph, of any regulations promulgated under this paragraph, 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 paragraph or of the conditions of a certificate issued under this paragraph.

(Feb. 4, 1887, ch. 104, pt. I, § 1, 24 Stat. 379; June 29, 1906, ch. 3591, § 1, 34 Stat. 584; Apr. 13, 1908, ch. 143, 35 Stat. 60; June 18, 1910, ch. 309, § 7, 36 Stat. 544; May 29, 1917, ch. 23, 40 Stat. 101; Feb. 28, 1920, ch. 91, §§ 400–403, 41 Stat. 474–479; June 19, 1934, ch. 652, § 602(b), 48 Stat. 1102; Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543; Sept. 18, 1940, ch. 722, title I, §§ 2, 3(a), (b), 4, 54 Stat. 899–901; June 24, 1948, ch. 622, 62 Stat. 602; Aug. 2, 1949, ch. 379, § 1, 63 Stat. 485; June 27, 1952, ch. 477, title IV, § 402(g), 66 Stat. 277; Aug. 12, 1958, Pub. L. 85–625, § 3, 72 Stat. 570; May 26, 1966, Pub. L. 89–430, § 1, 80 Stat. 168; Jan. 2, 1974, Pub. L. 93–236, title VI, § 601(e), 87 Stat. 1021; Feb. 5, 1976, Pub. L. 94–210, title II, §§ 202(a), (b), 211, 212(a), title III, § 310, title VIII, § 801, 90 Stat. 34, 35, 46, 60, 125; Nov. 8, 1978, Pub. L. 95–607, title IV, § 402, 92 Stat. 3067.)

§ 1a. 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:

graph shall not apply to express companies subject to the provisions of this chapter, except that the exemption herein accorded express companies shall not be construed to relieve them from the operation of any other provision contained in this Act.

(2) Competition of railroads with water routes; change of rates

Wherever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition.

(Feb. 4, 1887, ch. 104, pt. I, § 4, 24 Stat. 380; June 18, 1910, ch. 309, § 8, 36 Stat. 547; Feb. 28, 1920, ch. 91, § 406, 41 Stat. 480; Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543; Sept. 18, 1940, ch. 722, title I, § 6(a), 54 Stat. 904; July 11, 1957, Pub. L. 85-99, 71 Stat. 292; Sept. 27, 1962, Pub. L. 87-707, 76 Stat. 635.)

§ 5. 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:

§ 5. Combinations and consolidations of carriers

(1) Pooling; division of traffic, service, or earnings

Except upon specific approval by order of the Commission as in this section provided, and except as provided in paragraph (16) of section 1 of this Appendix, it shall be unlawful for any common carrier subject to this chapter, chapter 8, or chapter 12 of this Appendix to enter into any contract, agreement, or combination with any other such common carrier or carriers for the pooling or division of traffic, or of service, or of gross or net earnings, or of any portion thereof; and in any case of an unlawful agreement for the pooling or division of traffic, service, or earnings as aforesaid each day of its continuance shall be a separate offense: *Provided*, That whenever the Commission is of opinion, after hearing upon application of any such carrier or carriers or upon its own initiative, that the pooling or division, to the extent indicated by the Commission, of their traffic, service, or gross or net earnings, or of any portion thereof, will be in the interest of better service to the public or of economy in operation, and will not unduly restrain competition, the Commission shall by order approve and authorize, if assented to by all the carriers involved, such pooling or division, under such rules and regulations, and for such consideration as between such carriers and upon such terms and conditions, as shall be found by the Commission to be just and reasonable in the premises: *Provided further*, That any contract, agreement, or combination to which any common carrier by water subject to chapter 12 of this Appendix is a party, relating to the pooling or division of traffic, service, or earnings, or any portion thereof, lawfully existing on September 18, 1940, if filed with the Commission within six months after such date, shall continue to be lawful except to the extent that the Commission, after hearing upon application or upon its own initiative, may find and by order declare that such contract, agreement, or combination is not in the interest of better service to the public or of economy in operation, or that it will unduly restrain competition.

(2) Unifications, mergers, and acquisitions of control; procedures applicable

(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph or paragraph (3)–

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e) of this Appendix), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) of this section, is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

(d) The Commission shall have authority in the case of a proposed transaction under this paragraph involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

(e) No transaction which contemplates a guaranty or assumption of payment of dividends or of fixed charges, shall be approved by the Commission under

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 ratemaking 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 please of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, nor interested in the event of the proceeding or investigation. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition. Any person may be compelled to appear and depose, and to produce documentary evidence, in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the Commission as hereinbefore provided.

(5) Oath; subscription of testimony on deposition

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

(6) Deposition in foreign country; filing of depositions

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

(7) Fees for depositions

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

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

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

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

Prior to repeal, section read as follows:

§ 13. Complaints to and investigations by Commission

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

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

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

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

(3) Investigation involving State regulations; conference of State and interstate commissions

Whenever in any investigation under the provisions of this chapter, or in any investigation instituted upon petition of the carrier concerned, which petition is authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this chapter or chapter 12 of this title with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this chapter or chapter 12 of this Appendix.

(4) Duty of Commission where State regulations result in discrimination

Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against, or undue burden on, interstate or foreign commerce (which the Commission may find without a separation of interstate and intrastate property, revenues, and expenses, and without considering in totality the operations or results thereof of any carrier, or group or groups of carriers wholly within any State), which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, discrimination, or burden. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

(5) Exclusive authority to determine and prescribe intrastate rates; prerequisites; procedures

The Commission shall have exclusive authority, upon application to it, to determine and prescribe intrastate rates if,—

(a) a carrier by railroad has filed with an appropriate administrative or regulatory body of a State, a change in an intrastate rate, fare, or charge, or a change in a classification, regulation, or practice that has the effect of changing such a rate, fare, or charge, for the purpose of adjusting such rate, fare, or charge to the rate charged on similar traffic moving in interstate or foreign commerce; and

(b) the State administrative or regulatory body has not, within 120 days after the date of such filing, acted finally on such change.

Notice of the application to the Commission shall be served on the appropriate State administrative or regulatory body. Upon the filing of such an application, the Commission shall determine and prescribe, according to the standards set forth in paragraph (4) of this section, the rate thereafter to be charged. The provisions of this paragraph shall apply notwithstanding the laws or constitution of any State, or the pendency of any proceeding before any State court or other State authority. Nothing in this paragraph shall affect the authority of the Commission to institue [institute] an investigation or to act in such investigation as provided in paragraphs (3) and (4) of this section.

(6) Petition for commencement of proceeding for issuance, amendment, or repeal of order, etc., relating to common carriers by railroads; grant or denial; judicial review; limitations; definition

(a) Whenever, pursuant to section 553(e) of title 5, an interested person (including a government entity) petitions the Commission for the commencement of a proceeding for the issuance, amendment, or repeal of an order, rule, or regulation relating to common carriers by railroads under this Act, the Commission shall grant or deny such petition within 120 days after the date of receipt of such petition. If the Commission grants such a petition, it shall commence an appropriate proceeding as soon thereafter as practicable. If the Commission denies such a petition, it shall set forth, and publish in the Federal Register, its reasons for such denial.

(b) If the Commission denies a petition under subdivision (a) (or if it fails to act thereon within the 120-day period established by such subdivision), the petitioner may commence a civil action in an appropriate court of appeals of the United States for an order directing the Commission to initiate a proceeding to take the action requested in such petition. Such an action shall be commenced within 60 days after the date of such denial or, where appropriate, within 60 days after the date of expiration of such 120-day period.

(c) If the petitioner, in an action commenced under subdivision (b), demonstrates to the satisfaction of the court, by a preponderance of the evidence in the record before the Commission or, in an action based on a petition on which the Commission failed to act, in a new proceeding before such court, that the action requested in such petition to the Commission is necessary and that the failure of the Commission to take such action will result in the continuation of practices which are not consistent with the public interest or in accordance with this Act, such court shall order the Commission to initiate such action.

(d) In any action under this paragraph, a court shall have no authority to compel the Commission to take any action other than the initiation of a proceeding for the issuance, amendment, or repeal of an order, rule, or regulation under this Act.

(e) As used in this paragraph, the term "Commission" includes any division, individual Commissioner, administrative law judge, employee board, or any other person authorized to act on behalf of the Commission in any part of the proceeding for the issuance, amendment, or repeal of any order, rule, or regulation under this Act relating to common carriers by railroad.

(Feb. 4, 1887, ch. 104, pt. I, § 13, 24 Stat. 383; June 18, 1910, ch. 309, § 11, 36 Stat. 550; Feb. 28, 1920, ch. 91, § 416, 41 Stat. 484; Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543; Sept. 18, 1940, ch. 722, title I, § 9(b), (c), 54 Stat. 910; Aug. 12, 1958, Pub. L. 85-625, § 4, 72 Stat. 570; Feb. 5, 1976, Pub. L. 94-210, title II, § 210, title III, § 304(b), 90 Stat. 46, 52; Oct. 19, 1976, Pub. L. 94-555, title II, § 220(*l*), 90 Stat. 2630.)

§ 13a. 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:

(7) Compliance with orders

It shall be the duty of every common carrier, its agents and employees, to observe and comply with such orders so long as the same shall remain in effect.

(8) Failure of carrier or officer to obey orders; penalty

Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of sections 3, 13, or 15 of this Appendix shall forfeit to the United States the sum of $5,000 for each offense. Every distinct violation shall be a separate offense, and in case of a continuing violation each day shall be deemed a separate offense.

(9) Suit for recovery of forfeiture

The forfeiture provided for in this chapter shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States, brought in the district where the carrier has its principal operating office, or in any district through which the road of the carrier runs.

(10) United States attorneys to prosecute for forfeitures; costs and expenses

It shall be the duty of the various United States attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

(11) Employment of attorneys by Commission

The Commission may employ such attorneys as it finds necessary for proper legal aid and service of the Commission or its members in the conduct of their work, or for proper representation of the public interests in investigations made by it or cases or proceedings pending before it, whether at the Commission's own instance or upon complaint, or to appear for or represent the Commission in any case in court; and the expenses of such employment shall be paid out of the appropriation for the Commission.

(12) Proceedings to enforce orders other than for payment of money

If any carrier fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Interstate Commerce Commission or any party injured thereby, or the United States, by its Attorney General, may apply to any district court of the United States of competent jurisdiction for the enforcement of such order. If, after hearing, such court determines that the order was regularly made and duly served, and that the carrier is in disobedience of the same, such court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such carrier, its officers, agents, or representatives, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

(13) Copies of schedules, tariffs, contracts, etc., kept as public records; evidence

The copies of schedules and classifications and tariffs of rates, fares, and charges, and of all contracts, agreements, and arrangements between common carriers filed with the Commission as herein provided, and the statistics, tables, and figures contained in the annual or other reports of carriers made to the Commission as required under the provisions of this chapter shall be preserved as public records in the custody of the secretary of the Commission, and shall be received as prima facie evidence of what they purport to be for the purpose of investigations by the Commission and in all judicial proceedings; and copies of and extracts from any of said schedules, classifications, tariffs, contracts, agreements, arrangements, or reports, made public records as aforesaid, certified by the secretary, under the Commission's seal, shall be received in evidence with like effect as the originals.

(Feb. 4, 1887, ch. 104, pt. I, § 16, 24 Stat. 384; Mar. 2, 1889, ch. 382, § 5, 25 Stat. 859; June 29, 1906, ch. 3591, § 5, 34 Stat. 590; June 18, 1910, ch. 309, § 13, 36 Stat. 554; Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167; Oct. 22, 1913, ch. 32, 38 Stat. 219; Feb. 28, 1920, ch. 91, §§ 423–429, 41 Stat. 491, 492; June 7, 1924, ch. 325, 43 Stat. 633; Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543; Sept. 18, 1940, ch. 722, title I, § 11(a), (b), 54 Stat. 912, 913; June 25, 1948, ch. 646, § 1, 62 Stat. 909; Aug. 2, 1949, ch. 379, § 6, 63 Stat. 486; Aug. 26, 1958, Pub. L. 85–762, § 1(1), (2), 72 Stat. 859.)

§ 16a. Repealed. Sept. 18, 1940, ch. 722, title I, § 12, 54 Stat. 913

Section, act Feb. 4, 1887, ch. 104, pt. I, § 16a, as added June 29, 1906, ch. 3591, § 6, 34 Stat. 592, related to rehearings by Commission. See section 17 of this Appendix.

§ 17. 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

Section repealed subject to an exception related to transportation of oil by pipeline. Section 5 of Pub. L. 95–611, which amended par. (9)(f)(i) of this section 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.

Prior to repeal, section read as follows:

§ 17. Commission procedure; delegation of duties; rehearings

(1) Divisions of Commission; organization; composition

The Commission is authorized by its order to divide the members thereof into as many divisions (each to consist of not less than three members) as it may deem necessary, which may be changed from time to time. Such divisions shall be designated, respectively, division one, division two, and so forth, or by a term descriptive of the principal subject, work, business, or function assigned or referred to such divisions. The Commission may designate one or more of its divisions as appellate divisions. Any Commissioner may be assigned to such division or divisions as the Commission may direct, and the senior in service of the Commissioners constituting a division shall act as chairman thereof unless otherwise directed by the Commission. When a vacancy occurs in any division or when a Commissioner because of absence, or other cause, is unable to serve thereon, the Chairman of the Commission or any Commissioner designated by him for that purpose may serve temporarily on such division until the Commission otherwise orders.

(2) Reference of matters to divisions, individual Commissioners or boards

The Commission may by order direct that any of its work, business, or functions under any provision of law (except matters required to be referred to joint boards by section 305 of this Appendix, and except functions vested in the Commission under this section), or any matter which shall have been or may be referred to it by Congress or by either branch thereof, be assigned or referred to any division, to an individual Commissioner, or to a board to be composed of three or more eligible employees of the Commission (hereinafter in this section called a "board") to be designated by such order, for action thereon, and the Commission may by order at any time amend, modify, supplement, or rescind any such assignment or reference. The following classes of employees shall be eligible for designation by the Commission to serve on such boards: examiners, directors or assistant directors of bureaus, chiefs of sections, and attorneys. The assignment or reference, to divisions, of work, business, or functions relating to the lawfulness of rates, fares,

or charges shall be made according to the character of regulation to be exercised and not according to the kind or class of the carriers involved or to the form or mode of transportation in which such carriers may be engaged. When an individual Commissioner, or any employee, is unable to act upon any matter so assigned or referred because of absence or other cause, the Chairman of the Commission may designate another Commissioner or employee, as the case may be, to serve temporarily until the Commission otherwise orders.

(3) Conduct of proceedings; seal; oaths; quorum; rules

The Commission shall conduct its proceedings under any provision of law in such manner as will best conduce to the proper dispatch of business and to the ends of justice. The Commission shall have an official seal, which shall be judicially noticed. Any member of the Commission, the Secretary of the Commission, or any member of a board may administer oaths and affirmations and any member of the Commission or the Secretary of the Commission (or any member of a board in connection with the performance of any work, business, or functions referred under this section to a board upon which he serves) may sign subpenas. A majority of the Commission, of a division, or of a board shall constitute a quorum for the transaction of business. The Commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, or before any division, individual Commissioner, or board, including forms of notices and the service thereof, which shall conform, as nearly as may be, to those in use in the courts of the United States. Any party may appear before the Commission or any division, individual Commissioner, or board and be heard in person or by attorney. Every vote and official act of the Commission, or of any division, individual Commissioner, or board, shall be entered of record, and such record shall be made public upon the request of any party interested. All hearings before the Commission, a division, individual Commissioner, or board shall be public upon the request of any party interested. No Commissioner or employee shall participate in any hearing or proceeding in which he shall have any pecuniary interest.

(4) Powers of divisions, boards, etc.; effect of orders, etc.

A division, an individual Commissioner, or a board shall have authority to hear and determine, order, certify, report, or otherwise act as to any work, business, or functions assigned or referred thereto under the provisions of this section, and with respect thereto shall have all the jurisdiction and powers conferred by law upon the Commission, and be subject to the same duties and obligations. The secretary and seal of the Commission shall be the secretary and seal of each division, individual Commissioner, or board. Except as otherwise provided in this section, any order, decision, or requirement of a division, an individual Commissioner, or a board, with respect to any matter so assigned or referred, shall have the same force and effect, and may be made and evidenced in the same manner as if made or taken by the Commission.

(5) Findings, etc., of Commissioner or board; accompanying statement and recommended order; copies to parties; exceptions; recommended order as Commission's order; delegation of duties to employee boards

Any finding, report, or requirement of an individual Commissioner or board, with respect to any matter so assigned or referred involving the taking of testimony at a public hearing, shall be accompanied by a statement in writing of the reasons therefor, together with a recommended order, which shall be filed with the Commission. Copies thereof shall be served upon interested parties (including, in proceedings under chapter 8 of this Appendix, persons specified in section 305(e) of this Appendix), who may file exceptions thereto, but if within twenty days after service upon such persons, or within such further period as the Commission or a duly designated division thereof may authorize, no exceptions shall have been filed, such recommended order shall become the order of the Commission and become effective unless within such period the order shall have been stayed or postponed by the Commission or by a duly designated division thereof. The Commission, or a duly designated division thereof, upon its own motion may, and where exceptions are filed it shall, reconsider the matter either upon the same record or after further hearing, and such recommended order shall thereupon be stayed or postponed pending final determination thereof. When deemed by the Commission to be appropriate for the efficient and orderly conduct of its business, it may authorize duly designated employee boards to perform, under this paragraph, functions of the same character as those which may be performed thereunder by duly designated divisions.

(6) Rehearing, reargument, or reconsideration of decisions, orders, and requirements

After a decision, order, or requirement shall have been made by the Commission, a division, and individual Commissioner, or a board, or after an order recommended by an individual Commissioner or a board shall have become the order of the Commission as provided in paragraph (5) of this section, any party thereto may at any time, subject to such limitations as may be established by the Commission as hereinafter authorized, make application for rehearing, reargument, or reconsideration of the same, or of any matter determined therein. Such applications shall be governed by such general rules as the Commission may establish. Any such application, if the decision, order, or requirement was made by the Commission, shall be considered and acted upon by the Commission. If the decision, order, or requirement was made by a division, an individual Commissioner, or a board, such application shall be considered and acted upon by the Commission or referred to an appropriate appellate division for consideration and action. Rehearing, reargument, or reconsideration may be granted if sufficient reason therefor be made to appear; but the Commission may, from time to time, make or amend general rules or orders establishing limitations upon the right to apply for rehearing, reargument, or reconsideration of a decision, order, or requirement of the Commission or of a division so as to confine such right to proceedings, or classes of proceedings, involving issues of general transportation importance. Notwithstanding the foregoing provisions of this paragraph, any application for rehearing, reargument, or reconsideration of a matter assigned or referred to an individual Commissioner or a board, under the provisions of paragraph (2) of this section, if such application shall have been filed within twenty days after the recommended order in the proceeding shall have become the order of the Commission as provided in paragraph (5) of this section, and if such matter shall not have been reconsidered or reheard as provided in said paragraph, shall be referred to an appropriate appellate division of the Commission and such division shall reconsider the matter either upon the same record or after a further hearing.

(7) Reversal or modification after rehearing, etc.

If after rehearing, reargument, or reconsideration of a decision, order, or requirement of a division, an individual Commissioner, or board it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission or appellate division may reverse, change, or modify the same accordingly. Any decision, order, or requirement made after rehearing, reargument, or reconsideration, reversing, changing, or modifying the original determination shall be subject to the same provisions with respect to rehearing, reargument, or reconsideration as an original order.

the hearing session, the presiding officer may, with due regard for the convenience of the participants, direct advance distribution of the exhibits by a prescribed date. The presiding officer may also direct the preparation and distribution of any briefs and other documents which the presiding officer determines will substantially expedite the proceeding.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 578, 60 FR 19505, Apr. 19, 1995]

§ 385.602 Submission of settlement offers (Rule 602).

(a) *Applicability.* This section applies to written offers of settlement filed in any proceeding pending before the Commission or set for hearing under subpart E. For purposes of this section, the term ''offer of settlement'' includes any written proposal to modify an offer of settlement.

(b) *Submission of offer.* (1) Any participant in a proceeding may submit an offer of settlement at any time.

(2) An offer of settlement must be filed with the Secretary. The Secretary will transmit the offer to:

(i) The presiding officer, if the offer is filed after a hearing has been ordered under subpart E of this part and before the presiding officer certifies the record to the Commission; or

(ii) The Commission.

(3) If an offer of settlement pertains to multiple proceedings that are in part pending before the Commission and in part set for hearing, any participant may by motion request the Commission to consolidate the multiple proceedings and to provide any other appropriate procedural relief for purposes of disposition of the settlement.

(c) *Contents of offer.* (1) An offer of settlement must include:

(i) The settlement offer;

(ii) A separate explanatory statement;

(iii) Copies of, or references to, any document, testimony, or exhibit, including record citations if there is a record, and any other matters that the offerer considers relevant to the offer of settlement; and

(2) If an offer of settlement pertains to a tariff or rate filing, the offer must include any proposed change in a form suitable for inclusion in the filed rate schedules or tariffs, and a number of copies sufficient to satisfy the filing requirements applicable to tariff or rate filings of the type at issue in the proceeding.

(d) *Service.* (1) A participant offering settlement under this section must serve a copy of the offer of settlement:

(i) On every participant in accordance with Rule 2010;

(ii) On any person required by the Commission's rules to be served with the pleading or tariff or rate schedule filing, with respect to which the proceeding was initiated.

(2) The participant serving the offer of settlement must notify any person or participant served under paragraph (d)(1) of this section of the date on which comments on the settlement are due under paragraph (f) of this section.

(e) *Use of non-approved offers of settlement as evidence.* (1) An offer of settlement that is not approved by the Commission, and any comment on that offer, is not admissible in evidence against any participant who objects to its admission.

(2) Any discussion of the parties with respect to an offer of settlement that is not approved by the Commission is not subject to discovery or admissible in evidence.

(f) *Comments.* (1) A comment on an offer of settlement must be filed with the Secretary who will transmit the comment to the Commission, if the offer of settlement was transmitted to the Commission, or to the presiding officer in any other case.

(2) A comment on an offer of settlement may be filed not later than 20 days after the filing of the offer of settlement and reply comments may be filed not later than 30 days after the filing of the offer, unless otherwise provided by the Commission or the presiding officer.

(3) Any failure to file a comment constitutes a waiver of all objections to the offer of settlement.

(4) Any comment that contests an offer of settlement by alleging a dispute as to a genuine issue of material fact must include an affidavit detailing any genuine issue of material fact by specific reference to documents, testimony, or other items included in the

offer of settlement, or items not included in the settlement, that are relevant to support the claim. Reply comments may include responding affidavits.

(g) *Uncontested offers of settlement.* (1) If comments on an offer are transmitted to the presiding officer and the presiding officer finds that the offer is not contested by any participant, the presiding officer will certify to the Commission the offer of settlement, a statement that the offer of settlement is uncontested, and any hearing record or pleadings which relate to the offer of settlement.

(2) If comments on an offer of settlement are transmitted to the Commission, the Commission will determine whether the offer is uncontested.

(3) An uncontested offer of settlement may be approved by the Commission upon a finding that the settlement appears to be fair and reasonable and in the public interest.

(h) *Contested offers of settlement.* (1)(i) If the Commission determines that any offer of settlement is contested in whole or in part, by any party, the Commission may decide the merits of the contested settlement issues, if the record contains substantial evidence upon which to base a reasoned decision or the Commission determines there is no genuine issue of material fact.

(ii) If the Commission finds that the record lacks substantial evidence or that the contesting parties or contested issues can not be severed from the offer of settlement, the Commission will:

(A) Establish procedures for the purpose of receiving additional evidence before a presiding officer upon which a decision on the contested issues may reasonably be based; or

(B) Take other action which the Commission determines to be appropriate.

(iii) If contesting parties or contested issues are severable, the contesting parties or uncontested portions may be severed. The uncontested portions will be decided in accordance with paragraph (g) of this section.

(2)(i) If any comment on an offer of settlement is transmitted to the presiding officer and the presiding officer determines that the offer is contested, whole or in part, by any participant, the presiding officer may certify all or part of the offer to the Commission. If any offer or part of an offer is contested by a party, the offer may be certified to the Commission only if paragraph (h)(2)(ii) or (iii) of this section applies.

(ii) Any offer of settlement or part of any offer may be certified to the Commission if the presiding officer determines that there is no genuine issue of material fact. Any certification by the presiding officer must contain the determination that there is no genuine issue of material fact and any hearing record or pleadings which relate to the offer or part of the offer being certified.

(iii) Any offer of settlement or part of any offer may be certified to the Commission, if:

(A) The parties concur on a motion for omission of the initial decision as provided in Rule 710, or, if all parties do not concur in the motion, the presiding officer determines that omission of the initial decision is appropriate under Rule 710(d), and

(B) The presiding officer determines that the record contains substantial evidence from which the Commission may reach a reasoned decision on the merits of the contested issues.

(iv) If any contesting parties or contested issues are severable, the uncontested portions of the settlement may be certified immediately by the presiding officer to the Commission for decision, as provided in paragraph (g) of this section.

(i) *Reservation of rights.* Any procedural right that a participant has in the absence of an offer of settlement is not affected by Commission disapproval, or approval subject to condition, of the uncontested portion of the offer of settlement.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 541, 57 FR 21734, May 22, 1992; Order 578, 60 FR 19505, Apr. 19, 1995]

§ 385.603 Settlement of negotiations before a settlement judge (Rule 603).

(a) *Applicability.* This section applies to any proceeding set for hearing under subpart E of this part and to any other proceeding in which the Commission

(b) *Nature of briefs on exceptions and of briefs opposing exceptions.* (1) Any brief on exceptions and any brief opposing exceptions must include:

(i) If the brief exceeds 10 pages in length, a separate summary of the brief not longer than five pages; and

(ii) A presentation of the participant's position and arguments in support of that position, including references to the pages of the record or exhibits containing evidence and arguments in support of that position.

(2) Any brief on exceptions must include, in addition to matters required by paragraph (b)(1) of this section:

(i) A short statement of the case;

(ii) A list of numbered exceptions, including a specification of each error of fact or law asserted; and

(iii) A concise discussion of the policy considerations that may warrant full Commission review and opinion.

(3) A brief opposing exceptions must include, in addition to matters required by paragraph (b)(1) of this section:

(i) A list of exceptions opposed, by number; and

(ii) A rebuttal of policy considerations claimed to warrant Commission review.

(c) *Oral argument.* (1) Any participant filing a brief on exceptions or brief opposing exceptions may request, by written motion, oral argument before the Commission or an individual Commissioner.

(2) A motion under paragraph (c)(1) of this section must be filed within the time limit for filing briefs opposing exceptions.

(3) No answer may be made to a motion under paragraph (c)(1) and, to that extent, Rule 213(a)(3) is inapplicable to a motion for oral argument.

(4) A motion under paragraph (c)(1) of this section may be granted at the discretion of the Commission. If the motion is granted, any oral argument will be limited, unless otherwise specified, to matters properly raised by the briefs.

(d) *Failure to take exceptions results in waiver*—(1) *Complete waiver.* If a participant does not file a brief on exceptions within the time permitted under this section, any objection to the initial decision by the participant is waived.

(2) *Partial waiver.* If a participant does not object to a part of an initial decision in a brief on exceptions, any objections by the participant to that part of the initial decision are waived.

(3) *Effect of waiver.* Unless otherwise ordered by the Commission for good cause shown, a participant who has waived objections under paragraph (d)(1) or (d)(2) of this section to all or part of an initial decision may not raise such objections before the Commission in oral argument or on rehearing.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 375, 49 FR 21316, May 21, 1984; Order 575, 60 FR 4860, Jan. 25, 1995]

§ 385.712 Commission review of initial decisions in the absence of exceptions (Rule 712).

(a) *General rule.* If no briefs on exceptions to an initial decision are filed within the time established by rule or order under Rule 711, the Commission may, within 10 days after the expiration of such time, issue an order staying the effectiveness of the decision pending Commission review.

(b) *Briefs and argument.* When the Commission reviews a decision under this section, the Commission may require that participants file briefs or present oral arguments on any issue.

(c) *Effect of review.* After completing review under this section, the Commission will issue a decision which is final for purposes of rehearing under Rule 713.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 375, 49 FR 21316, May 21, 1984; Order 575, 60 FR 4860, Jan. 25, 1995]

§ 385.713 Request for rehearing (Rule 713).

(a) *Applicability.* (1) This section applies to any request for rehearing of a final Commission decision or other final order, if rehearing is provided for by statute, rule, or order.

(2) For the purposes of rehearing under this section, a final decision in any proceeding set for hearing under subpart E of this part includes any Commission decision:

(i) On exceptions taken by participants to an initial decision;

(ii) When the Commission presides at the reception of the evidence;

(iii) If the initial decision procedure has been waived by consent of the participants in accordance with Rule 710;

(iv) On review of an initial decision without exceptions under Rule 712; and

(v) On any other action designated as a final decision by the Commission for purposes of rehearing.

(3) For the purposes of rehearing under this section, any initial decision under Rule 709 is a final Commission decision after the time provided for Commission review under Rule 712, if there are no exceptions filed to the decision and no review of the decision is initiated under Rule 712.

(b) *Time for filing; who may file.* A request for rehearing by a party must be filed not later than 30 days after issuance of any final decision or other final order in a proceeding.

(c) *Content of request.* Any request for rehearing must:

(1) State concisely the alleged error in the final decision or final order;

(2) Conform to the requirements in Rule 203(a), which are applicable to pleadings, and, in addition, include a separate section entitled ''Statement of Issues,'' listing each issue in a separately enumerated paragraph that includes representative Commission and court precedent on which the party is relying; any issue not so listed will be deemed waived; and

(3) Set forth the matters relied upon by the party requesting rehearing, if rehearing is sought based on matters not available for consideration by the Commission at the time of the final decision or final order.

(d) *Answers.* (1) The Commission will not permit answers to requests for rehearing.

(2) The Commission may afford parties an opportunity to file briefs or present oral argument on one or more issues presented by a request for rehearing.

(e) *Request is not a stay.* Unless otherwise ordered by the Commission, the filing of a request for rehearing does not stay the Commission decision or order.

(f) *Commission action on rehearing.* Unless the Commission acts upon a request for rehearing within 30 days after the request is filed, the request is denied.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 375, 49 FR 21316, May 21, 1984; Order 575, 60 FR 4860, Jan. 25, 1995; 60 FR 16567, Mar. 31, 1995; Order 663, 70 FR 55725, Sept. 23, 2005; 71 FR 14642, Mar. 23, 2006]

§ 385.714 Certified questions (Rule 714).

(a) *General rule.* During any proceeding, a presiding officer may certify or, if the Commission so directs, will certify, to the Commission for consideration and disposition any question arising in the proceeding, including any question of law, policy, or procedure.

(b) *Notice.* A presiding officer will notify the participants of the certification of any question to the Commission and of the date of any certification. Any such notification may be given orally during the hearing session or by order.

(c) *Presiding officer's memorandum; views of the participants.* (1) A presiding officer should solicit, to the extent practicable, the oral or written views of the participants on any question certified under this section.

(2) The presiding officer must prepare a memorandum which sets forth the relevant issues, discusses all the views of participants, and recommends a disposition of the issues.

(3) The presiding officer must append to any question certified under this section the written views submitted by the participants, the transcript pages containing oral views, and the memorandum of the presiding officer.

(d) *Return of certified question to presiding officer.* If the Commission does not act on any certified question within 30 days after receipt of the certification under paragraph (a) of this section, the question is deemed returned to the presiding officer for decision in accordance with the other provisions of this subpart.

(e) *Certification not suspension.* Unless otherwise directed by the Commission or the presiding officer, certification under this section does not suspend the proceeding.

Tesoro Alaska Company and **Docket No. IS09-348, et al.**
Anadarko Petroleum Corporation, v. FERC
D.C. Cir. No. 13-1248 and 13-1249

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 11th day of September 2014, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system or via U.S. Mail, as indicated below:

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