ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

No. 13-1302

ST. PAUL PARK REFINING CO. LLC,
Petitioner,

v.

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

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

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

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June 6, 2014

CIRCUIT RULE 28(A)(1) CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

All parties and intervenors appearing before this Court are identified in Petitioner's brief.

B. Ruling Under Review

St. Paul Park Refining Co. LLC v. Enbridge Pipelines (North Dakota) LLC, 145 FERC ¶ 61,050 (2013) (FERC Order), App. 8.

C. Related Cases

This case has not previously been before this Court or any other court. There are no related cases pending before this Court or elsewhere.

/s/ Elizabeth E. Rylander
Elizabeth E. Rylander

June 6, 2014

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Answer	Motion to Dismiss and Answer of Enbridge Pipelines (North Dakota) LLC in Response to Complaint of St. Paul Park Refining Co. LLC, Docket No. OR13-28-000 (Aug. 14, 2013).
Beaver Lodge Loop Order	*Enbridge Pipelines (North Dakota) and Enbridge Pipelines (Bakken) L.P.*, 133 FERC ¶ 61,167 (2010).
Commission or FERC	Federal Energy Regulatory Commission
Complaint	Complaint of St. Paul Park Refining Co., Docket No. OR13-28-000 (July 25, 2013).
Enbridge Pipelines (North Dakota) Inc.	Former corporate name of Intervenor North Dakota Pipeline Company LLC
FERC Order	*St. Paul Park Refining Co. LLC v. Enbridge Pipelines (North Dakota) LLC*, 145 FERC ¶ 61,050 (2013).
ICA	Interstate Commerce Act, 49 U.S.C. app. § 1, *et seq.*
North Dakota Pipeline	North Dakota Pipeline Company LLC
Phase 5 Expansion Offer of Settlement	Offer of Settlement, Docket No. OR06-9-000 (Aug. 14, 2006).
Phase 5 Order	*Enbridge Pipelines (North Dakota) LLC*, 117 FERC ¶ 61,131 (2006).
Phase 6 Expansion Offer of Settlement	Offer of Settlement, Docket No. OR06-000 (Jan. 18, 2008).

GLOSSARY

Phase 6 Order	*Enbridge Pipelines (North Dakota) LLC*, 125 FERC ¶ 61,052 (2006).
Phase 6 Surcharge	Cost-based rate surcharge, assessed to North Dakota Pipeline shippers transporting volumes to Clearbrook, Minnesota, that recovers the cost of the Phase 6 Expansion
Settlement	Agreement between North Dakota Pipeline and its shippers that established the Phase 6 Surcharge
St. Paul Park	St. Paul Park Refining Co., LLC

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

STATEMENT OF THE ISSUE

The Federal Energy Regulatory Commission denied St. Paul Park Refining Co., LLC's challenge to the ongoing reasonableness of an uncontested and previously-approved settlement agreement that established a rate surcharge to fund a pipeline expansion. The issue presented for review is:

Whether the Commission's management of the underlying case, and its decision that St. Paul Park had not shown that changed circumstances justified

amending the settlement agreement, satisfied its responsibility under the Interstate Commerce Act, the Commission's own regulations, and applicable precedent to ensure that the settlement rate remained just and reasonable.

STATUTES AND REGULATIONS

The pertinent statutes and regulations are reproduced in the Addendum.

INTRODUCTION

In the order on review, the Federal Energy Regulatory Commission (Commission or FERC) denied rate relief that Petitioner St. Paul Park Refining Co. LLC (St. Paul Park) sought by way of an administrative complaint. *St. Paul Park Refining Co. LLC v. Enbridge Pipelines (North Dakota) LLC*, 145 FERC ¶ 61,050 (2013) (FERC Order), App. 8. St. Paul Park challenged a 2008 settlement agreement (Settlement) between Intervenor North Dakota Pipeline Company LLC (North Dakota Pipeline) and its shippers that established a rate surcharge (Phase 6 Surcharge) to recover the costs of the pipeline's Phase 6 Expansion. The Phase 6 Surcharge, in its fourth year of effectiveness, had become more expensive for St. Paul Park than it was in the previous three years.

In the FERC Order, the Commission found that St. Paul Park had not shown that changes in circumstances had rendered the Settlement in general, or the Phase 6 Surcharge in particular, unjust and unreasonable under the Interstate Commerce Act, 49 U.S.C. app. § 1(5). FERC Order at PP 29-37, App. 15-18. The

Commission also found that because the language of the Settlement – and therefore the application of the Phase 6 Surcharge – was controlling, there was no need to consider the intent of the settling parties. *Id.* P 31, App. 31. Moreover, there was no disputed issue of material fact that required the Commission to hold an evidentiary hearing or conduct discovery to further investigate St. Paul Park's allegations. *Id.* P 37, App. 18. In light of its findings, the Commission denied St. Paul Park's request that the Commission revisit the Settlement and revise the Phase 6 Surcharge. *Id.*

STATEMENT OF FACTS

I. Statutory And Regulatory Background

A. Interstate Commerce Act

In 1906, Congress extended the definition of common carrier under the Interstate Commerce Act (ICA) to oil pipelines and required that they file their rates with the Interstate Commerce Commission. *See* 49 U.S.C. app. §§ 6(1), 6(7) (1988). In 1977, in conjunction with the formation of the Department of Energy, regulatory authority over oil pipelines under the ICA was transferred from the Interstate Commerce Commission to the newly-created FERC. *See* 49 U.S.C. § 60502. The traditional standards governing rate regulation under the ICA were not modified. *See Frontier Pipeline Co. v. FERC*, 452 F.3d 774, 776 (D.C. Cir. 2006) (explaining that "oil pipelines were to be regulated under the version of the ICA

that prevailed on October 1, 1977," and explaining citation of ICA provisions to appendix to the 1988 edition of the United States Code).

ICA section 1(5)(a) requires that "[a]ll charges" for pipeline transportation, or service in connection with transportation, be just and reasonable and declares all "unjust and unreasonable charge[s] . . . to be unlawful." 49 U.S.C. app. § 1(5)(a). Section 13(1) sets forth procedures for complaints to the Commission against carriers for ICA violations. *Id*. § 13(1). If "there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper." *Id.* And should the Commission determine after a hearing that any rate or charge is unjust and unreasonable, it is empowered to set a just and reasonable rate to be thereafter observed. *Id*. § 15(1).

B. Commission Regulations

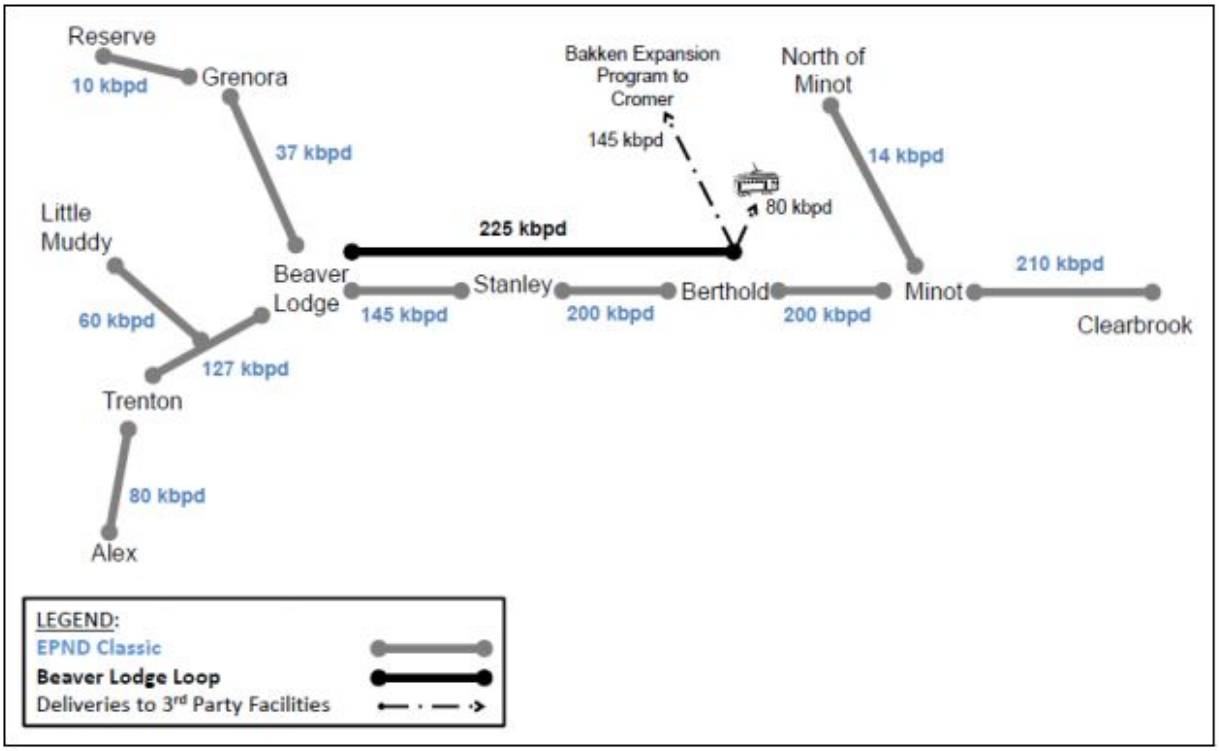
FERC's regulations allow any person to file a complaint seeking Commission action against any other person alleged to be in contravention or violation of any FERC-administered statute. 18 C.F.R. § 385.206(a). After public notice and an opportunity for responsive pleadings, the Commission may assign the matter to alternative dispute resolution or to a settlement judge, set the case for hearing before an administrative law judge, or "issue an order on the merits based on the pleadings." 18 C.F.R. § 385.206(g). The Commission has frequently

resolved complaints alleging violations of the ICA on the record, without formal hearing procedures. *See, e.g.*, *Thrifty Propane, Inc. v. Enterprise TE Prods. Pipeline, LLC*, 140 FERC ¶ 61,017 (2012); *Nexen Marketing U.S.A., Inc. v. Belle Fourche Pipeline Co.*, 121 FERC ¶ 61,235 (2007).

II. The Phase 6 Expansion

A. Factual Background

North Dakota Pipeline's mainline runs from several origin points in the Williston Basin, in eastern Montana and western North Dakota, east to an exit point in Clearbrook, Minnesota. The Enbridge Bakken Pipeline, which is separately owned, branches north from Berthold, North Dakota, to interconnect with the Enbridge mainline at Cromer, Manitoba, Canada. As the system diagram below indicates, North Dakota Pipeline's current average capacity is 210,000 barrels per day into the exit point at Clearbrook, plus 225,000 barrels per day into the exit point at Berthold. Answer at 6 & Att. A at 6, App. 254, 288; Motion for Leave to Reply and Reply of Enbridge Pipelines (North Dakota) LLC in Response to Answer of St. Paul Park Refining Co. LLC at 4, App. 328.



1. North Dakota Pipeline's Expansion Projects

In recent years, a surge in crude oil production at the Williston Basin has placed unusual pressure on pipelines, including North Dakota Pipeline, that were not equipped to manage the current levels of demand for capacity. Offer of Settlement, Docket No. OR06-9-000, at 1 (Aug. 14, 2006) (Phase 5 Expansion Offer of Settlement). North Dakota Pipeline explained to the Commission in 2010 that oil production from the Bakken Formation underlying the Williston Basin had increased from 3,250 barrels per day in 2005 to more than 250,000 barrels per day in 2010. *Enbridge Pipelines (North Dakota) LLC, and Enbridge Pipelines (Bakken) L.P.*, 133 FERC ¶ 61,167, at P 3 (2010) (Beaver Lodge Loop Order). The production surge left North Dakota Pipeline – which had a historical capacity

of 84,000 barrels per day – "heavily prorated." *Enbridge Pipelines (North Dakota) LLC*, 117 FERC ¶ 61,131, at P 1, 4 (2006) (Phase 5 Order). To cope with the larger volumes, North Dakota Pipeline has undertaken a series of expansion projects designed to increase its capacity.

In 2006, after making preliminary improvements, North Dakota Pipeline planned two capacity expansions: (1) the Looping Expansion, which increased capacity on the feeder line between Alexander, North Dakota and Beaver Lodge, North Dakota; and (2) the Mainline Expansion, which involved upgrading the Beaver Lodge pumping station and adding two new pumping stations. *Id*. P 2, 5. North Dakota Pipeline proposed, through a settlement similar to the one at issue in this case, to recover the costs of these two projects through surcharges that for five years would be added to the indexed base rates that it had on file with the Commission. *Id*. P 2, 8. The costs of the Mainline Expansion were assessed to all shippers, because they would all benefit from the capacity improvements there, whereas the costs of the Looping Expansion were assessed only to shippers originating shipments at Trenton or Alexander, North Dakota. *Id*. P 8. The Commission approved the proposal rate treatment. *Id*. P 9. When the upgrades went into service on January 1, 2008, North Dakota Pipeline's capacity increased from about 84,000 barrels per day to about 110,000 barrels per day. *Enbridge Pipelines (North Dakota) LLC*, 125 FERC ¶ 61,052, at P 8 (2006) (Phase 6 Order).

Just days after the Mainline Expansion and the Looping Expansion went into service, North Dakota Pipeline filed the draft Settlement, again proposing to recover the costs of a pipeline expansion via a surcharge. For its Phase 6 Expansion, North Dakota Pipeline planned to increase horsepower at 12 pumping stations on its system, to implement measurement and station upgrades at Clearbrook, to install a 100,000-barrel tank at Beaver Lodge, and to make extensive use of drag-reducing agent.[1] Phase 6 Expansion Offer of Settlement at 4, App. 43. Claiming the support of shippers representing 84 percent of the volumes on its pipeline, North Dakota Pipeline proposed to recover the costs of this expansion by way of an across-the-board surcharge on all shipments to Clearbrook for seven years. *Id*. at 4-5, App. 43-44. The Commission approved the Settlement, finding that it appeared to be fair and reasonable and in the public interest. Phase 6 Order at P 8.

The Phase 6 Expansion was implemented in 2009-10. It added 40,000 barrels per day of capacity from the western end of the pipeline system to Minot, North Dakota, and about 51,000 barrels per day of capacity from Minot to the eastern end of the system. Motion to Dismiss and Answer of Enbridge Pipelines

[1] Drag-reducing agent is a product injected into the pipeline that minimizes friction and, thus, increases transportation efficiency. *SFPP, L.P.*, Opinion No. 522, 140 FERC ¶ 61,220, at n.74 (2012). Its use enhances the capacity of a crude oil pipeline. Offer of Settlement, Docket No. OR0-6-000, at 2 (Jan. 18, 2008) (Phase 6 Expansion Offer of Settlement), App. 41.

(North Dakota) LLC in Response to Complaint of St. Paul Park Refining Co. LLC, Docket No. OR13-28-000, at 3 & Att. A, at 2-3 (Aug. 14, 2013) (Answer), App. 251, 284-85. After this expansion, North Dakota Pipeline undertook a sour removal project[2] and total pipeline control project, which increased system capacity from 185,000 barrels per day to 210,000 barrels per day into Clearbrook. Answer at 4 & Att. A at 4, App. 252, 286.

From 2006 through at least early 2010, each of North Dakota Pipeline's expansions filled immediately, which meant that North Dakota Pipeline operated "in constant apportionment" – i.e., it had to prorate capacity among its shippers. Beaver Lodge Loop Order at P 4. By 2011, North Dakota Pipeline's mainline between Beaver Lodge and Clearbrook had reached maximum capacity. Answer at 4, App. 252. North Dakota Pipeline therefore initiated what it called the Bakken Expansion Program. Beaver Lodge Loop Order at PP 4-14. It built the Beaver Lodge Loop between Beaver Lodge and Berthold, adding 225,000 barrels per day into Berthold; it reversed and reopened the Portal Line from Berthold to the Canadian border; it reversed a pipeline from the Canadian border to Steelman, Saskatchewan; and it built a new pipeline from Steelman to Cromer, Manitoba,

[2] North Dakota Pipeline explained below that the "sour removal project consisted of eliminating segregated movements of sour crude oil on the system, which enabled Enbridge North Dakota to place all barrels in a continuous stream," and enhanced available capacity. Answer at 4 n.2.

where it connects with the Enbridge mainline. Answer at 4-5, App. 252-53. This new structure allows oil to flow to Clearbrook via North Dakota Pipeline or via the Enbridge mainline in Canada. The incremental costs of the Beaver Lodge Loop were recovered through North Dakota Pipeline's rates for movement to Berthold, and were not imposed on existing shippers transporting volumes to Clearbrook solely on the North Dakota Pipeline system. Beaver Lodge Loop Order at n.9 & P 10.

North Dakota Pipeline now plans to build a new pipeline parallel to its mainline from Beaver Lodge to Clearbrook, and to extend its system from Clearbrook to Superior, Wisconsin. *North Dakota Pipeline Co. LLC*, 147 FERC ¶ 61,121, at PP 2-3 (2014). Its so-called Sandpiper Expansion will increase capacity into Clearbrook from 210,000 to 440,000 barrels per day. *Id.* P 2. North Dakota Pipeline intends to recover the cost of the parallel pipeline from Beaver Lodge to Clearbrook through an expansion rate component, added to the base rates on file for shipments to Clearbrook. *Id.* P 9.

2. St. Paul Park's Complaint

St. Paul Park was formed in 2010, and late that year it purchased the assets of the St. Paul Park refinery from Marathon Oil Company. Complaint of St. Paul Park Refining Co., Docket No. OR13-28-000, at P 7 (July 25, 2013), App. 24 (Complaint). Marathon Oil Company, a shipper on the North Dakota Pipeline

system, had previously supported both portions of the Phase 5 Expansion and the Phase 6 Expansion. It stated in its letters of support for the expansions that it understood the terms of the rate surcharges associated with the expansion projects. Letter from John R. Miller, Enbridge Energy Co., Inc., to Andrew Franklin, Marathon Oil Co. (May 23, 2006), *attached to* Phase 5 Offer of Settlement (Looping Expansion Shipper Support Letters); Letter from John R. Miller, Enbridge Energy Co., Inc., to Andrew Franklin, Marathon Oil Co. (Aug. 10, 2006), *attached to* Phase 5 Offer of Settlement (Mainline Expansion Shipper Support Letters); Letter from A.A. Franklin, Marathon Oil Co. to Brian Johnson, Enbridge Pipelines (Oct. 24, 2007), *attached to* Phase 6 Offer of Settlement, Exhibit A at 51, App. 89.

On July 25, 2013, St. Paul Park filed its Complaint before the Commission, challenging the ongoing reasonableness of the surcharge for the Phase 6 Expansion. As relevant here, St. Paul Park contended that excluding the volumes traveling on the North Dakota Pipeline system to the new Berthold Rail Facility from the Phase 6 Surcharge alters one of the fundamental bases underlying the Settlement, and affects the calculation of the rates derived from the Settlement. Complaint at P 1, App. 21-22. St. Paul Park argued that the Settlement assumed that nearly all barrels entering the North Dakota Pipeline system would exit at Clearbrook and be assessed the Phase 6 Surcharge. *Id.* at P

18, App. 29. North Dakota Pipeline, in response, disputed these allegations. *See* Answer, App. 249.

B. The FERC Order

The Commission began its analysis of St. Paul Park's arguments by examining the Settlement, because there "is no reason to determine the intent of the settlement when the plain language is clear." FERC Order at P 31, App. 16. Because the Settlement stated that the Phase 6 Surcharge applies to all volumes leaving the North Dakota Pipeline system at Clearbrook, Minnesota, the Commission found that shippers to other exit points were not subject to the surcharge. *Id.* The Commission also found that shippers to Berthold were paying the costs of the Beaver Lodge Loop expansion, and that shippers to Clearbrook were paying the costs of the Phase 6 Expansion. *Id.* Finally, the Commission found that the yearly true-up mechanism adjusts the surcharge to reflect actual costs and pipeline throughput, and this protects shippers from over-recovery of costs. *Id.* P 33.

This appeal followed.

SUMMARY OF ARGUMENT

The Commission's first task in reviewing an administrative complaint is to determine whether a party has raised a dispute of genuine material fact, and whether that dispute can be resolved on the basis of the pleadings before it. Depending on the outcome of this analysis, the Commission, under its own rules, may decide to develop the record further, such as by holding a trial-type hearing before an administrative law judge, or proceed to an order on the merits.

Here, FERC reasonably chose to issue an order on the merits. It reasonably declined to revisit the rate surcharge established in the Settlement because, under the terms of the Settlement, the Phase 6 Surcharge applies to Clearbrook shippers. Moreover, the Settlement provides no basis to assess the Phase 6 Surcharge to other shippers. Because St. Paul Park did not dispute the language of the Settlement, FERC appropriately found that it did not need to determine the underlying intent of the Settlement.

The Commission also correctly found that St. Paul Park had not shown changed circumstances that rendered the Phase 6 Surcharge no longer reasonable. The record contains no support for St. Paul Park's claim that a "key assumption" underlying the Settlement was that almost all barrels would exit the North Dakota Pipeline system at Clearbrook, and that construction of the Beaver Lodge Loop undermined this assumption. Instead, the record shows that North Dakota

Pipeline's system was constrained; that there was another exit point on the North Dakota Pipeline system in 2008; and that the Phase 6 Surcharge was intended to benefit Clearbrook shippers. Together these circumstances demonstrate that the Settlement parties made a conscious choice to assign the costs of the Phase 6 Expansion to Clearbrook shippers (such as St. Paul Park).

Finally, as the Commission observed, St. Paul Park did not object to the Phase 6 Surcharge in its first three years, when the rate was decreasing; it filed a complaint only when the rate increased. Commission and court precedent establishes that contracts are not rendered unreasonable just because they eventually cost more than parties would prefer. For all of these reasons, St. Paul Park has not established that the Commission must take the rare step of amending the Settlement on the ground that changes in circumstances rendered the existing rate unjust and unreasonable in violation of the Interstate Commerce Act.

ARGUMENT

I. Standard Of Review

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

explanation for its action, including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 158 (1962)). This Court will uphold the Commission's factual findings if they are supported by substantial evidence. *Freeport-McMoRan Corp. v. FERC*, 669 F.3d 302, 308 (D.C. Cir. 2012). Substantial evidence "requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence." *La. Pub. Serv. Comm'n v. FERC*, 522 F.3d 378, 395 (D.C. Cir. 2008) (internal quotation marks and citation omitted). Review of FERC's ratemaking determinations is particularly deferential. *See Morgan Stanley Capital Grp., Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty., Wash.*, 554 U.S. 527, 532 (2008) (the "statutory requirement that rates be 'just and reasonable' is obviously incapable of precise judicial definition").

A reviewing court is respectful of the Commission's "'reading of a settlement agreement, even when the issue simply involves the proper construction of language.'" *Freeport-McMoRan*, 669 F.3d at 311 (quoting *Transcontinental Gas Pipe Line Corp. v. FERC*, 922 F.2d 865, 869 (D.C. Cir 1991)). *See also Ameren Servs. Co. v. FERC*, 330 F.3d 494, 498 (D.C. Cir. 2003) (affirming Commission determination that a prior settlement agreement unambiguously

prevents Ameren from adjusting certain charges in the contract that was the subject of the appeal).

II. The Commission Reasonably Denied St. Paul Park's Requested Relief

A. The Commission's Reading Of The Settlement Was Reasonable

St. Paul Park contends that the Commission did not examine the Settlement Agreement to determine whether construction of the Beaver Lodge Loop fundamentally changed the Settlement's assumption that nearly all volumes of oil exit the system at Clearbrook. Br. 34. It argues that after the Settlement was approved, the number of shippers that use the Phase 6 Expansion facilities but exit the System at points other than Clearbrook increased "astronomically." Br. 35. Consequently, St. Paul Park says, the Phase 6 Surcharge is no longer just and reasonable because the Beaver Lodge Loop shippers are using, but not paying for, the Phase 6 Expansion. Br. 37.

Contrary to St. Paul Park's assertion, the Commission not only examined the Settlement, but it correctly applied principles of contract interpretation to find that it did not need to analyze the Settlement's intent. "The interpretation of a contract is to be resolved in the first instance from its express language, *i.e.*, on its face." *City of Lebanon, Ohio v. Cincinnati Gas & Elec. Co.*, 64 FERC ¶ 61,341, at p. 63,445 (1993); *accord Transmission Agency of N. Cal. v. FERC*, 628 F.3d 538, 547 (D.C. Cir. 2010). Only when an agreement "is reasonably susceptible of

different constructions or interpretations" should the Commission inquire further into the purpose for which a tariff was imposed. *Iberdrola Renewables Inc. v. FERC*, 597 F.3d 1299, 1304 (D.C. Cir. 2010). Where there is no reason to look for extrinsic evidence, the Commission "will hold parties to the language they drafted and agreed to. We are not disposed (even assuming that we could) to read into parties' agreements language that they did not put there." *City of Lebanon*, 64 FERC ¶ 61,341, at p. 63,445 (internal citation omitted).

Consistent with this authority, at the outset of its analysis the Commission examined the plain language of the Settlement. It found that the Settlement states that it applies "'to all volumes leaving the System at Clearbrook, Minnesota,'" and, "contrary to St. Paul Park's argument, the [S]ettlement does not indicate that shippers other than those exiting the system at Clearbrook, Minnesota are subject to the surcharge." FERC Order at P 31, App. 16. The Commission held that because the language was clear, there was no need to determine the intent underlying the Settlement. *Id.*

St. Paul Park admits that it agrees with the Commission's interpretation: "The Offer of Settlement expressly limited the application of the Surcharge to those volumes exiting the system at Clearbrook." Br. 12. Moreover, "the Phase 6 Surcharge, by its terms, applies only to Clearbrook Shippers," Br. 35, and "simply provides no mechanism for St. Paul Park or any other Clearbrook Shipper to

recover from [North Dakota Pipeline] or from any other Beaver Lodge Loop Shipper any portion of the costs of the construction of the Phase 6 Expansion." Br. 38. St. Paul Park has never argued that the Settlement is ambiguous, or that there may be more than one conclusion to be drawn as to its meaning. Instead, it argues that changes in circumstances since the Settlement was executed "changed the key factual assumption underlying the Settlement," *i.e.*, that nearly all volumes would exit the North Dakota Pipeline system at Clearbrook and pay the Phase 6 Surcharge. Br. 34.

Essentially, St. Paul Park "argues that its understanding of the 'purpose' of the Settlement[] takes precedence over [its] respective provisions." *Dominion Transmission, Inc. v. FERC*, 533 F.3d 845, 854 (D.C. Cir. 2008) (citing *Ameren*, 330 F.3d at 498). This is "[n]ot so" in a case where the Settlement is not ambiguous. *Id.* The Commission therefore properly declined to look for extrinsic evidence of intent, and St. Paul Park has shown no basis in the record for this Court to revisit the Commission's conclusion as to the meaning of the Settlement language.

B. St. Paul Park Has Not Demonstrated Changed Circumstances Requiring Amendment Of The Settlement

A settlement "by its very nature is a compromise – a process by which positions, legal or factual, no matter how seriously maintained or legally supportable, are surrendered in whole or in part to achieve peace." *Tex. E.*

Transmission Corp. v. FPC, 306 F.2d 345, 357 (5th Cir. 1962). "Indeed, the very purpose of the settlement is to make adjudication of these intricate problems unnecessary. . . ." *Id.* The settlement process is an important tool for efficient resolution of administrative disputes: "Settling cases saves energy companies, their customers, and the Commission significant time and resources and provides a quicker determination of appropriate rates, terms, and conditions of service." Federal Energy Regulatory Commission Strategic Plan at 11 (2014), *available at* http://www.ferc.gov/about/strat-docs/FY-2014-FY-2018-strat-plan.pdf.

The Commission may approve an uncontested settlement upon finding that it appears to be fair and reasonable, and in the public interest. 18 C.F.R. § 385.602(g)(3). The Commission may not base such a finding only on the agreement of the parties, but must independently determine that the settlement is consistent with the Interstate Commerce Act or other governing statute. *NorAm Gas Transmission Co. v. FERC*, 148 F.3d 1158, 1165 (D.C. Cir. 1998). The latter obligation sometimes requires that the Commission amend an uncontested settlement in order to approve it. *See, e.g., Colo. Interstate Gas Co.*, 53 FERC ¶ 61,458 (1990) (approving settlement agreement as amended to preserve the Commission's right to future review), *clarified*, 54 FERC ¶ 61,205 (1991).

"[C]ourts have characterized settlement agreements as 'private contracts,' 'administrative contracts,' or simply as 'contracts,' and further explained that one party cannot unilaterally alter a contract." *El Paso Natural Gas Co.*, 40 FERC ¶ 61,362, at p. 62,084 (1987) *reh'g denied*, 42 FERC ¶ 61,362 (1987). The Commission must modify a settlement after approval only if it finds, based on substantial evidence, that the settlement was producing unjust and unreasonable results due to substantially changed circumstances. *See generally Colo. Interstate*, 54 FERC ¶ 61,205, at p. 61,606 (clarifying standard); *El Paso Natural Gas Co.*, 99 FERC ¶ 61,244 (2002) (modifying a settlement agreement was in the public interest because its terms and conditions, as implemented, resulted in unreliable service and unjust and unreasonable capacity allocations), *clarified*, 100 FERC ¶ 61,285 (2002), *order on reh'g*, 104 FERC ¶ 61,045 (2003), order *on reh'g*, 106 FERC ¶ 61,233 (2004), *aff'd, Ariz. Corp. Comm'n v. FERC*, 397 F.3d 952 (D.C. Cir. 2005). A showing of changed circumstances also may prompt the Commission to investigate a proposal to amend a settlement. *See NV Energy Operating Cos.*, 142 FERC ¶ 61,166, at PP 41-42 (2013) (setting challenge to imbalance provisions established in settlement agreement, and related proposed rate revisions, for hearing and settlement judge procedures).

1. The Record Does Not Support St. Paul Park's Allegations Concerning Assumptions Underlying the Settlement

St. Paul Park alleges that circumstances have changed because it is no longer true that nearly all volumes exit the North Dakota Pipeline system at Clearbrook. Although St. Paul Park alleges that this fundamental assumption underlies the Settlement and the Phase 6 Surcharge, Br. 13, 16, 21, 34, 39, it does not present a shred of evidence to support this theory. It does not identify language in the Settlement itself that suggests this, or even contend that there exists extrinsic evidence of this "key factual basis." Br. 34. And nothing in the record supports its allegation that the Phase 6 Surcharge has become unjust and unreasonable now that some barrels exit the North Dakota Pipeline system at Berthold.

By contrast, the record *does* suggest that the parties to the Settlement made a conscious choice to assess the Phase 6 Surcharge to volumes exiting the System at Clearbrook, and this choice is consistent with the structure of earlier rate surcharges that North Dakota Pipeline used to recover the costs of new infrastructure. The Settlement itself indicates that "recovery of the expansion costs will occur through a cost-based surcharge on all shipments *to Clearbrook* that will be trued-up at the end of each year." Phase 6 Offer of Settlement at 1, App. 40 (emphasis added). This "provision limiting the application of the surcharge to Clearbrook barrels was an important aspect of the 2008 Settlement because the Phase 6 expansion was designed to benefit, and primarily would benefit, shippers

moving to Clearbrook." Answer at 7, 17-18, App. 255, 265-66. The assessment of expansion costs to the shippers most likely to benefit from the expansion was also a feature of the Phase 5 Expansion settlement, and later it would become a feature of the Beaver Lodge Loop rate design. *See* Phase 5 Order at P 8 (describing assessment of two Phase 5 surcharges to different classes of shippers); Beaver Lodge Loop Order at n.9 ("all incremental costs of the Beaver Lodge Loop will be recovered through the rates for movements to Berthold"). In fact, North Dakota Pipeline states that its shippers preferred to pay a surcharge on their Clearbrook shipments over an alternative proposal that would have created a more expensive form of service that was protected from prorationing. Phase 6 Offer of Settlement at 4-5, App. 43-44. Finally, Clearbrook was not the only exit point on the North Dakota Pipeline system in 2008. *See* Complaint at 15, App. 28 (citing Docket No. IS10-71-000, at Tariff pages 3-4); Answer at 18, App. 266. That there were two destination points adds significance to the reference to Clearbrook in the Settlement language.

The record also indicates that the North Dakota Pipeline system was oversubscribed at the time of the Phase 6 Expansion, and that North Dakota Pipeline intended to expand further in the future. Expansion capacity had been filling immediately. *See* Beaver Lodge Loop Order at P 4. When it presented the Phase 6 Expansion, North Dakota Pipeline stated that the "purpose of this

Settlement is to facilitate a further expansion of the presently-prorated [North Dakota Pipeline] System." Phase 6 Offer of Settlement at 1, App. 40. In that filing, North Dakota Pipeline reserved the right "to propose a different plan for expansion if future development indicates the need for additional capacity beyond that achievable with the proposed Phase 6 modifications." *Id.* n.2, App. 41. It was therefore reasonably foreseeable that North Dakota Pipeline would continue to expand beyond what was contemplated in the Settlement. The Settlement, however, does not provide for a different application in the future if circumstances change.

The record therefore suggests the Settlement reflected a decision that Clearbrook shippers – not Clearbrook shippers and Beaver Lodge Loop shippers, as St. Paul Park would have it – should pay the costs of the Phase 6 Expansion. The Commission therefore reasonably concluded on the basis of the written pleadings that there was no merit to St. Paul Park's argument regarding changed circumstances.

2. Economic Impact Does Not Constitute Sufficiently Changed Circumstances To Warrant Amending The Settlement

There is no dispute that St. Paul Park's expenses related to the Phase 6 Surcharge were higher in 2013 than they had been in previous years. *See* Br. 13 (surcharge increased from 22.57 cents/barrel in 2012 to 82.69 cents/barrel in 2013); Complaint at P 11 (same), App. 26; Answer at 8 (same), App. 256. The

Commission also observed that the surcharge began at about 60 cents in 2010, then decreased to 39 and 22 cents in 2011 and 2012, and increased to 82 cents in 2013. FERC Order at P 33, App. 16.

The Commission reviewed and accepted North Dakota Pipeline's annual update describing the rate surcharges for 2013. *See Enbridge Pipelines (North Dakota) LLC*, 142 FERC ¶ 61,242 (2013). The Commission noted that there was no reason to believe that the throughput estimate used to calculate the Phase 6 Surcharge was unreasonable, and explained that the true-up would return any over-collections to shippers. *Id.* P 13. St. Paul Park understands that the annul true-up is "designed to adjust the Surcharge to reflect actual costs to throughput and nothing more." Br. 38; *see also id.* n.1 (true-up is a ratemaking and accounting mechanism by which a pipeline assesses over-collections and under-collections of costs).

St. Paul Park contends that the Settlement over-recovers costs of the Phase 6 Expansion from Clearbrook shippers because Beaver Lodge Loop shippers are "free riders" that should share in the costs of the Phase 6 Expansion. Br. 13-17. It alleges that the Settlement is invalid because Beaver Lodge Loop shippers benefit from the Phase 6 Expansion, but do not pay for it. Br. 36-37. But as explained above, the Phase 6 Surcharge applies only to the Clearbrook shippers.

Merely alleging that there are more shippers on the system who could share in the cost of the Phase 6 Expansion does not establish a basis for amending the Settlement. "It is Commission policy to encourage settlements, and the Commission is extremely reluctant to alter a settlement during its term." *El Paso*, 99 FERC ¶ 61,244, at p. 62,008. The Commission has done so only when circumstances have changed "drastically," and in such a way as to produce unjust and unreasonable results. *Id.*; *see also Colo. Interstate Gas Co.*, 54 FERC ¶ 61,205, at p. 61,606 (1991) (Commission cannot modify an approved settlement unless settlement produces unjust and unreasonable results). For example, in *El Paso*, the Commission found a sufficient change of circumstances when implementation of a settlement intended to manage the problem of capacity turnbacks associated with excess pipeline capacity resulted in the pipeline becoming oversubscribed, and service becoming disrupted and unreliable. *El Paso*, 99 FERC ¶ 61,244, at p. 62,008. *See also Ariz. Corp. Comm'n*, 397 F.3d at 955 (upholding modification of settlement provisions governing service contracts where "FERC could reasonably find that petitioners' contracts posed an unusual threat to the public interest").

St. Paul Park does not allege that its service has become unreliable, but only that it cost more in 2013 than it did in previous years. Indeed, "St. Paul Park did not find fault with the [S]ettlement methodology in the years when rates decreased

but now asserts that it is no longer valid when the surcharge has increased." FERC Order at P 33, App. 16. By design, the Phase 6 Surcharge varies from year to year. *See* Answer at 8-10 (describing fluctuations in the surcharge that occur with changes including system capacity, volumes, and cost), App. 256-58.

Where the benefits and burdens of a rate agreement are not spread evenly over the life of the agreement, the Commission has held that "a finding of justness and reasonableness must include a review of the overall benefits and burdens experienced over the entire term of the Agreements." *Soyland Power Coop. v. Cent. Ill. Pub. Serv. Co.*, 51 FERC ¶ 61,004, at p. 61,014 (1990), *order on reh'g*, 52 FERC ¶ 61,149 (1990). "FERC precedent makes clear that the fact that a contract has become uneconomic to one of the parties does not necessarily render the contract contrary to the public interest." *See Potomac Elec. Power Co. v. FERC*, 210 F.3d 403, 409 (D.C. Cir. 2000) (citing *Soyland* and other FERC orders). *See also El Paso Natural Gas Co.*, 49 FERC ¶ 61,164, at p. 61,639 (1989) (foreseeable but unexpectedly large decline in sales is not a basis to amend settlement) *reh'g denied*, 50 FERC ¶ 61,362 (1990). A one-year increase in St. Paul Park's Phase 6 Settlement expenses therefore does not provide a sufficient basis for finding that the Settlement has become unjust and unreasonable overall. "[C]ontract stability ultimately benefits consumers, even if short-term rates for a subset of the public might be high by historical standards . . . ." *Morgan Stanley*,

554 U.S. at 551 (declining to modify contracts when, during the contract period, "buyer's remorse set in").

III. The Commission Reasonably Declined To Establish Hearing Procedures

St. Paul Park argues that it was arbitrary and capricious for the Commission to resolve its complaint summarily, without ordering an investigation, discovery, or a hearing. But the Commission need only hold a hearing when there is a disputed issue of material fact, and here there is none. *See, e.g.*, *Kourouma v. FERC*, 723 F.3d 274, 277-78 (D.C. Cir. 2013) (no hearing needed where there are no disputed issues of material fact); *Moreau v. FERC*, 982 F.2d 556, 568 (D.C. Cir. 1993) (same, and even if there is a genuine issue of material fact, no hearing necessary if the issue can be adequately resolved on the written record).

St. Paul Park does not explain — and it has never explained — what evidence it expects to discover in the administrative hearing process, and how that evidence is important to the resolution of its complaint case. Further, its characterization of North Dakota Pipeline's evidence as unsupported and conclusory is not enough to establish a disputed issue of material fact sufficient to warrant a hearing. *Hi-Tech Furnace Sys., Inc. v. FCC*, 224 F.3d 781, 790 (D.C. Cir. 2000). This Court reviews decisions not to allow discovery for abuse of discretion, and with "extreme deference," because this decision is entrusted to the expert agency and "will not, barring the most extraordinary circumstances, warrant

the Draconian sanction of overturning a reasoned agency decision." *Id.* at 789 (quoting *Lakeland Bus Lines v. ICC*, 810 F.2d 280, 286 (D.C. Cir. 1987)). *See also Moreau*, 982 F.2d at 568 (court reviews FERC's decision not to hold a hearing only for abuse of discretion).

The Commission has "broad discretion to determine when and how to hear and decide the matters that come before it." *Tenn. Valley Mun. Gas Ass'n v. FERC*, 140 F.3d 1085, 1088 (D.C. Cir. 1998). To that end, the Commission's Rules of Practice and Procedure allow the Commission to refer a complaint case to alternative dispute resolution, to assign a settlement judge, to establish a hearing before an administrative law judge, or to "issue an order on the merits based on the pleadings." 18 C.F.R. § 385.206(g). In deciding what approach to take, "the Commission's task . . . is to consider whether a party has raised a dispute of genuine material fact, and whether the dispute can be resolved on the basis of the pleadings before it; not to conduct a fishing expedition." *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 131 FERC ¶ 61,144, at P 24 (2010). If the Commission "determines that there is no genuine issue of fact material to the decision of a proceeding or part of a proceeding," then it may summarily dispose of all or part of the proceeding. 18 C.F.R. § 385.217(b). And in a case like this one, where the issue is the ongoing justness and reasonableness of rates, "[w]ithout a demonstration that [a utility's] current rates are unjust and unreasonable,

including adequate evidence and a clear demonstration of the rates' financial impact . . . there are no issues of material fact that necessitate a formal trial-type evidentiary hearing." *Tri-State Generation and Transmission Ass'n, Inc. v. Pub. Serv. Co. of N.M.*, 143 FERC ¶ 61,226, at P 21 (2013).

It is undisputed that St. Paul Park was assessed a larger Phase 6 Surcharge in 2013 than in previous years. FERC Order at P 33, App. 16. St. Paul Park also agrees with the Commission's understanding of what the Settlement says. Br. 12, 35, 38. Although it contends that circumstances have changed so much as to make the Settlement, and its imposition of the Phase 6 Surcharge, unjust and unreasonable, St. Paul Park describes only economic harm, which is insufficient to justify modifying the Settlement. *See Potomac Elec. Power Co.*, 210 F.3d at 403. It does not present any other issues that might reasonably be characterized as disputes of material fact, or explain what it hopes to discover in administrative discovery or hearing procedures. The Commission therefore reasonably found that because "St. Paul Park's complaint lacks merit . . . it does not warrant further Commission investigation." FERC Order at P 37, App. 18.

CONCLUSION

For the foregoing reasons, the petition for review should be denied, and the FERC Order should be affirmed.

Respectfully submitted,

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June 6, 2014

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(ii), I certify that the Brief of Respondent Federal Energy Regulatory Commission contains 6,484 words, not including the tables of contents and authorities, the glossary, the certificates of counsel, and the addendum.

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June 6, 2014

ADDENDUM

STATUTES
AND
REGULATIONS

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§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(e).	June 11, 1946, ch. 324, §10(e), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

ABBREVIATION OF RECORD

Pub. L. 85–791, Aug. 28, 1958, 72 Stat. 941, which authorized abbreviation of record on review or enforcement of orders of administrative agencies and review on the original papers, provided, in section 35 thereof, that: ''This Act [see Tables for classification] shall not be construed to repeal or modify any provision of the Administrative Procedure Act [see Short Title note set out preceding section 551 of this title].''

CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

§ 801. Congressional review

(a)(1)(A) Before a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report containing—

(i) a copy of the rule;

(ii) a concise general statement relating to the rule, including whether it is a major rule; and

(iii) the proposed effective date of the rule.

(B) On the date of the submission of the report under subparagraph (A), the Federal agency promulgating the rule shall submit to the Comptroller General and make available to each House of Congress—

(i) a complete copy of the cost-benefit analysis of the rule, if any;

(ii) the agency's actions relevant to sections 603, 604, 605, 607, and 609;

(iii) the agency's actions relevant to sections 202, 203, 204, and 205 of the Unfunded Mandates Reform Act of 1995; and

(iv) any other relevant information or requirements under any other Act and any relevant Executive orders.

(C) Upon receipt of a report submitted under subparagraph (A), each House shall provide copies of the report to the chairman and ranking member of each standing committee with jurisdiction under the rules of the House of Representatives or the Senate to report a bill to amend the provision of law under which the rule is issued.

(2)(A) The Comptroller General shall provide a report on each major rule to the committees of jurisdiction in each House of the Congress by the end of 15 calendar days after the submission or publication date as provided in section 802(b)(2). The report of the Comptroller General shall include an assessment of the agency's compliance with procedural steps required by paragraph (1)(B).

(B) Federal agencies shall cooperate with the Comptroller General by providing information relevant to the Comptroller General's report under subparagraph (A).

(3) A major rule relating to a report submitted under paragraph (1) shall take effect on the latest of—

(A) the later of the date occurring 60 days after the date on which—

(i) the Congress receives the report submitted under paragraph (1); or

(ii) the rule is published in the Federal Register, if so published;

(B) if the Congress passes a joint resolution of disapproval described in section 802 relating to the rule, and the President signs a veto of such resolution, the earlier date—

(i) on which either House of Congress votes and fails to override the veto of the President; or

(ii) occurring 30 session days after the date on which the Congress received the veto and objections of the President; or

(C) the date the rule would have otherwise taken effect, if not for this section (unless a joint resolution of disapproval under section 802 is enacted).

(4) Except for a major rule, a rule shall take effect as otherwise provided by law after submission to Congress under paragraph (1).

(5) Notwithstanding paragraph (3), the effective date of a rule shall not be delayed by oper-

In subsection (c), the words ''the services of'' are omitted as surplus. The words ''department, agency, or instrumentality of the United States Government'' are substituted for ''Federal . . . agency or instrumentality'' for consistency in the revised title and with other titles of the Code.

In subsection (e), the words ''by the Secretary'' are omitted as surplus. The words ''beginning on October 1, 1985'' are omitted as executed.

TRANSFER OF FUNCTIONS

For transfer of duties, powers, and authority of Research and Special Programs Administration under this chapter to the Administrator of the Pipeline and Hazardous Materials Safety Administration, see section 2(b) of Pub. L. 108–426, set out as a note under section 108 of this title.

STUDY AND REPORT ON USER FEE ASSESSMENT FACTORS

Pub. L. 104–304, §17, Oct. 12, 1996, 110 Stat. 3803, provided that:

''(a) IN GENERAL.—Not later than 1 year after the date of the enactment of this Act [Oct. 12, 1996], the Secretary of Transportation shall transmit to the Congress a report analyzing the present assessment of pipeline safety user fees solely on the basis of mileage to determine whether—

''(1) that measure of the resources of the Department of Transportation is the most appropriate measure of the resources used by the Department of Transportation in the regulation of pipeline transportation; or

''(2) another basis of assessment would be a more appropriate measure of those resources.

''(b) CONSIDERATIONS.—In making the report, the Secretary shall consider a wide range of assessment factors and suggestions and comments from the public.''

CHAPTER 605—INTERSTATE COMMERCE REGULATION

§ 60501. Secretary of Energy

Except as provided in section 60502 of this title, the Secretary of Energy has the duties and powers related to the transportation of oil by pipeline that were vested on October 1, 1977, in the Interstate Commerce Commission or the chairman or a member of the Commission.

(Pub. L. 103–272, §1(e), July 5, 1994, 108 Stat. 1329.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
60501	42:7155. 49:101 (note prec.).	Aug. 4, 1977, Pub. L. 95–91, §306, 91 Stat. 581. Oct. 17, 1978, Pub. L. 95–473, §4(c)(1)(A), (2) (related to §306 of Department of Energy Organization Act), 92 Stat. 1470.

The words ''duties and powers . . . that were vested . . . in'' are coextensive with, and substituted for, ''transferred . . . such functions set forth in the Interstate Commerce Act and vested by law in'' for clarity and to eliminate unnecessary words. The words ''on October 1, 1977'' are added to reflect the effective date of the transfer of the duties and powers to the Secretary of Energy.

ABOLITION OF INTERSTATE COMMERCE COMMISSION AND TRANSFER OF FUNCTIONS

Interstate Commerce Commission abolished and functions of Commission transferred, except as otherwise provided in Pub. L. 104–88, to Surface Transportation Board effective Jan. 1, 1996, by section 702 of this title, and section 101 of Pub. L. 104–88, set out as a note under section 701 of this title. References to Interstate Commerce Commission deemed to refer to Surface Transportation Board, a member or employee of the Board, or Secretary of Transportation, as appropriate, see section 205 of Pub. L. 104–88, set out as a note under section 701 of this title.

§ 60502. Federal Energy Regulatory Commission

The Federal Energy Regulatory Commission has the duties and powers related to the establishment of a rate or charge for the transportation of oil by pipeline or the valuation of that pipeline that were vested on October 1, 1977, in the Interstate Commerce Commission or an officer or component of the Interstate Commerce Commission.

(Pub. L. 103–272, §1(e), July 5, 1994, 108 Stat. 1329.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
60502	42:7172(b). 49:101 (note prec.).	Aug. 4, 1977, Pub. L. 95–91, §402(b), 91 Stat. 584. Oct. 17, 1978, Pub. L. 95–473, §4(c)(1)(B), (2) (related to §402(b) of Department of Energy Organization Act), 92 Stat. 1470.

The words ''duties and powers . . . that were vested . . . in'' are coextensive with, and substituted for, ''transferred to, and vested in . . . all functions and authority of'' for clarity and to eliminate unnecessary words. The word ''regulatory'' is omitted as surplus. The words ''on October 1, 1977'' are added to reflect the effective date of the transfer of the duties and powers to the Federal Energy Regulatory Commission.

ABOLITION OF INTERSTATE COMMERCE COMMISSION AND TRANSFER OF FUNCTIONS

Interstate Commerce Commission abolished and functions of Commission transferred, except as otherwise provided in Pub. L. 104–88, to Surface Transportation Board effective Jan. 1, 1996, by section 702 of this title, and section 101 of Pub. L. 104–88, set out as a note under section 701 of this title. References to Interstate Commerce Commission deemed to refer to Surface Transportation Board, a member or employee of the Board, or Secretary of Transportation, as appropriate, see section 205 of Pub. L. 104–88, set out as a note under section 701 of this title.

§ 60503. Effect of enactment

The enactment of the Act of October 17, 1978 (Public Law 95–473, 92 Stat. 1337), the Act of January 12, 1983 (Public Law 97–449, 96 Stat. 2413), and the Act enacting this section does not repeal, and has no substantive effect on, any right, obligation, liability, or remedy of an oil pipeline, including a right, obligation, liability, or remedy arising under the Interstate Commerce Act or the Act of August 29, 1916 (known as the Pomerene Bills of Lading Act), before any department, agency, or instrumentality of the United States Government, an officer or employee of the Government, or a court of competent jurisdiction.

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

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,

unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

(8) Preference to shipments for United States

In time of war or threatened war preference and precedence shall, upon demand of the President of the United States, be given, over all other traffic, for the transportation of troops and material of war, and carriers shall adopt every means within their control to facilitate and expedite the military traffic. And in time of peace shipments consigned to agents of the United States for its use shall be delivered by the carriers as promptly as possible and without regard to any embargo that may have been declared, and no such embargo shall apply to shipments so consigned.

(9) Schedule lacking notice of effective date

The Commission may reject and refuse to file any schedule that is tendered for filing which does not provide and give lawful notice of its effective date, and any schedule so rejected by the Commission shall be void and its use shall be unlawful.

(10) Penalty for failure to comply with regulations

In case of failure or refusal on the part of any carrier, receiver, or trustee to comply with the terms of any regulation adopted and promulgated or any order made by the Commission under the provisions of this section, such carrier, receiver, or trustee shall be liable to a penalty of $500 for each such offense, and $25 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.

(11) Jurisdiction of Commission over transportation by rail and water

When property may be or is transported from point to point in the United States by rail and water through the Panama Canal or otherwise, the transportation being by a common carrier or carriers, and not entirely within the limits of a single State, the Interstate Commerce Commission shall have jurisdiction of such transportation and of the carriers, both by rail and by water, which may or do engage in the same, in the following particulars, in addition to the jurisdiction otherwise given by this chapter:

(a) To establish physical connection between the lines of the rail carrier and the dock at which interchange of passengers or property is to be made by directing the rail carrier to make suitable connection between its line and a track or tracks which have been constructed from the dock to the limits of the railroad right-of-way, or by directing either or both the rail and water carrier, individually or in connection with one another to construct and connect with the lines of the rail carrier a track or tracks to the dock. The Commission shall have full authority to determine and prescribe the terms and conditions upon which these connecting tracks shall be operated, and it may, either in the construction or the operation of such tracks, determine what sum shall be paid to or by either carrier: *Provided,* That construction required by the Commission under the provisions of this paragraph shall be subject to the same restrictions as to findings of public convenience and necessity and other matters as is construction required under section 1 of this Appendix.

(b) To establish proportional rates or maximum, or minimum, or maximum and minimum proportional rates, by rail to and from the ports to which the traffic is brought, or from which it is taken by the water carrier, and to determine to what traffic and in connection with what vessels and upon what terms and conditions such rates shall apply. By proportional rates are meant those which differ from the corresponding local rates to and from the port and which apply only to traffic which has been brought to the port or is carried from the port by a common carrier by water.

(12) Jurisdiction of Commission over carriers contracting with water carriers operating to foreign ports

If any common carrier subject to this Act enters into arrangements with any water carrier operating from a port in the United States to a foreign country, through the Panama Canal or otherwise, for the handling of through business between interior points of the United States and such foreign country, the Commission may by order require such common carrier to enter into similar arrangements with any or all other lines of steamships operating from said port to the same foreign country.

(Feb. 4, 1887, ch. 104, pt. I, § 6, 24 Stat. 380; Mar. 2, 1889, ch. 382, § 1, 25 Stat. 855; June 29, 1906, ch. 3591, § 2, 34 Stat. 586; June 18, 1910, ch. 309, § 9, 36 Stat. 548; Aug. 24, 1912, ch. 390, § 11, 37 Stat. 568; Aug. 29, 1916, ch. 417, 39 Stat. 604; Feb. 28, 1920, ch. 91, §§ 409–413, 41 Stat. 483; Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543; Sept. 18, 1940, ch. 722, title I, § 8, 54 Stat. 910; Aug. 2, 1949, ch. 379, § 5, 63 Stat. 486; Feb. 5, 1976, Pub. L. 94–210, title II, § 209, 90 Stat. 45.)

§ 7. 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. Combinations to prevent continuous carriage of freight prohibited

It shall be unlawful for any common carrier subject to the provisions of this chapter to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this chapter.

(Feb. 4, 1887, ch. 104, pt. I, § 7, 24 Stat. 382; Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543.)

§ 8. 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:

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.

§ 13a. Discontinuance or change of the operation or service of trains or ferries; notice; investigation; hearing; determination

(1) A carrier or carriers subject to this chapter, if their rights with respect to the discontinuance or change, in whole or in part, of the operation or service of any train or ferry operating from a point in one State to a point in any other State or in the District of Columbia, or from a point in the District of Columbia to a point in any State, are subject to any provision of the constitution or statutes of any State or any regulation or order of (or are the subject of any proceeding pending before) any court or an administrative or regulatory agency of any State, may, but shall not be required to, file with the Commission, and upon such filing shall mail to the Governor of each State in which such train or ferry is operated, and post in every station, depot or other facility served thereby, notice at least thirty days in advance of any such proposed discontinuance or change. The carrier or carriers filing such notice may discontinue or change any such operation or service pursuant to such notice except as otherwise ordered by the Commission pursuant to this paragraph, the laws or constitution of any State, or the decision or order of, or the pendency of any proceeding before, any court or State authority to the contrary notwithstanding. Upon the filing of such notice the Commission shall have authority during said thirty days' notice period, either upon complaint or upon its own initiative without complaint, to enter upon an investigation of the proposed discontinuance or change. Upon the institution of such investigation, the Commission, by order served upon the carrier or carriers affected thereby at least ten days prior to the day on which such discontinuance or change would otherwise become effective, may require such train or ferry to be continued in operation or service, in whole or in part, pending hearing and decision in such investigation, but not for a longer period than four months beyond the date when such discontinuance or change would otherwise have become effective. If, after hearing in such investigation whether concluded before or after such discontinuance or change has become effective, the Commission finds that the operation or service of such train or ferry is required by public convenience and necessity and will not unduly burden interstate or foreign commerce, the Commission may by order require the continuance or restoration of operation or service of such train or ferry, in whole or in part, for a period not to exceed one year from the date of such order. The provisions of this paragraph shall not supersede the laws of any State or the orders or regulations of any administrative or regulatory body of any State applicable to such discontinuance or change unless notice as in this paragraph provided is filed with the Commission. On the expiration of an order by the Commission after such investigation requiring the continuance or restoration of operation or service, the jurisdiction of any State as to such discontinuance or change shall no longer be superseded unless the procedure provided by this paragraph shall again be invoked by the carrier or carriers.

(2) Where the discontinuance or change, in whole or in part, by a carrier or carriers subject to this chapter, of the operation or service of any train or ferry operated wholly within the boundaries of a single State is prohibited by the constitution or statutes of any State or where the State authority having jurisdiction thereof shall have denied an application or petition duly filed with it by said carrier or carriers for authority to discontinue or change, in whole or in part, the operation or service of any such train or ferry or shall not have acted finally on such an application or petition within one hundred and twenty days from the presentation thereof, such carrier or carriers may petition the Commission for authority to effect such discontinuance or change. The Commission may grant such authority only after full hearing and upon findings by it that (a) the present or future public convenience and necessity permit of such discontinuance or change, in whole or in part, of the operation or service of such train or ferry, and (b) the continued operation or service of such train or ferry without discontinuance or change, in whole or in part, will constitute an unjust and undue burden upon the interstate operations of such carrier or carriers or upon interstate commerce. When any petition shall be filed with the Commission under the provisions of this paragraph the Commission shall notify the Governor of the State in which such train or ferry is operated at least thirty days in advance of the hearing provided for in this paragraph, and such hearing shall be held by the Commission in the State in which such train or ferry is operated; and the Commission is authorized to avail itself of the cooperation, services, records and facilities of the authorities in such State in the performance of its functions under this paragraph.

(Feb. 4, 1887, ch. 104, pt. I, § 13a, as added Aug. 12, 1958, Pub. L. 85-625, § 5, 72 Stat. 571.)

§ 14. 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:

§ 14. Reports and decisions of Commission

(1) Reports of investigations by Commission

Whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises; and in case damages are awarded, such report shall include the findings of fact on which the award is made.

(2) Record of reports; copies

All reports of investigations made by the Commission shall be entered of record, and a copy thereof shall be furnished to the party who may have complained, and to any common carrier that may have been complained of.

(3) Publication of reports and decisions; printing and distribution of annual reports

The Commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and such authorized publications shall be competent evidence of the reports and decisions of the Commission therein contained in all courts of the United States and of the several States without any further proof or authentication thereof. The Commission may also cause to be printed for early distribution its annual reports.

(Feb. 4, 1887, ch. 104, pt. I, § 14, 24 Stat. 384; Mar. 2, 1889, ch. 382, § 4, 25 Stat. 859; June 29, 1906, ch. 3591, § 3, 34 Stat. 589; Feb. 28, 1920, ch. 91, § 417, 41 Stat. 484; Aug. 9, 1935, ch. 408, § 1, 49 Stat. 543.)

§ 15. 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 401 of Pub. L. 95-607, which amended par. (8)(c) and (d) of this section subsequent to the repeal of this section by Pub. L. 95-473, was repealed by Pub. L. 96-258, effective July 1, 1980, as provided by section 3(c) of 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:

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

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

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

(2) Orders of Commission

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

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

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

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

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

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

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

each tariff or rate filing must include, as appropriate:

(1) If known, the reference numbers, docket numbers, or other identifying symbols of any relevant tariff, rate, schedule, contract, application, rule, or similar matter or material;

(2) The name of each participant for whom the filing is made or, if the filing is made for a group of participants, the name of the group, provided that the name of each member of the group is set forth in a previously filed document which is identified in the filing being made;

(3) The specific authorization or relief sought;

(4) The tariff or rate sheets or sections;

(5) The name and address of each person against whom the complaint is directed;

(6) The relevant facts, if not set forth in a previously filed document which is identified in the filing being made;

(7) The position taken by the participant filing any pleading, to the extent known when the pleading is filed, and the basis in fact and law for such position;

(8) Subscription or verification, if required;

(9) A certificate of service under Rule 2010(h), if service is required;

(10) The name, address, and telephone number of an individual who, with respect to any matter contained in the filing, represents the person for whom filing is made; and

(11) Any additional information required to be included by statute, rule, or order.

(b) *Requirement for any initial pleading or tariff or rate filing.* The initial pleading or tariff or rate filing submitted by a participant or a person seeking to become a party must conform to the requirements of paragraph (a) of this section and must include:

(1) The exact name of the person for whom the filing is made;

(2) The location of that person's principal place of business; and

(3) The name, address, and telephone number of at least one, but not more than two, persons upon whom service is to be made and to whom communications are to be addressed in the proceeding.

(c) *Combined filings.* If two or more pleadings, or one or more pleadings and a tariff or rate filing are included as items in a single filing each such item must be separately designated and must conform to the requirements which would be applicable to it if filed separately.

(d) *Form of notice.* If a pleading or tariff or rate filing must include a form of notice suitable for publication in the FEDERAL REGISTER, the company shall submit the draft notice in accordance with the form of notice specifications prescribed by the Secretary and posted under the Filing Procedures link at *http://www.ferc.gov* and available in the Commission's Public Reference Room.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 647, 69 FR 32439, June 10, 2004; Order 663, 70 FR 55725, Sept. 23, 2005; 71 FR 14642, Mar. 23, 2006; Order 714, 73 FR 57538, Oct. 3, 2008]

§ 385.204 Applications (Rule 204).

Any person seeking a license, permit, certification, or similar authorization or permission, must file an application to obtain that authorization or permission.

§ 385.205 Tariff or rate filings (Rule 205).

A person must make a tariff or rate filing in order to establish or change any specific rate, rate schedule, tariff, tariff schedule, fare, charge, or term or condition of service, or any classification, contract, practice, or any related regulation established by and for the applicant.

§ 385.206 Complaints (Rule 206).

(a) *General rule.* Any person may file a complaint seeking Commission action against any other person alleged to be in contravention or violation of any statute, rule, order, or other law administered by the Commission, or for any other alleged wrong over which the Commission may have jurisdiction.

(b) *Contents.* A complaint must:

(1) Clearly identify the action or inaction which is alleged to violate applicable statutory standards or regulatory requirements;

(2) Explain how the action or inaction violates applicable statutory standards or regulatory requirements;

(3) Set forth the business, commercial, economic or other issues presented by the action or inaction as such relate to or affect the complainant;

(4) Make a good faith effort to quantify the financial impact or burden (if any) created for the complainant as a result of the action or inaction;

(5) Indicate the practical, operational, or other nonfinancial impacts imposed as a result of the action or inaction, including, where applicable, the environmental, safety or reliability impacts of the action or inaction;

(6) State whether the issues presented are pending in an existing Commission proceeding or a proceeding in any other forum in which the complainant is a party, and if so, provide an explanation why timely resolution cannot be achieved in that forum;

(7) State the specific relief or remedy requested, including any request for stay or extension of time, and the basis for that relief;

(8) Include all documents that support the facts in the complaint in possession of, or otherwise attainable by, the complainant, including, but not limited to, contracts and affidavits;

(9) State

(i) Whether the Enforcement Hotline, Dispute Resolution Service, tariff-based dispute resolution mechanisms, or other informal dispute resolution procedures were used, or why these procedures were not used;

(ii) Whether the complainant believes that alternative dispute resolution (ADR) under the Commission's supervision could successfully resolve the complaint;

(iii) What types of ADR procedures could be used; and

(iv) Any process that has been agreed on for resolving the complaint.

(10) Include a form of notice of the complaint suitable for publication in the FEDERAL REGISTER in accordance with the specifications in §385.203(d) of this part. The form of notice shall be on electronic media as specified by the Secretary.

(11) Explain with respect to requests for Fast Track processing pursuant to section 385.206(h), why the standard processes will not be adequate for expeditiously resolving the complaint.

(c) *Service.* Any person filing a complaint must serve a copy of the complaint on the respondent, affected regulatory agencies, and others the complainant reasonably knows may be expected to be affected by the complaint. Service must be simultaneous with filing at the Commission for respondents. Simultaneous or overnight service is permissible for other affected entities. Simultaneous service can be accomplished by electronic mail in accordance with §385.2010(f)(3), facsimile, express delivery, or messenger.

(d) *Notice.* Public notice of the complaint will be issued by the Commission.

(e) [Reserved]

(f) *Answers, interventions and comments.* Unless otherwise ordered by the Commission, answers, interventions, and comments to a complaint must be filed within 20 days after the complaint is filed. In cases where the complainant requests privileged treatment for information in its complaint, answers, interventions, and comments are due within 30 days after the complaint is filed. In the event there is an objection to the protective agreement, the Commission will establish when answers will be due.

(g) *Complaint resolution paths.* One of the following procedures may be used to resolve complaints:

(1) The Commission may assign a case to be resolved through alternative dispute resolution procedures in accordance with §§385.604–385.606, in cases where the affected parties consent, or the Commission may order the appointment of a settlement judge in accordance with §385.603;

(2) The Commission may issue an order on the merits based upon the pleadings;

(3) The Commission may establish a hearing before an ALJ;

(h) *Fast Track processing.* (1) The Commission may resolve complaints using Fast Track procedures if the complaint requires expeditious resolution. Fast Track procedures may include expedited action on the pleadings by the Commission, expedited hearing before an ALJ, or expedited action on requests for stay, extension of time, or other relief by the Commission or an ALJ.

only as provided under paragraph (d) of this section.

(b) *Answers.* Any participant, or any person who has filed a timely motion to intervene which has not been denied, may answer a written or oral amendment in accordance with Rule 213.

(c) *Motion opposing an amendment.* Any participant, or any person who has filed a timely motion to intervene which has not been denied, may file a motion opposing the acceptance of any amendment, other than an amendment under paragraph (a)(3)(i) of this section, not later than 15 days after the filing of the amendment.

(d) *Acceptance of amendments.* (1) An amendment becomes effective as an amendment at the end of 15 days from the date of filing, if no motion in opposition to the acceptance of an amendment under paragraph (a)(3)(iii) of this section is filed within the 15 day period.

(2) If a motion in opposition to the acceptance of an amendment is filed within 15 days after the filing of the amendment, the amendment becomes effective as an amendment on the twentieth day after the filing of the amendment, except to the extent that the decisional authority, before such date, issues an order rejecting the amendment, wholly or in part, for good cause.

(e) *Directed amendments.* A decisional authority, on motion or otherwise, may direct any participant, or any person seeking to be a party, to file a written amendment to amplify, clarify, or technically correct a pleading.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 714, 73 FR 57538, Oct. 3, 2008]

§ 385.216 Withdrawal of pleadings and tariff or rate filings (Rule 216).

(a) *Filing.* Any participant, or any person who has filed a timely motion to intervene which has not been denied, may seek to withdraw a pleading by filing a notice of withdrawal. The procedures provided in this section do not apply to withdrawals of tariff or rate filings, which may be withdrawn only as provided in the regulations under this chapter.

(b) *Action on withdrawals.* (1) The withdrawal of any pleading is effective at the end of 15 days from the date of filing of a notice of withdrawal, if no motion in opposition to the notice of withdrawal is filed within that period and the decisional authority does not issue an order disallowing the withdrawal within that period. The decisional authority may disallow, for a good cause, all or part of a withdrawal.

(2) If a motion in opposition to a notice of withdrawal is filed within the 15 day period, the withdrawal is not effective until the decisional authority issues an order accepting the withdrawal.

(c) *Conditional withdrawal.* In order to prevent prejudice to other participants, a decisional authority may, on motion or otherwise, condition the withdrawal of any pleading upon a requirement that the withdrawing party leave material in the record or otherwise make material available to other participants.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 714, 73 FR 57538, Oct. 3, 2008]

§ 385.217 Summary disposition (Rule 217).

(a) *Applicability.* This section applies to:

(1) Any proceeding, or any part of a proceeding, while the Commission is the decisional authority; and

(2) Any proceeding, or part of a proceeding, which is set for hearing under subpart E.

(b) *General rule.* If the decisional authority determines that there is no genuine issue of fact material to the decision of a proceeding or part of a proceeding, the decisional authority may summarily dispose of all or part of the proceeding.

(c) *Procedures.* (1) Any participant may make a motion for summary disposition of all or part of a proceeding.

(2) If a decisional authority, other than the Commission, is considering summary disposition of a proceeding, or part of a proceeding, in the absence of a motion for summary disposition by a participant, the decisional authority will grant the participants an opportunity to comment on the proposed disposition prior to any summary disposition, unless, for good cause shown, the

(2) If any excluded evidence is in the form of an exhibit or is a public document, a copy of such exhibit will constitute the offer of proof or the public document will be specified for identification.

Subpart F—Conferences, Settlements, and Stipulations

§ 385.601 Conferences (Rule 601).

(a) *Convening.* The Commission or other decisional authority, upon motion or otherwise, may convene a conference of the participants in a proceeding at any time for any purpose related to the conduct or disposition of the proceeding, including submission and consideration of offers of settlement or the use of alternative dispute resolution procedures.

(b) *General requirements.* (1) The participants in a proceeding must be given due notice of the time and place of a conference under paragraph (a) of this section and of the matters to be addressed at the conference. Participants attending the conference must be prepared to discuss the matters to be addressed at the conference, unless there is good cause for a failure to be prepared.

(2) Any person appearing at the conference in a representative capacity must be authorized to act on behalf of that person's principal with respect to matters to be addressed at the conference.

(3) If any party fails to attend the conference such failure will constitute a waiver of all objections to any order or ruling arising out of, or any agreement reached at, the conference.

(c) *Powers of decisional authority at conference.* (1) The decisional authority, before which the conference is held or to which the conference reports, may dispose, during a conference, of any procedural matter on which the decisional authority is authorized to rule and which may appropriately and usefully be disposed of at that time.

(2) If, in a proceeding set for hearing under subpart E, the presiding officer determines that the proceeding would be substantially expedited by distribution of proposed exhibits, including written prepared testimony and other documents, reasonably in advance of 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,

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CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 6th day of June 2014, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system, as indicated below:

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