ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

No. 14-1078

COLONIAL PIPELINE COMPANY, *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

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

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CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties:

To counsel's knowledge, all parties before this Court and the Federal Energy Regulatory Commission are listed in Petitioner's brief.

B. Ruling Under Review:

Order on Petition for Declaratory Order, *Colonial Pipeline Company*, FERC Docket No. OR14-8-000, 146 FERC ¶ 61,206 (Mar. 20, 2014), R. 29, JA 332.

C. Related Cases:

The order under review in this proceeding has not previously been before this Court or any other court.

/s/ *Ross R. Fulton*
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December 23, 2014

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GLOSSARY

Airlines	Southwest Airlines Co. and United Airlines, Inc.
Br.	Opening Brief of Petitioner Colonial Pipeline Company
Colonial	Colonial Pipeline Company
Commission or FERC	Federal Energy Regulatory Commission
ICA or Act	Interstate Commerce Act
JA	Joint Appendix
Marathon	Marathon Petroleum Company LP
Order	*Colonial Pipeline Co.*, Order on Petition for Declaratory Order, 146 FERC ¶ 61,206 (2014), R. 29, JA 332
P	Denotes a paragraph number in a Commission order
Petition	Petition for Declaratory Order of Colonial Pipeline Company, R. 1, JA 1
Protestors	Chevron Products Company, Marathon Petroleum Company LP, Southwest Airlines Co. and United Airlines, Inc. – current shippers on Colonial's pipeline that protested Colonial's petition for a declaratory order.
R.	Indicates an item in the certified index to the record
Reply	Reply Comments of Colonial Pipeline Company and Answer to Complaint, R. 26, JA 204
Southwest	Southwest Airlines Co.
United	United Airlines, Inc.

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

STATEMENT OF THE ISSUES

Colonial Pipeline Company filed a declaratory petition proposing to subdivide its existing shippers into two classes, one with term contract rates and one without. Shippers committing by contract to Colonial's proposal agree to ship certain volumes for a specified period or pay a penalty in exchange for discounts, while uncommitted shippers pay a higher rate and receive less pipeline access. The Federal Energy Regulatory Commission rejected Colonial's proposal, finding

it unduly discriminated among shippers in violation of section 3(1) of the Interstate Commerce Act, 49 U.S.C. app. § 3(1) (1988).

The issues presented on appeal are:

1. Whether the Commission reasonably exercised its discretion to find that Colonial's proposed contract rates are unduly discriminatory because Colonial is not investing in pipeline infrastructure, shippers do not receive the benefit of new capacity, and uncommitted shippers receive degraded service.

2. Whether the Commission appropriately applied precedent governing contract rates, as opposed to orders involving volume discount programs and settlement rate agreements, when such programs and agreements are readily distinguishable and the Commission emphasized factors not addressed by those lines of precedent.

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutes and regulations are contained in the Addendum.

STATEMENT OF THE FACTS

I. BACKGROUND

A. Statutory And Regulatory Background

In 1887, Congress passed the Interstate Commerce Act (ICA or the Act) to regulate railroads and created the Interstate Commerce Commission to administer the statute. *Frontier Pipeline Co. v. FERC*, 452 F.3d 774, 776 (D.C. Cir. 2006). In

1906, Congress extended the definition of common carrier under the ICA to oil pipelines and required that pipeline carriers file rates with the Interstate Commerce Commission. *Id.*

In 1977, in conjunction with the formation of the Department of Energy, Congress transferred regulatory authority over oil pipelines to the newly created Federal Energy Regulatory Commission. *See Resolute Natural Resources Co. v. FERC*, 596 F.3d 840, 841 (D.C. Cir. 2010) (explaining history of oil pipeline regulation); *Frontier Pipeline*, 452 F.3d at 776 (same). In 1978, Congress amended the Act and applied the pre-October 1, 1977 version of the law to oil pipelines. *See Resolute Natural Resources*, 596 F.3d at 841 (holding that the October 1, 1977, version of the ICA applies and can be found in 49 U.S.C. § 1 *et seq.* (1976), reprinted in 49 U.S.C. app. § 1 *et seq.* (1988)); *Frontier Pipeline*, 452 F.3d at 776 (same).

The Interstate Commerce Act only permits rate setting through "purely tariff-based regulation." *See Morgan Stanley Capital Group, Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 531 (2008) (contrasting the ICA with the Federal Power Act). All pipeline rates and charges must be filed with the Commission – including approved contract rates. *See* ICA § 6(1), 49 U.S.C. app. § 6(1); *see also MarkWest Michigan Pipeline Co. v. FERC*, 646 F.3d 30, 31 (D.C. Cir. 2011)

(providing background on rate-setting process); *Sea-Land Service, Inc. v. ICC*, 738 F.2d 1311, 1313 (D.C. Cir. 1984) (accepting two contract rates for filing).

The Commission has the authority to review all rates to determine if they are "just and reasonable." 49 U.S.C. app. §§ 15(1), (7) (1988); *MarkWest*, 646 F.3d at 31. In setting rates, pipelines cannot improperly discriminate among shippers. Pipelines are prohibited from receiving greater or less compensation from similarly situated shippers. 49 U.S.C. app. § 2 (1988). Section 3(1) provides that:

> It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable advantage to any particular person [or] company . . . or to subject any particular person [or] company . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

49 U.S.C. app. § 3(1) (1988). Congress "has delegated broad discretion" to the Commission "to determine when differential treatment amounts to improper discrimination among shippers and when such treatment is justified by relevant dissimilarities in transportation conditions." *Sea-Land*, 738 F.2d at 1319; *see also Indiana Harbor Belt R.R. v. United States*, 510 F.2d 644, 649 (7th Cir. 1975) ("That a body should exist to make a primary determination from the facts as to whether a preference or discrimination obtains was one of the reasons for the creation of the Commission.").

B. Colonial Pipeline's Proposed Contract Rates

Colonial Pipeline operates a 5,500-mile oil pipeline system extending from Houston, Texas to Linden, New Jersey. *Colonial Pipeline Co.*, 146 FERC ¶ 61,206, P 3 (Order), R. 29, JA 332-33. According to Colonial, use of the pipeline by shippers – companies that ship oil on the pipeline – has increased in recent years due to expanded production at Gulf Coast refineries. *Id.* For the last two years, Colonial's main lines were fully allocated and shippers faced volume reductions. *Id.* Colonial states it undertook small-scale expansions, but its ability to add capacity through incremental measures was diminishing. *Id.*

In response, Colonial sought to enter transportation service agreements with shippers, also known as contract rates. *Id.* Such an agreement between a pipeline and a shipper commits the shipper to ship-or-pay for a specified term. *See Mid-America Pipeline Co.*, 136 FERC ¶ 61,087, P 7 (2011). Contract shippers receive a lower price for their shipments in exchange for long-term volume commitments and other restrictions. *Id.* If the Commission permits a contract rate, the rates for committed shippers are determined by the method set forth in each contract. Order P 10, JA 335. Rates for uncommitted shippers, by contrast, are established in the pipeline owner's base tariff. *See* 18 C.F.R. § 342.4 (governing oil pipeline rates).

Under the terms of Colonial's proposal, contracting or "committed" shippers pledge to transport a certain volume level. *See* Petition for Declaratory Order of

Colonial Pipeline Company at 8 (Petition), R. 1, JA 31. If a shipper does not meet its allocated volume, it must pay a specified deficiency charge. Order P 7, JA 334. The longer the length of term and level of volume commitment selected, the greater the discounted rate. Petition at 10, JA 11. Qualifying contract shippers also receive first access to additional pipeline shipping capacity. Order P 7, JA 334.

In exchange, contracting shippers waive their right to challenge Colonial's past or present rates. *Id.* P 6, JA 333-34; Petition at 11, JA 12. Colonial reserves the right to amend its rates at any time. Petition at 11, JA 12. Contract shippers are further required to waive Colonial's liability in damages for breaching the contract. Petition at 10, 11, JA 11, 12; Order PP 26, 28, JA 340. Shippers that do not accept Colonial's contract rates, known as "uncommitted shippers," pay regular tariff rates. Uncommitted shippers are also behind committed shippers to receive access to additional shipping capacity. *See* Petition at 7, JA 8.

Colonial does not have any expansion or other construction plans. *Id.* at 14, JA 15. Colonial instead purportedly sought to impose contract rates to assess whether to consider further expansion efforts. Order P 3, JA 332-33; Petition at 4, JA 5.

Colonial conducted an open season from September 12, 2013 to October 28, 2013. Petition at 17, JA 18. During that time shippers could decide whether to

accept Colonial's proposed contract rates. *Id.* According to Colonial, shippers representing 75 percent of the volume shipped on the pipeline executed 76 contracts. *Id.* at 8, JA 9.

On November 8, 2013, Colonial filed a petition for a declaratory order with the Commission, requesting approval of Colonial's proposed contract rates. Order P 1, JA 332. Colonial further requested that the Commission confirm that rates for contract shippers will only be determined under the method set forth in each contract rate. *Id.* P 10, JA 335. And Colonial wanted approval of its proposed procedure for providing committed shippers priority access to available shipping capacity on its pipeline. *Id.*

On November 12, 2013, the Commission issued notice of Colonial's petition and requested comments. Order P 15, JA 336. The Commission received comments from multiple parties. Sheetz, Inc., CITGO Petroleum Corporation, Phillips 66 Company, and QT Fuels, Inc. "filed letters in support of Colonial's petition." *Id.* P 16, JA 336. A group of shippers who do not use Colonial's system, and an industry organization titled the Liquid Shippers Group, requested that the Commission provide more standardized guidelines regarding when pipeline owners can use contract rates. *Id.* PP 18-19, JA 337-38.

Chevron Products Company, Marathon Petroleum Company LP, Southwest Airlines Co. and United Airlines, Inc. – all current shippers on Colonial's system –

protested Colonial's petition (Protestors). *Id.* P 20, JA 338. The Protestors asserted that, although the Commission has permitted contract rates for new construction, the Interstate Commerce Act generally disfavors contract rates and Colonial did not propose any expansion. *Id.* PP 21-22, JA 338; Chevron Products Comments at 4-7, R. 18, JA 90-93; Marathon Petroleum Comments at 8-9, R. 21, JA 116 -17; Southwest Airlines and United Airlines (Airlines) Comments at 35-38, R. 22, JA 166-69; *see also* Liquid Shipper Group Comments at 13, R. 20, JA 107. The Protestors further asserted that Colonial's contract rates are particularly onerous, given that Colonial requires committed shippers to waive their right to challenge Colonial's rates, Colonial maintains the right to alter those rates at any time, and Colonial is not liable for breaching the contract. *See* Chevron Comments at 9, JA 95; Marathon Comments at 13-16, JA 121-24; Airline Comments at 33, JA 164. And the Protestors also challenged Colonial's proposal to provide committed shippers with first access to additional shipping capacity, asserting it would limit access for uncommitted shippers to existing capacity. *See* Marathon Comments at 9-10, JA 117 -18; Airlines Comments at 49, JA 180.

C. The Commission's Order

On March 20, 2014, the Commission denied Colonial's request. The Commission noted the threshold issue was whether it should grant a declaratory order when a pipeline seeks approval for contract rates for existing capacity – as

opposed to pipeline construction. *See* Order P 33, JA 341-42 ("The core of Colonial's petition for declaratory order is the novel request for Commission authorization for contract rates for existing capacity that is fully utilized."). The Commission noted it can approve contract rates under the Interstate Commerce Act, citing *Sea-Land*, 738 F.2d 1311, and began using declaratory orders to permit contract rates in *Express Pipeline Partnership*, 76 FERC ¶ 61,245 (1996). Order P 34, JA 342. In *Express Pipeline*, the Commission approved a declaratory order for contract rates to guarantee financing for new pipeline construction. *Id.* Subsequent to *Express Pipeline*, the Commission issued "numerous" declaratory orders approving contract rates. *Id.* P 35, JA 342-43. But those orders were for "new pipelines, expansion projects, or, at the very least, reversals or reconfigurations of existing pipelines." *Id.*

The Commission observed that for construction projects, contractual commitments are necessary to "determine support for construction of the project, obtain financing, ensure the initial financial viability of the project, or to determine the support in new or growing markets." *Id.* The Commission continued that even for reversals or reconfigurations, "contract rates ensure that a pipeline's investments to serve new markets are necessary in the long term." *Id.*

But Colonial did not offer any new investment to expand its pipeline's capacity. *Id.* P 38, JA 343. Colonial's proposed rates would simply provide

Colonial a "legally unassailable revenue stream whether or not committed shippers make any shipments." *Id.* PP 37, 39, JA 343-44. And without construction, the Commission found that shippers do not receive the same benefits. Committed shippers do not receive any commitment from Colonial for new capacity for "a constrained system" that has been full for two years. *Id.* P 37, JA 343. Yet committed shippers waive their right to challenge Colonial's past or present rates – even though Colonial retains the right to change rates and is not liable for breach of contract. *Id.* PP 25, 26, JA 339, 340.

Likewise, Colonial's proposal would "degrade the service of existing shippers that would not (or could not) prudently sign the [contract rates] as against their interests." Order PP 36, 37, JA 340. Committed shippers receive first access to excess capacity. *Id.* PP 7, 33, JA 334, 341-42. So uncommitted shippers receive less capacity – even though the two groups were equal prior to Colonial instituting contract rates, and despite the fact that nothing about the pipeline has changed. *Id.* P 37, JA 343.

The Commission clarified that existing policy is to "entertain such proposals essentially in support of new infrastructure to support changing market needs." *Id.* P 39, JA 343-44. The Commission suggested that Colonial consider expansion and that the Commission would consider a proposal from Colonial for contract rates if it adopted plans for its constrained system. *Id.* P 38, JA 343. But without such

plans, Colonial's proposed contract rates were "inconsistent" with the Commission's policy and do not justify treating existing shippers differently. *Id.* P 39, JA 343-44. Because the Commission found the entire rate structure to violate the anti-discrimination mandate of section 3(1) of the Interstate Commerce Act, the Commission did not address the specific objections raised to particular provisions of Colonial's contract rates. *Id.*

SUMMARY OF ARGUMENT

The Interstate Commerce Act prohibits rate discrimination by a carrier among shippers unless the disparity is warranted by competitive conditions or unique circumstances. Within the Act's limits, the Commission has discretion to permit contracts charging shippers different rates, and has exercised that discretion to permit contract rates when the rates are available to all shippers and a pipeline is undertaking an infrastructure investment to ensure shipper financial support for the project. Here, the Commission reasonably exercised its discretion in denying Colonial's proposed contract rates.

The Commission found that Colonial failed to justify its proposal, based on the circumstances presented. Colonial did not announce infrastructure investment plans for its full pipeline – in contrast to the Commission's policy of permitting contract rates to finance construction. Without such plans, the Commission reasonably found that Colonial has no need for a guaranteed revenue stream.

And shippers do not receive the benefit of additional capacity to justify disparate treatment on a pipeline that is already full. Shippers instead face a choice – accept Colonial's proposal and forego their right to challenge rates without any promise of additional shipping capacity, or decline term contract rates and accept degraded service with less available shipping. The Commission reasonably determined that, in those circumstances, Colonial lacked justification for contract rates providing existing shippers differing service, rendering its rates unduly discriminatory.

Colonial asserts two bases to challenge the Commission's determination. First, Colonial contends that this Court's *Sea-Land* decision and the Commission's prior contract rate orders compel the Commission to approve contract rates, as long as they are offered to all shippers. But neither *Sea-Land* nor Commission precedent contains such an unyielding mandate; both firmly commit contract rates to the Commission's discretion.

And Colonial ignores that *Sea-Land* requires that contract rates must also respond to particular circumstances. Established Commission precedent addressing contract rates reflects that the Commission examines the need for a guaranteed revenue stream, and has permitted contract rates for pipeline infrastructure investments that require shipper financial support. The Commission

reasonably determined that Colonial, which has proposed no new infrastructure investment, does not need a "legally unassailable" revenue stream.

Second, Colonial's reliance on Commission precedent involving volume rate discounts and settlement rates likewise fails. Volume discounts are unilaterally filed in a pipeline's tariff – as opposed to contract rates, which are bilateral agreements between a pipeline and consenting shippers. Volume discounts do not require shippers to agree to any particular term – or any contract. Further, the Commission here emphasized the importance of considerations that were not present in those volume discount orders, specifically analyzing why term contract rates are unnecessary in the absence of pipeline investment.

Likewise, Colonial's reliance on Commission approval of settlement rates fails. Colonial did not seek to file its contract rates as settlement rates. Different standards – such as requiring the consent of all current shippers – apply to settlement rates, and the settlements cited by Colonial involve pipeline construction. In these circumstances, it was reasonable for the Commission to use its discretion and judgment to determine that Colonial's proposed contract rates were unduly discriminatory. The Commission's decision is entitled to deference and should be upheld.

ARGUMENT

I. STANDARD OF REVIEW

The Court reviews Commission orders under the Administrative Procedure Act's arbitrary and capricious standard. *See, e.g.*, *Freeport-McMoRan Corp. v. FERC*, 669 F.3d 302, 308 (D.C. Cir. 2012). Commission decisions "will be upheld as long as the Commission examined the relevant data and articulated a rational connection between the facts found and the choice made." *SFPP v. FERC*, 592 F.3d 189, 193 (D.C. Cir. 2009) (addressing the Interstate Commerce Act); *ExxonMobil Oil Corp. v. FERC*, 487 F.3d 945, 951 (D.C. Cir. 2007) (same); *accord Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). "In other words, the Commission must 'cogently explain why it has exercised its discretion in the given matter.'" *ExxonMobil Oil Corp.*, 487 F.3d at 951 (quoting *Exxon Mobil Oil Corp. v. FERC*, 206 F.3d 47, 54 (D.C. Cir. 2000)).

Courts are "particularly deferential to the Commission's expertise with respect to ratemaking issues" and will not second-guess the agency's policy-choices when the Commission reasonably explains its position. *ExxonMobil Oil Corp.*, 487 F.3d at 951 (internal quotation omitted) (holding that "policy choices about ratemaking are the responsibility of the Commission – not this Court"); *see also Morgan Stanley Capital Grp.*, 554 U.S. at 532 ("[W]e afford the Commission

great deference in its rate decisions."); *Ass'n of Oil Pipe Lines v. FERC*, 83 F.3d 1424, 1431 (D.C. Cir. 1996) ("Because the subject of our scrutiny is ratemaking – and thus an agency decision involving complex industry analyses and difficult policy choices – the Court will be particularly deferential to the Commission's expertise."); *Cities of Bethany v. FERC*, 727 F.2d 1131, 1138 (D.C. Cir. 1984) (Courts provide FERC substantial deference regarding the reasonableness of particular customer categories because "ratemaking is less science then art").

An agency's construction of the statute it administers – here, the anti-discrimination mandate of the Interstate Commerce Act – is reviewed under well-settled principles. If Congress has directly spoken to the precise question at issue, the Court "must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). "Statutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency." *City of Arlington, Tex. v. FCC*, 133 S.Ct. 1863, 1868 (2013); *see also Ass'n of Oil Pipe Lines*, 83 F.3d 1424 at 1440 ("[T]he court has no occasion to assign a meaning to the [Interstate Commerce Act] where that meaning would contravene a reasonable interpretation by the [Commission, which is] responsible for administering the statute.").

Chevron deference applies to the Commission's interpretation of contracts – such as the contracts between Colonial and Colonial's shippers – involving ratemaking. *See MarkWest*, 646 F.3d at 34 (deference to the Commission's interpretation of settlement agreements); *Williams Natural Gas Co. v. FERC*, 303 F.3d 1544, 1549 (D.C. Cir. 1993) (review of FERC's contract interpretations is to be conducted under *Chevron*); *see also Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 814 (D.C. Cir. 1998) (the Court provides substantial deference to the Commission's construction of contract language). The Commission receives this deference because: (1) the Commission possesses broad power over ratemaking, including the power to analyze contracts; and (2) the Commission has "familiarity with the field of enterprise to which the contract pertains." *MarkWest*, 646 F.3d at 34 (quoting *Nat'l Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1563, 1569-70 (D.C. Cir. 1987)).

II. THE COMMISSION REASONABLY DETERMINED THAT COLONIAL'S CONTRACT RATES WERE UNDULY DISCRIMINATORY

A. The Interstate Commerce Act Provides The Commission Broad Discretion To Prevent Unduly Discriminatory Rates

"The principal evil at which the Interstate Commerce Act was aimed was discrimination in its various manifestations." *Harborlite Corp. v. ICC*, 613 F.2d 1088, 1091 (D.C. Cir. 1979) (quoting *New York v. United States*, 331 U.S. 284, 296 (1947)) (applying 1977 version of the ICA). The "nub" of the issue is

competitive injury. *Flint Hills Resources Alaska, LLC v. FERC*, 627 F.3d 881, 888 (D.C. Cir. 2010) (citing *Harborlite*, 613 F.2d at 1091-92).

Section 3(1) of the Act, 49 U.S.C. app. § 3(1) (1988), contains broad anti-discrimination language. *Harborlite*, 613 F.2d at 1091; *see also Ayrshire Collieries Corp. v. United States*, 335 U.S. 573, 584 (1949) (holding that section 2 of the ICA prohibits charging similarly situated shippers different rates). A violation occurs when:

- There is a disparity in rates.
- The complaining party is competitively injured, actually or potentially.
- The carrier is the common source of both the allegedly prejudicial and preferential treatment.
- The disparity in rates is not justified by transportation conditions.

Harborlite, 613 F.2d at 1088. If the first three conditions are present, the carrier has the burden to prove that the disparity in rates is justified. *Id.* at 1088. The justification must result from the "cost of the respective services, by their values, or by other transportation conditions." *Id.* at 1100.[1]

[1] This Court has provided a similar test under the Federal Communications Act, which "was based upon the ICA and must be read in conjunction with it." *MCI Telecommunications Corp. v. FCC*, 917 F.2d 30, 37 (D.C. Cir. 1990) (finding that the "almost identical" non-discrimination provisions of the ICA impose the same substantive anti-discrimination requirements). A court addresses: (1) whether the services are alike; (2) whether there is a price difference; and (3) if there is a difference, whether it is reasonable, *i.e.* a "neutral, rational basis underlying the disparity." *Id.* at 39, 41.

In *Sea-Land*, this Court declined to find the Act mandates a *per se* ban on contract rates. 738 F.2d at 1317. Instead, the Interstate Commerce Commission could – but was not required – to accept contract rates, based upon the "broad legislative discretion" to the Commission. *Id.* at 1319. The Court established a two-part test for when contract rates do not constitute undue discrimination. First, the carrier must make such rates publicly available. *Id.* at 1317. Second, the terms must produce significant economic benefits, such as "result[ing] in lower costs or respond[ing] to unique competitive circumstances." *Id.* If those two conditions are satisfied, the Commission may – in its discretion – accept a carrier charging different rates for contract and non-contract shippers without "running afoul of the prohibition on discriminatory pricing." *Id.*

Beginning with *Express Pipeline Partnership*, 76 FERC ¶ 61,245 (1996), the Commission has "approved a number of volume incentive programs to support pipelines' efforts to attract shippers that will make long-term volume commitments to support the construction of new facilities." *TransCanada Keystone Pipeline, LP*, 125 FERC ¶ 61,025, P 21 (2008); *see also* Order P 34 (explaining history of "non-traditional rate structures for oil pipelines, such as contract rates," beginning with *Express Pipeline*), JA 342. In *Express Pipeline*, the Commission permitted contract rates for the construction of an oil pipeline from Alberta to Wyoming. *Express Pipeline*, 76 FERC ¶ 61,245 at 62,249. The Commission reasoned that

"issuing a declaratory order is appropriate for a new oil pipeline entrant . . . because it needs to acquire and guarantee financing in order to begin construction." *Id*. at 62,259.

The Commission has granted subsequent declaratory orders for contract rates consistent with *Express Pipeline*. *See Tesoro High Plains Pipeline Co.*, 148 FERC ¶ 61,129, P 23 (2014) (allowing contract rates for a new pipeline "consistent with *Express Pipeline*"); *Enterprise Liquids Pipeline LLC*, 142 FERC ¶ 61,087, P 24 (2013) (same); *Shell Pipeline Company LP*, 139 FERC ¶ 61,228, P 20 (2012) (same). But as the Commission explained in the Order here, "[i]n all of the cases approving contract rates, contractual commitments of shippers were necessary to, among other things, determine support for construction of the project, obtain financing, ensure the initial financial viability of the project, or to determine the support in new or growing markets." Order P 35, JA 342-43.

For example, in *Skelly-Belvieu Pipeline Co., LLC*, 138 FERC ¶ 61,153, P 16 (2012), the Commission approved contract rates to finance new construction:

> To meet the growing need for capacity to transport [natural gas liquids] out of Skellytown, Skelly-Belvieu must undertake a significant capital investment to expand capacity of the Skelly-Belvieu system. Without the substantial financial investment of shippers that commit to move barrels on the new capacity pursuant to the [contract rates], there exists the possibility that the expansion will not occur in a timely manner. To minimize the risk that the project will not move forward, and to provide financial assurances to Skelly-Belvieu, the proposed [contracts] require shippers to commit to ship-or-pay contracts . . . .

Id.; *accord Enbridge Pipelines (Southern Lights) LLC*, 141 FERC ¶ 61,244, P 4 (2012) ("Due to the nature of the project [reversal and construction of new pipeline], it was necessary to obtain financial support through long-term volume commitments without which the project could not go forward."); *Sunoco Pipeline L.P.*, 137 FERC ¶ 61,107, P 13 (2011) ("[T]he Project entails a significant capital investment, which requires the support of committed shippers to share the financial risk of the Project."). In essence, the Commission permits contract rates to help ensure regulatory support and shipper financing when an owner invests in a pipeline project. *See* Order P 39 (noting "the Commission's policy of entertaining such proposals essentially in support of new infrastructure to support changing market needs"), JA 343-44.

B. The Commission Reasonably Exercised Its Discretion In Finding That Colonial's Rates Were Unduly Discriminatory Because Colonial Did Not Require Construction Financing And Its Shippers Do Not Receive The Same Benefits

Although the Commission has permitted contract rates for new construction projects, Colonial presented the first request to implement term contract rates for an existing pipeline not proposing an infrastructure investment. Order P 36 ("The core of Colonial's petition . . . is the novel request for Commission authorization of contract rates for existing capacity that is fully utilized."), JA 343. In its order, the

Commission re-affirmed that it has a policy of "entertaining such proposals essentially in support of new infrastructure." *Id.* P 39, JA 343-44.

Without such infrastructure investment plans, the Commission reasonably determined that Colonial could not justify its proposed disparate rate treatment for existing shippers. *See Harborlite*, 613 F.2d at 1091 (common carrier must justify discrimination); *see also Sea-Land*, 738 F.2d at 1317 (disparate treatment must be justified by unique competitive conditions). Order P 37, JA 343. Colonial did not require shipper financial commitments to fund investment. *Id.* P 36, JA 343. Shippers do not receive additional capacity even though Colonial's pipeline is full. *Id.* Instead, uncommitted shippers receive less shipping availability for the same pipeline. *Id.* P 37, JA 343. So the Commission understandably exercised its broad discretion to conclude Colonial's proposal was unduly discriminatory under section 3(1) of the Interstate Commerce Act.

The Commission likewise had a clear rational basis for its underlying findings that contract rates, generally, are unnecessary without pipeline investment and, specifically here, result in degraded service for uncommitted shippers. *See Ass'n of Oil Pipe Lines*, 83 F.3d at 1431 (the Commission has broad discretion in ratemaking matters because of the Commission's industry and policymaking expertise). Colonial asserts that its contract rates are economically necessary as an existing pipeline because Colonial cannot otherwise ensure continued shipping

volumes. Br. at 27. But Colonial offers no evidence that it faces a decline in pipeline use. Colonial concedes that its current rates have led to rapid growth and that its pipeline is "currently full." *Id.*

And the Commission found that Colonial is a long-standing, financially successful pipeline – one that has been in full allocation for at least two years. Order P 36, JA 343. This means that Colonial has received more requests to ship than the pipeline can handle; it has to ration availability among shippers, and must turn down shipping requests. *See id.* So the Commission found continued demand. *See id.* P 37, JA 343.

In response, Colonial contends that contract rates permit long-term planning and help assess future expansion projects. Br. at 27-28, 30. But this is precisely the Commission's point – the primary purpose for contract rates is financing construction. Colonial states its capacity is nearly full and it needs to assess expansion. Order P 36, JA 343. Numerous shippers support expansion. *Id.* The Commission left the door open to Colonial proposing contract rates in support of infrastructure improvements. *Id.* P 38 ("If Colonial believes there will be demand for capacity in the long-term, then it should consider expansion . . . ."), JA 343.

Yet here, Colonial seeks financial certainty without actually undertaking any commitment. In this light, the Commission reasonably determined both that, unlike a pipeline financing improvements, Colonial does not need a guaranteed

revenue stream and that contract rates treating existing shippers differently are not necessary without such investment. *Id.* PP 37, 38, JA 343; *see also id.* P 33 (the Commission only rejected the "central notion of reclassifying existing shippers on existing facilities"), JA 341-42.

And shippers do not receive the same benefit. Committed shippers can accept Colonial's pre-determined contract and receive lower rates. But they must commit to ship certain volumes and forego their right to challenge rates without receiving expanded capacity. *Id.* P 37, JA 343. And Colonial can unilaterally raise those rates. *Id.* P 26, JA 340.

Or shippers can forego contract rates and receive degraded service. *Id.* Colonial admits that, under its plan, committed shippers would receive a preference for excess shipping capacity over uncommitted shippers. Br. at 29. Yet Colonial's pipeline will remain unchanged, meaning that uncommitted existing shippers are left with less shipping capacity on an unchanged pipeline. Order P 37, JA 343. So the Commission had a rational basis to exercise its judgment and find that uncommitted shippers would receive inferior service. *See Ass'n of Oil Pipe Lines*, 83 F.3d at 1431. In turn, it was reasonable for the Commission to determine that, unlike a pipeline funding construction, Colonial's disparate treatment of shippers is not warranted under the Interstate Commerce Act. *See Sea-Land*, 738 F.2d at 1319 (Commission has broad discretion to determine when rates are unduly

discriminatory); *MarkWest*, 646 F.3d at 34 (FERC receives *Chevron* deference for its interpretation of both the ICA and rate-setting contracts).

C. The Commission's Order Is Consistent With *Sea-Land*

In response, Colonial asserts that the Commission's decision is inconsistent with this Court's *Sea-Land* decision. *See* Br. at 16. But although agencies act arbitrarily when they depart from precedent without explanation, when an agency "'has not in fact diverged from past decisions, the need for a comprehensive and explicit statement of its current rationale is less pressing.'" *Environmental Action v. FERC*, 996 F.2d 401, 411-412 (D.C. Cir. 1993) (quoting *Hall v. McLaughlin*, 864 F.2d 868, 873 (D.C. Cir. 1989)); *see also Sacramento Mun. Util. Dist. v. FERC*, 616 F.3d 520, 542 (D.C. Cir. 2010) (finding "FERC's decision was consistent with its precedent" where the cases cited by the petitioner did not "compel the imposition of either of the particular remedies" demanded, because the precedent addressed a different matter).

Here, Colonial misconstrues *Sea-Land's* holding in two ways. First, Colonial asserts *Sea-Land* mandates that the Commission always approve contract rates whenever they are available to all shippers. *See* Br. at 7, 13. This is wrong. As the Commission explained in the order on review, *Sea-Land* permits – but does not mandate – approval of contract rates in certain circumstances. *See Sea-Land*, 738 F.2d at 1319 ("Congress has delegated broad legislative discretion to the

Commission to determine when differential treatment amounts to improper discrimination among shippers"); *see also* Order P 11 ("However, the fact that contract rates are not inherently discriminatory does not mean they must always be approved."), JA 335. Indeed, the Commission regularly exercises its discretion and denies petitions for approval of contract rates where the rates are unjustified. *See Enbridge Pipelines (North Dakota) LLC*, 142 FERC ¶ 61,212, P 30 (2013) (denying petition for declaratory order seeking approval of terms contained in shipper support letters, even to support a proposed pipeline expansion, where the self-styled settlement rates were protested by certain shippers); *Enbridge (U.S.), Inc. and ExxonMobil Pipeline Co.*, 124 FERC ¶ 61,199, P 37 (2008) (denying petitioner's request to approve a discounted rate to committed shippers because it would provide committed shippers access to 90 percent of the pipeline's capacity, resulting in no access for uncommitted shippers for "90 percent of the pipeline's capacity for the duration of the 15-year contract term"); *Texaco Pipeline Inc.*, 74 FERC ¶ 61,071, 61,201 (1996) (denying contract rates as discriminatory for providing an unreasonable preference despite having an open contract season).

Second, Colonial ignores *Sea-Land's* holding that rates must respond to "unique competitive conditions." 738 F.2d at 1317. Colonial implies that it can file contract rates as a matter of right, even if the Commission finds the proposed contracts do not produce economic benefits. But the Commission requires contract

rates to produce such benefits, and has interpreted pipeline investment as satisfying this requirement. *See* Order P 36, JA 343; *see also TransCanada Keystone Pipeline*, 125 FERC ¶ 61,025, P 21 (observing the Commission has approved a number of contract rates to support pipeline construction projects); *Express Pipeline P'ship*, 76 FERC ¶ 61,245 at 61,766 (contract rates are critical for pipeline construction projects to guarantee financing). The Commission here found Colonial lacked the same basis – financing infrastructure investment – to justify distinguishing between committed and uncommitted shippers. Because the disparate treatment was unjustified, Colonial's contract rates were unduly discriminatory. *See* Order P 37 (holding Colonial's rates "unduly discriminatory in these circumstances"), JA 343.

The Commission's order was thus entirely consistent with *Sea-Land*. Colonial, at bottom, is not challenging the Commission's application of facts to the Commission's policy. Colonial challenges the policy itself. In Colonial's judgment, the Commission should broadly allow all contract rates – not just those necessary to finance new construction – whenever all shippers are offered the same contract terms. *See* Br. at 7.

But this is not the Commission's policy – with good reason. *See* Order PP 36, 39 (Commission policy is to entertain contract rates to obtain financing for infrastructure investments to support the changing market needs of shippers),

JA 343-44. Such policy judgments are specifically entrusted to the Commission's expertise and will not be second-guessed by courts. *See New England Power Generators Assn. v. FERC*, 757 F.3d 283, 293, 296 (D.C. Cir. 2014) (declining to substitute the petitioner's policy preference for the agency's because "such a juggling act would not benefit from our rearranging," as these are the types of policy matters FERC is charged with considering, and the court defers to FERC's expertise); *Sacramento Mun. Util. Dist.*, 616 F.3d at 541-42 ("[T]he court properly defers to policy determinations invoking the Commission's expertise in evaluating complex market conditions."); *ExxonMobil Oil Corp.*, 487 F.3d at 953 (finding that FERC reasonably explained its policy and that the petitioners "offered no compelling reason to second-guess the agency's policy choices").

III. THE VOLUME DISCOUNT AND SETTLEMENT RATE CASES CITED BY COLONIAL ARE DISTINGUISHABLE

Colonial relies in error on Commission orders permitting volume discount programs and settlement rates. As an initial matter, Colonial failed to preserve its arguments by not raising them with sufficient specificity before the Commission. *See ExxonMobil Oil Corp.*, 487 F.3d at 962 (a party seeking review of a Commission order under the ICA need not petition for agency rehearing but nonetheless must first raise the issue with the Commission); *Tesoro Refining and Marketing Co. v. FERC*, 552 F.3d 868, 872 (D.C. Cir. 2009) (dismissing appeal because the petitioner failed to exhaust its remedies under the ICA).

Volume discount and settlement rates are also distinguishable. Agency action stands "without elaborate explanation where distinctions between the case under review and the asserted precedent are so plain that no inconsistency appears." *Bush-Quayle '92 Primary Comm., Inc. v. FEC*, 104 F.3d 448, 454 (D.C. Cir. 1997). Further, the Commission may distinguish precedent simply by "emphasizing the importance of considerations not previously contemplated, and that in so doing it need not refer to the cases being distinguished by name." *Envtl. Action*, 996 F.2d at 411-12 (finding each decision relied upon by the petitioners "readily distinguishable" and that the circumstances differed too significantly from precedent to invalidate the agency orders); *Gilbert v. NLRB*, 56 F.3d 1438, 1446 (D.C. Cir. 1995) (same).

A. The Commission's Volume Discount Precedent Is Inapplicable

Colonial cites three Commission decisions approving volume discount tariffs to support its contention that the Commission has permitted similar programs when a pipeline owner is not undertaking an infrastructure investment. Br. at 19 (citing *Mid-America Pipeline Co.*, 93 FERC ¶ 61,306 (2000); *Williams Pipe Line Co.*, 80 FERC ¶ 61,402 (1997); *Explorer Pipeline Co.*, 71 FERC ¶ 61,416 (1995)). But Colonial waived this argument. Colonial's single fleeting reference to permitting volume discount programs without infrastructure investment – in its "Reply Comments of Colonial Pipeline and Answer to

Complaint," and not in its Petition – without supporting citations to the now-relied upon orders, hardly provides the Commission an opportunity to fully and fairly consider Colonial's position. *See* Reply at 18 ("Volume Discounts are not Limited to New and Expanded Pipelines"), R. 26, JA 221; *see also ExxonMobil Oil Corp.*, 487 F.3d at 962 (purpose of exhaustion under the ICA is to fairly permit a full airing of the issue before the Commission, to allow the Commission an adequate opportunity to consider the issue, and to provide the Court a full record to evaluate complex regulatory issues); *City of Vernon, Cal v. FERC*, 845 F.2d 1042, 1047 (D.C. Cir. 1988) ("[T]he Commission cannot be asked to make silk purse responses to sow's ear arguments.").[2]

The cited orders are also inapplicable. *See SFPP*, 592 F.3d at 195 (finding that the petitioner failed to raise its argument before the Commission and, even if it were raised, petitioner's argument by analogy was inapplicable and the Commission properly exercised its discretion and explained the considerations supporting its decision). None of the orders cited by Colonial address whether a pipeline owner was financing construction. In fact, none of the orders addresses contract rates of the type Colonial proposes.

[2] Colonial later cites *Williams Pipe Line Co.*, 80 FERC ¶ 61,402, and *Explorer Pipeline Co.*, 71 FERC ¶ 61,416, in its Reply, but only for the limited proposition that "volume discounts are often filed by oil pipelines without seeking prior declaratory approval, and the Commission has consistently held that whether to offer such discounts is within the pipeline's discretion." Reply at 20, JA 223.

Instead, as Colonial concedes, those orders all involved volume incentive rates. Br. at 19. As Colonial further admits, volume discounts are unilaterally included in a pipeline's tariff and apply to all shippers – as opposed to contract rates, which are agreements between the pipeline owner and committed shippers that control the terms of service between those parties. *Id.*; *see Mid-America Pipeline Co.*, 136 FERC ¶ 61,087, P 7 (describing contract rate programs); *see also Plantation Pipeline Co.*, 98 FERC ¶ 61,219, 61,866 (2002) (differentiating term contract rate programs from volume incentive programs); *Express Pipeline*, 76 FERC ¶ 61,245 at 62,252 (same).

Volume discount rates also do not require a shipper to commit to a particular term. *See Explorer Pipeline Co.*, 71 FERC ¶ 61,416 at 62,639 (approving volume rates under the Commission's indexing method where the rates served as incentives to shippers). By contrast, here the Commission particularly relied upon the fact that the contract rates applied only to committed shippers and contained additional terms that are not involved in volume discount rates, such as a waiver of the right to challenge the rates, Colonial's unilateral ability to alter the rates, and agreement absolving Colonial from damages claims. *See* Order PP 28, 32, JA 340, 41. And unlike Colonial's request for the Commission's approval of new contract rates, and the Commission's policy of considering new contract rates to support new infrastructure, *id.* P 39, JA 343-44, two of the cited orders simply

amended existing volume discount programs, and one did not even involve a protest – meaning that all existing shippers supported (or did not oppose) the proposed program. *See Explorer Pipeline Co.*, 71 FERC ¶ 61,416 at 62,639 (no protest); *Williams Pipe Line Co.*, 80 FERC ¶ 61,402 at 62,330.

Only *Mid-America Pipeline Co.*, 93 FERC ¶ 61,180 at 61,306, references a contract where shippers undertook ship-or-pay commitments. Notably, Colonial never cited *Mid-America Pipeline* before the Commission. And the Commission has only relied upon the *Mid-America Pipeline* order once – in support of new pipeline construction. *See Plantation Pipe Line*, 98 FERC ¶ 61,219 at 61,866 n.13. So the *Mid-America Pipeline* order hardly represents Commission policy. Further, while that order did not address construction, subsequent *Mid-America Pipeline* orders make clear that the pipeline was expanded during the period in question. *See Mid-America Pipeline Co.*, 116 FERC ¶ 61,040, P 10 (2006) (noting that the Rocky Mountain segment of the pipeline was expanded in 1999); *see also Mid-America Pipeline Co.*, 136 FERC ¶ 61,087, P 4 (2011) (detailing how Mid-America has undertaken six previous expansions between 1973 and 2007).

As between established Commission precedent following *Sea-Land* and permitting contract rates where necessary to support infrastructure investment, and the orders cited by Colonial permitting tariff-based volume discount programs applicable to all qualifying volume shippers, the Commission reasonably applied

its precedent governing contract rates. The orders cited by Colonial are not applicable to contract rates, and do nothing to distinguish the factors that the Commission found significant here. *See Hall*, 864 F.2d at 873 (The agency's burden to explain any "departures" is "considerably less" if the past decisions involve "materially different situations"). To the extent those orders have any applicability, the Commission amply "emphasized the importance of considerations not previously contemplated" with respect to Colonial – namely that term contract rates are unnecessary because Colonial is not investing in pipeline construction, shippers do not receive any benefit of new capacity, and uncommitted shippers receive degraded service. *See Envtl. Action*, 996 F.2d at 411 (the Commission also does not have to distinguish each case by name).

B. Colonial Has Not Proposed Settlement Rates

Colonial's reliance on the Commission's approval of settlement rates is similarly unpersuasive. As compared to its volume discount argument, Colonial made even less of an effort to raise this issue before the Commission. The single reference to the Commission's treatment of settlement rates in Colonial's pleadings before the Commission, without supporting citations to the cases Colonial now relies upon (Br. at 23), certainly did not portend Colonial's extensive reliance upon this argument in its opening brief. *See* Colonial Reply at 11 ("That policy is also consistent with the Commission's general policy of upholding settlements and

other similar agreements."), JA 214. Colonial's vague sentence was not sufficiently specific to put the Commission on notice and provide the Commission the opportunity to address Colonial's argument. *See ExxonMobil Oil Corp.*, 487 F.3d at 962.

Even if Colonial had made the argument to the Commission, its analogy would not have helped. Settlement rates are governed by distinct standards, which Colonial did not invoke with its filing here. And, in any event, the orders cited by Colonial – as with the volume discount orders – do not address the factors the Commission found most troubling.

Colonial did not file its proposed contracts as settlement rates, and never asked the Commission to treat the rates as such.[3] Separate procedural and substantive standards apply to settlement rates. *See* 18 C.F.R. § 385.602; 18 C.F.R. § 342.4(c). And a pipeline cannot use a settlement rate without Commission approval unless all current shippers agree to it – a condition that does not exist here. *See Express Pipeline*, 76 FERC ¶ 61,245 at 62,258 ("These settlement rate filings must contain a verified statement by the oil pipeline that the

[3] Colonial is a well-established pipeline familiar with FERC practice, and it has used other Commission rate filing procedures before. *See Southwest Airlines and United Airlines v. Colonial Pipeline Co.*, 148 FERC ¶ 61,161 (2014) (accepting Colonial's proposed settlement under 18 C.F.R. § 385.602); *Colonial Pipeline Co.*, 95 FERC ¶ 61,355 (2001) (approving Colonial's initial rates under 18 C.F.R. § 342's rate-setting procedures).

proposed rate change has been agreed to by all current shippers."); *Enbridge Pipelines* (*North Dakota*), 142 FERC ¶ 61,212, P 29 (rejecting pipeline owner's contention that a rate change constituted a settlement rate because, even though it was agreed to by numerous shippers, some shippers protested the rate and so "the proposed rates have not been agreed to in writing by each person who is using the service on the day of the filing"); *Seaway Crude Pipeline Co.*, 146 FERC ¶ 61,151, P 6 (2014) (if a settlement rate is protested, the pipeline owner must obtain Commission approval).

In addition, the orders cited by Colonial authorizing a rate change by settlement all involve pipeline infrastructure investments. Br. at 23.[4] So as with the volume discount orders, the settlement cases cited by Colonial are readily distinguishable and have no applicability here. *See Sacramento Mun. Util. Dist.*, 616 F.3d at 542 (precedent is not applicable where it is readily distinguishable). The Commission's interpretation of Colonial's contract rates as, indeed, contract

[4] *See, e.g.*, *Seaway Crude Pipeline Co.*, 142 FERC ¶ 61,201, P 13 (2013) (pipeline reversal; petition denied); *Sunoco Pipeline LP*, 146 FERC ¶ 61,273, P 1 (2013) (proposed new pipeline; no protests); *Tesoro High Plains Pipeline Co.*, 148 FERC ¶ 61,129, PP 3, 12 (petition unopposed and involved "substantial investment"); *Kinder Morgan Pony Express Pipeline LLC, Belle Fourche Pipeline Co.*, 141 FERC ¶ 61,180, P 1 (2012) (proposed new pipeline; petition unopposed); *Kinder Morgan Pony Express Pipeline LLC and Hiland Crude LLC*, 141 FERC ¶ 61,249, P 1 (2012) (same); *Enbridge Pipelines (North Dakota)*, 133 FERC ¶ 61,167, PP 1, 25 (2013) (expansion project; no protests); *Express Pipeline*, 76 FERC ¶ 61,245 (proposed new pipeline; rates agreed to by all shippers).

rates – as evidenced by its application of policy and precedent governing contract rates – is entitled to respect. *See MarkWest*, 646 F.3d at 34.

CONCLUSION

For the foregoing reasons, Colonial's petition should be denied and the Commission's order should be upheld.

Respectfully submitted,

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D.C. Cir. No. 14-1078

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I certify that the Final Brief of Respondent Federal Energy Regulatory Commission contains 7,654 words, not including the (i) cover page, (ii) certificates of counsel, (iii) tables of contents and authorities, (iv) glossary, and (v) addendum.

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ADDENDUM
Statutes & Regulations

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not in reorganization, as determined by the Commission.

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

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

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

Prior to repeal, section read as follows:

§ 2. Special rates and rebates prohibited

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

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

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

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

Prior to repeal, section read as follows:

§ 3. Preferences; interchange of traffic; terminal facilities

(1) Undue preferences or prejudices prohibited

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

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

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

(2) Payment of freight as prerequisite to delivery

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

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

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

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

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

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

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

Prior to repeal, section read as follows:

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

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

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

(2) Schedule of rates through foreign country

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

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

No change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the Commission and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection: *Provided,* That the Commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified, or modify the requirements of this section in respect to publishing, posting, and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions: *Provided further,* That the Commission is authorized to make suitable rules and regulations for the simplification of schedules of rates, fares, charges, and classifications and to permit in such rules and regulations the filing of an amendment of or change in any rate, fare, charge, or classification without filing complete schedules covering rates, fares, charges, or classifications not changed if, in its judgment, not inconsistent with the public interest.

(4) Joint tariffs

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

(5) Copies of traffic contracts to be filed

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

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

The schedules required by this section to be filed shall be published, filed, and posted in such form and manner as the Commission by regulation shall prescribe. The Commission shall, beginning 2 years after February 5, 1976, require (a) that all rates shall be incorporated into the individual tariffs of each common carrier by railroad subject to this chapter or rail 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,

§ 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.

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

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

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

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

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

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

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

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

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

1992, if such section applies to such rate or to any prior rate. The rate decrease must be accomplished by filing a revised tariff publication with the Commission to be effective July 1 of the index year to which the reduced ceiling level applies.

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

§ 342.4 Other rate changing methodologies.

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

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

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

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

PART 343—PROCEDURAL RULES APPLICABLE TO OIL PIPELINE PROCEEDINGS

Sec.
343.0 Applicability.
343.1 Definitions.
343.2 Requirements for filing interventions, protests and complaints.
343.3 Filing of protests and responses.
343.4 Procedure on complaints.
343.5 Required negotiations.

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

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

§ 343.0 Applicability.

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

§ 343.1 Definitions.

For purposes of this part, the following definitions apply:

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

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

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

§ 343.2 Requirements for filing interventions, protests and complaints.

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

(b) *Standing to file protest.* Only persons with a substantial economic interest in the tariff filing may file a protest to a tariff filing pursuant to the Interstate Commerce Act. Along with the protest, a verified statement that the protestor has a substantial economic interest in the tariff filing in question must be filed.

(c) *Other requirements for filing protests or complaints*—(1) *Rates established under § 342.3 of this chapter.* A protest or complaint filed against a rate proposed or

(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,

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

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

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

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

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

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

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

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

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

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

(b) *Definition*. For purposes of this section, *settlement judge* means the administrative law judge appointed by the Chief Administrative Law Judge to conduct settlement negotiations under this section.

(c) *Requests for appointment of settlement judges*. (1) Any participant may file a motion requesting the appointment of a settlement judge with the presiding officer, or, if there is no presiding officer for the proceeding, with the Commission.

(2) A presiding officer may request the Chief Administrative Law Judge to appoint a settlement judge.

(3) A motion under paragraph (c)(1) of this section may be acted upon at any time, and the time limitations on answers in Rule 213(d) do not apply.

(4) Any answer or objection filed after a motion has been acted upon will not be considered.

(d) *Commission order directing appointment of settlement judge*. The Commission may, on motion or otherwise, order the Chief Administrative Law Judge to appoint a settlement judge.

(e) *Appointment of settlement judge by Chief Administrative Law Judge*. The Chief Administrative Law Judge may appoint a settlement judge for any proceeding, if requested by the presiding officer under paragraph (c)(2) of this section or if the presiding officer concurs in a motion made under paragraph (c)(1) of this section.

(f) *Order appointing settlement judge*. The Chief Administrative Law Judge will appoint a settlement judge by an order, which specifies whether, and to what extent, the proceeding is suspended pending termination of settlement negotiations conducted in accordance with this section. The order may confine the scope of any settlement negotiations to specified issues.

(g) *Powers and duties of settlement judge*. (1) A settlement judge will convene and preside over conferences and settlement negotiations between the participants and assess the practicalities of a potential settlement.

(2)(i) A settlement judge will report to the Chief Administrative Law Judge

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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 23rd day of December 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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