ORAL ARGUMENT NOT YET SCHEDULED

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

No. 15-1009

PETRO STAR INC.,
Petitioner,

v.

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

ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

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

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Final Brief: November 12, 2015

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Respondent submits:

A. Parties and Amici

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

B. Ruling Under Review

BP Pipelines (Alaska) Inc., Order on Initial Decision and Request for Rehearing, 149 FERC ¶ 61,149 (2014), R. 396, JA 542.

C. Related Cases

Counsel is not aware of any related cases pending before this Court or any other court.

/s/ Susanna Y. Chu
Susanna Y. Chu

November 12, 2015

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Pipeline	Trans-Alaska Pipeline System

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STATEMENT OF THE ISSUE

Whether the challenged order of the Federal Energy Regulatory Commission ("FERC" or "Commission"), which affirmed in all respects an Initial Decision issued by an Administrative Law Judge after an evidentiary hearing, reasonably rejected Petitioner Petro Star Inc.'s proposal to modify aspects of the existing Quality Bank methodology for the Trans-Alaska Pipeline System ("Pipeline"), affirmed by this Court in *Petro Star Inc. v. FERC*, 268 F. App'x 7 (2008) (unpublished).

STATUTORY PROVISIONS

Pertinent statutes are contained in the Addendum.

INTRODUCTION

This appeal arises out of a crude oil refiner's proposal to selectively revise the existing Quality Bank methodology for calculating balancing payments between crude oil shippers and refiners connected to the Pipeline. The portion of the Quality Bank methodology at issue here—the valuation of "Resid," a component of the crude oil transported over the Pipeline—was adopted by a FERC Administrative Law Judge, *Trans Alaska Pipeline Sys. v. Amerada Hess Pipeline Corp.*, 108 FERC ¶ 63,030 at PP 1228, 1231 (2004), and approved by the Commission as just and reasonable in Opinion No. 481, *Trans Alaska Pipeline Sys. v. Amerada Hess Pipeline Corp.*, 113 FERC ¶ 61,062 at PP 33-38 (2005) ("2005 Order"). This Court upheld the Commission's determinations in *Petro Star*, 268 F. App'x at 8-10. (Petro Star's brief does not contain a single reference to the *Petro Star* decision.)

Before the agency, Petro Star proposed to modify the Resid valuation formula adopted in the 2005 Order and upheld in *Petro Star*, citing changed market conditions arising from the 2008-2009 recession. After an extensive evidentiary hearing, an Administrative Law Judge issued a 78-page Initial Decision, *BP Pipelines (Alaska) Inc.*, 147 FERC ¶ 63,008 (2014), R. 381, JA 378 ("Initial

Decision"). The Initial Decision found that the evidence in the record contradicted Petro Star's contentions and thus did not support Petro Star's proposed modification. In particular, the Initial Decision found one of the premises underlying Petro Star's position to be "completely illegitimate." *Id.* P 135, JA 450. The Initial Decision also rejected Petro Star's proposal as inconsistent with this Court's precedent. The Commission affirmed the Initial Decision in its entirety. Order on Initial Decision and Request for Rehearing, *BP Pipelines (Alaska) Inc.*, 149 FERC ¶ 61,149 (2014), R. 396, JA 542 ("Affirming Order").

Contrary to Petro Star's arguments, the Commission carefully considered and adequately addressed all of the arguments presented by Petro Star. As in *Petro Star*—where the Commission likewise affirmed the decision of an Administrative Law Judge—the Commission's decision should be upheld, and the petition denied.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND: THE TRANS-ALASKA PIPELINE SYSTEM QUALITY BANK

Over the past two decades, this Court has become quite familiar with the Trans-Alaska Pipeline System and the Quality Bank. In particular, the Court has addressed the Quality Bank's methodology in five cases: *Flint Hills Res. Alaska, LLC v. FERC*, 631 F.3d 543, 544 (D.C. Cir. 2011); *Petro Star*, 268 F. App'x at 8; *Tesoro Alaska Petroleum Co. v. FERC*, 234 F.3d 1286, 1287 (D.C. Cir. 2000);

Exxon Co. v. FERC, 182 F.3d 30, 34-35 (D.C. Cir. 1999); and *Oxy USA, Inc. v. FERC*, 64 F.3d 679, 684-85 (D.C. Cir. 1995).

Extending approximately 800 miles from Alaska's North Slope to the Port of Valdez on Alaska's south-central coast, the Pipeline provides the only commercially-viable method for transporting Alaska North Slope crude oil to market. Oil companies ship crude oil of varying quality from different North Slope oil fields over the Pipeline, resulting in a commingled "common stream." On the way to Valdez, refineries connected to the Pipeline—including refineries owned by Petro Star—divert portions of the common stream, processing petroleum products out of the stream and returning unused residual components of the stream to the Pipeline. *Oxy*, 64 F.3d at 684-85.

As a result of the commingling and refining processes that take place along the Pipeline, the crude oil that is returned to the shippers at Valdez may differ in quality from the oil they originally tendered to the Pipeline. *Id*. Thus, in 1984, the Commission approved a settlement agreement establishing the Quality Bank to "make[] monetary adjustments between shippers in an attempt to place each in the same economic position it would enjoy if it received the same petroleum at Valdez that it delivered to [the Pipeline] on the North Slope." *Id. See also Tesoro*, 234 F.3d at 1288.

The Quality Bank is a zero-sum mechanism: it "charges shippers of relatively low-quality petroleum who benefit from commingling and distributes the proceeds to shippers of higher quality petroleum whose product is degraded by commingling." *Oxy*, 6 F.3d at 684. *See also* Initial Decision P 14, JA 395. As relevant here, the Quality Bank charges refiners such as Petro Star for the extraction of valuable crude oil components from the common stream. *See* Affirming Order P 5, JA 544; Initial Decision P 19, JA 397. The Quality Bank "compares the value of the diverted portion of the common stream to that of the [refinery] return stream, charging the refiners and compensating other shippers for the reduction in the common stream's value caused by the removal of the refinery products." *Oxy*, 64 F.3d at 685.

A. Quality Bank Methodology

"The goal of the Quality Bank valuation methodology . . . is to assign accurate relative values to the petroleum that is delivered to [the Pipeline] and becomes part of the common stream." *Id.* at 693. Because Alaska North Slope crude oil is not sold until after it is commingled and shipped to Valdez, however, there is no independent market upon which to base the relative price of the various crude oil streams shipped over the Pipeline. *Exxon*, 182 F.3d at 35. The Quality

Bank thus determines the relative value of the oil streams using a "distillation" methodology. *Tesoro*, 234 F.3d at 1289; *Exxon*, 182 F.3d at 35.[1]

Distillation is an initial step in the oil refining process, in which crude oil is separated into different components or "cuts." Initial Decision, Joint Stipulated Stmt. ("Joint Stip.") at 3, JA 383. The crude oil is heated until it starts to boil, and the different cuts boil out at different temperatures, with the lightest cuts boiling out at lower temperatures and the heaviest cuts boiling out at considerably higher temperatures. *Id.* at 4, JA 384.[2] The "Resid" (*i.e.*, Residual) cut at issue in this appeal is what remains after the lighter, more valuable components boil out. *See id.; Oxy*, 64 F.3d at 688.

The Quality Bank assigns a value to each of the nine distillation cuts and determines how much of each cut is contained in each of the crude oil streams transported by the Pipeline. For Quality Bank purposes, the value of each oil

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[1] The Quality Bank initially used a "gravity" methodology to determine the monetary adjustments between Pipeline participants. *Oxy*, 64 F.3d at 685; *Tesoro*, 234 F.3d at 1288. When the components of the oil shipped over the Pipeline changed, however, the Commission found the gravity methodology to be no longer just and reasonable, and approved the distillation methodology as a just and reasonable replacement. *Oxy*, 64 F.3d at 686-87; *Tesoro*, 234 F.3d at 1288-89. This Court affirmed the Commission's adoption of the distillation methodology in *Oxy*, 64 F.3d at 689-92, 696-700, 701.

[2] From lightest to heaviest, the nine Quality Bank "cuts" are: (1) Propane, (2) Isobutane, (3) Normal Butane, (4) Light Straight Run, (5) Naphtha, (6) Light Distillate, (7) Heavy Distillate, (8) Vacuum Gas Oil, and (9) Resid. Initial Decision, Joint Stip. at 3, JA 383.

stream is the volume-weighted value of its component cuts. The value of each shipper's oil stream is then compared with the value of the common stream to determine whether the shipper will make payments into or receive payments from the Quality Bank. Initial Decision, Joint Stip. at 4, JA 384.

Six of the nine Quality Bank cuts have published market prices, and the Quality Bank uses such prices for cut valuation purposes. Petro Star calls these the "marketable" cuts because they may be sold without additional processing. It is assumed that Quality Bank cuts with published market prices already reflect the simple refining (*i.e.*, distillation) cost of producing the cut. Initial Decision P 17, n.21, JA 396.

The other three cuts—Light Distillate, Heavy Distillate, and Resid—lack published market prices because they require additional processing to produce marketable products. *Id.* P 17, JA 396. Petro Star calls these the "pre-market" cuts. There is no active market for these cuts. *See Exxon*, 182 F.3d at 37. To derive values for these cuts, the Quality Bank uses market prices for finished products resulting from additional refining, subtracting out the processing costs required to produce such products. Initial Decision PP 17, 123, JA 396, 443-44.

The Quality Bank methodology values Resid as a "coker feedstock" because it requires significant additional processing in a coker unit[3] to produce marketable products. Affirming Order P 4, JA 543; Initial Decision P 17, JA 396. Thus, under the Quality Bank methodology, "Resid's value is the value of the products from the coking less the cost of the apparatus and material used in coking." Affirming Order P 4, JA 543.[4] The Quality Bank Resid valuation includes a 20% capital recovery factor—also described as a capital investment allowance—that provides for a return of and on the capital investment required to build a coker unit. *See* Initial Decision P 121, JA 443. The Quality Bank methodology likewise includes a 20% capital recovery factor for Light Distillate and Heavy Distillate. Affirming Order P 68, JA 563; Initial Decision P 123 & n.61, JA 443-44.

B. Resid Valuation Litigation

The Resid valuation methodology in use today was developed after significant litigation before the Commission and this Court.

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[3] A "coker" unit is refinery equipment that breaks Resid down into marketable products—*i.e.*, lighter fuel products and a heavy residue, such as asphalt. *See Exxon*, 182 F.3d at 36. Light Distillate and Heavy Distillate also require additional processing to produce marketable products, but are not processed through a coker. Initial Decision P 123 & n.60, JA 443-44.

[4] Petro Star does not process Resid at its refineries, instead returning Resid to the common stream. Initial Decision P 19 & n.26, JA 397.

Because there is no published market price for Resid, valuing it as a product of simple distillation—consistent with the Quality Bank cuts with market prices—is "difficult." *Oxy*, 64 F.3d at 694. The Commission initially used the unadjusted market prices of certain finished products as a proxy for Resid's value. *See id.* at 688. The Court in *Oxy* rejected this approach, explaining that the goal of the Quality Bank is "to assign accurate *relative* values" to the diverse streams delivered to the Pipeline. *Id.* at 693 (emphasis added).

Thus, "if the agency chooses to value some cuts . . . at the prices they command in the market without the benefit of [additional] processing [post-distillation], . . . it must attempt, to the extent possible, to value all cuts at the price they would command without processing." *Id.* at 694. In so holding, the Court emphasized that methodological consistency was key: "FERC must accurately value all cuts . . . or it must overvalue or undervalue all cuts to approximately the same degree." *Id.* at 693. And as the Court later explained, "we did not remand [in *Oxy*] because the old method was inaccurate, but because it was unfairly nonuniform." *Exxon*, 182 F.3d at 38.

On remand from *Oxy*, the Commission approved a methodology that used adjusted market prices of finished products as proxies for the market value of Resid. The Court rejected this methodology for lack of substantial evidence, remanding to the Commission for further proceedings. *Id.* at 41-42.

On remand from *Exxon*, the Commission ordered a hearing before an Administrative Law Judge to address, among other things, the Resid valuation issue. *Trans Alaska Pipeline Sys.*, 97 FERC ¶ 61,150 at 61,651 (2001).[5] Petro Star was a party to those proceedings. After an extensive hearing, the Administrative Law Judge approved a stipulation among the parties stating that the Quality Bank would value Resid as a coker feedstock using the following formula: "Resid = Before-Cost Value of Coker Products – (Coking Costs x Nelson Farrar Index[6])." *Trans Alaska Pipeline Sys.*, 108 FERC ¶ 63,030 at P 25 (2004).

As relevant here, although the parties did not agree on the specific coking cost value, all agreed that coking costs should include a capital recovery factor, *i.e.*, a return of and on the capital required to build a coker unit. Petro Star and other parties advanced the specific approach ultimately adopted by the Administrative Law Judge:

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[5] While the *Oxy* remand was pending, Exxon filed a complaint challenging the distillation methodology. *Tesoro*, 234 F.3d at 1289. Subsequently, Tesoro filed a complaint challenging the Naphtha and VGO cut valuations. *Id.* The Commission rejected both complaints, finding no changed circumstances justifying re-examination of these issues. On review in *Tesoro*, this Court found that the Commission had not responded meaningfully to Exxon's and Tesoro's evidence of changed circumstances. *Id.* at 1294-95. The hearing before the Administrative Law Judge addressed the issues remanded by *Tesoro*, along with the Resid valuation issue remanded by *Exxon*.

[6] The Nelson Farrar Index reflects production cost changes. *See* Initial Decision P 90.

> [A] simple five-year payback following commencement of operations, which is equivalent to a 20% capital recovery factor . . . [T]his is the type of financial return that refiners will typically require for projects of this kind, and [it] . . . is a reasonable approach for use in the Resid coker feedstock valuation calculation.

Id. PP 29, 1228, 1231. In adopting the 20% capital recovery factor supported by Petro Star, the Administrative Law Judge rejected an alternative proposal that would have resulted in a 19.5% capital recovery factor. *Id.* PP 1230-31.

The Commission affirmed the Administrative Law Judge's decision with respect to the Resid valuation issue, with one modification not relevant here. 2005 Order, 113 FERC ¶ 61,062 at P 33. Numerous parties challenged various aspects of the Commission's decision to this Court. However, no party—including Petro Star—challenged the 20% capital recovery factor in the Resid valuation. *See Petro Star*, 268 F. App'x at 8-10. On appeal, this Court upheld the 2005 Order in its entirety, finding that petitioners' challenges "all lack merit." *Id.* at 8. The Resid valuation methodology upheld by the Court in *Petro Star* is the existing just and reasonable methodology now challenged by Petro Star.

II. PROCEDURAL BACKGROUND

This appeal arises from the Commission's initiation of an investigation into the existing Quality Bank methodology under section 15(1) of the Interstate

Commerce Act, 49 U.S.C. App. § 15(1) (1988).[7] Affirming Order P 20, JA 548. As relevant here, section 15(1) authorizes FERC to prescribe just and reasonable rates if, after a hearing, it determines that rates charged by carriers subject to the Commission's jurisdiction are unjust or unreasonable, and that the new rates will be just and reasonable.

The Commission initiated its investigation after Flint Hills Resources Alaska, LLC ("Flint Hills"), which at the time operated a refinery connected to the Pipeline,[8] filed a complaint alleging that the existing Quality Bank methodology undervalues the Resid cut. *See* Affirming Order P 5, JA 544. Flint Hills asserted that, as a result of market circumstances, the Quality Bank methodology had become unjust and unreasonable in assigning too low a value to Resid. *Id.* P 6, JA 544. Flint Hills thus requested that the Commission adopt a new Resid valuation formula. *Id.* P 7, JA 544. Petitioner Petro Star intervened in the complaint

[7] FERC regulates the Pipeline under the Interstate Commerce Act, exercising the powers of the former Interstate Commerce Commission as they existed on October 1, 1977. *Flint Hills*, 631 F.3d at 544 & n.1 (explaining that Congress transferred regulatory authority over oil pipelines from the Interstate Commerce Commission to FERC in the Department of Energy Organization Act, Pub. L. No. 95-91, § 402(b), 91 Stat. 565, 584 (1977), codified as 49 U.S.C. § 60502 (2010)). Citations to the Interstate Commerce Act in this brief are to the 1988 reprint.

[8] Flint Hills withdrew from the Commission proceedings in December 2014 after announcing its intention to terminate its Alaskan refinery operations. *See* Notice of Withdrawal of Flint Hills Resources Alaska, LLC (Dec. 4, 2014), R. 397, JA 570. Flint Hills is not a party to this appeal.

proceeding, along with the State of Alaska ("Alaska") and other parties. Initial Decision, Joint Stip. at 7, JA 387.

Although the Commission found Flint Hills' complaint to be time barred under section 4412(c)(1) of the Motor Carrier Safety Reauthorization Act, Pub. L. No. 109-59, 119 Stat. 1144, 1778-79 (2005),[9] the Commission found that the complaint had "raised issues whether there have been 'changed circumstances,' warranting review of the existing [Quality Bank] formula." Order Dismissing Complaint, Initiating an Investigation and Establishing Hearing, *Flint Hills Res. Alaska, LLC v. BP Pipelines (Alaska) Inc.*, 145 FERC ¶ 61,117 at PP 46-47 (2013) ("Hearing Order"), R. 2, JA 135-36. Accordingly, the Commission set a hearing "to determine whether the existing [Quality Bank] formula for valuing Resid is just and reasonable, and if it is not, what adjustment should be made to the [Quality Bank] formula." *Id.* Finding that section 4412 required that FERC act expeditiously, the Commission ordered the Administrative Law Judge to issue an initial decision within six months, in order to permit the Commission to issue a final decision within 15 months. Hearing Order P 48, JA 136; Affirming Order n.20, JA 548-49.

[9] Section 4412(c)(1) requires claims relating to the Quality Bank to be filed with FERC not later than two years after the date the claim arose.

A. Evidentiary Hearing Before Administrative Law Judge

In accordance with the Hearing Order, Administrative Law Judge H. Peter Young convened a hearing, at which Flint Hills presented testimony and evidence. Petro Star and Alaska participated in the hearing, but did not present testimony or offer any evidence into the record. *See* Initial Decision, Joint Stip. at 7 (listing parties and witnesses), JA 387.

Relying on the testimony of Flint Hills witness Phillip Verleger, Flint Hills and Petro Star argued that a 2005-2013 comparison between the published price of a barrel of Alaska North Slope crude oil (*i.e.*, the common stream coming out of the pipe at Valdez) and the aggregate value of the nine Quality Bank cuts demonstrated that the Quality Bank no longer produced accurate values for Resid. Initial Decision PP 48, 50-51, 53, 54-56, JA 409-412. Mr. Verleger testified that the Quality Bank aggregate valuation exceeded the published price for Alaska North Slope crude from 2005-2008, but that the relationship was reversed during the 2009-2013 period. *Id.* P 48, JA 409-10.

According to Flint Hills, this "reversal" represented a fundamental change in circumstances precipitated by a "global economic collapse." *Id*. Moreover, the "reversal" demonstrates that the Quality Bank is broken because the composite value of the nine Quality Bank cuts should always exceed the value of a barrel of

Alaska North Slope crude oil, due to the added cost of distilling the nine Quality Bank cuts out of crude oil. *Id.* PP 50, 54, JA 410, 411-12.

Flint Hills and Petro Star further argued that the 20% capital recovery factor should be removed from the Resid valuation because current market conditions do not guarantee recovery of the coker unit capital costs included in the processing cost adjustment. *Id.* PP 47, 55, 133-34, JA 409, 412, 449-50. This is because, according to Flint Hills' primary witness, "permanent market changes" have "compell[ed] West Coast refiners to abandon any reasonable expectation they ever again will realize capital investment returns on their cokers." *Id.* P 143, JA 455. Thus, according to Flint Hills and Petro Star, real world refiners do not include a capital investment component in their Resid processing cost calculations, regarding such capital investments as a "sunk" cost. *See, e.g., id.* P 55, JA 412.

B. Administrative Law Judge's Initial Decision

After the hearing concluded, the Administrative Law Judge issued a 78-page decision decisively rejecting Flint Hills and Petro Star's arguments.

As an initial matter, the Administrative Law Judge found—and Flint Hills and Petro Star conceded—that the petitioners had the burden of proving that the existing Quality Bank methodology was unjust and unreasonable as to the Resid valuation. *See* Initial Decision P 40, JA 404. Moreover, if Flint Hills and Petro Star met this burden, they would bear the additional burden of proving that their

proposed revised methodology was just and reasonable. *Id.* n.36, JA 406. The Administrative Law Judge concluded that Flint Hills/Petro Star failed to satisfy their burden.

1. Flint Hills/Petro Star's Less-Than-A-Barrel Theory

Addressing the "less-than-a-barrel" theory, the Administrative Law Judge rejected Flint Hills/Petro Star's position that the Quality Bank composite value exceeded the published price for Alaska North Slope crude from 2005-2008, but that the relationship was reversed during the 2009-2013 period. "The record indicates the Quality Bank composite cut valuation exceeded the . . . common stream market price for most of 2012 and 2013." Initial Decision P 137 n.73, JA 452. Thus, there was no permanent price "reversal," contrary to Flint Hills/Petro Star's position. Rather, the temporary price inversion lasted only three years—and was resolved by the time of the hearing before the Administrative Law Judge.

The Administrative Law Judge also concluded that the theory that the Quality Bank composite value always should exceed the published price for Alaska North Slope common stream crude oil is "simply wrong." *Id.* P 136, JA 451. The objective of the Quality Bank methodology is "to assign accurate *relative values*" to the Quality Bank cuts and individual crude oil streams transported on the Pipeline, consistent with *Oxy*, 64 F.3d at 693. Initial Decision P 137, JA 452. In addition, the Administrative Law Judge did not accept the assumption that simple

distillation adds value to the Quality Bank cuts such that the Quality Bank composite value must always exceed the published price of a barrel of Alaska North Slope crude. *See id.* P 136, JA 451 (Quality Bank composite value "couldn't possibly reflect" the published price of Alaska North Slope crude since the Quality Bank does not take into account any of the advanced processing a real world refinery would perform post-distillation).

2. Flint Hills/Petro Star's Proposal to Eliminate the Capital Recovery Factor from the Resid Valuation

The Administrative Law Judge explained that, even accepting Flint Hills/Petro Star's premise that the Quality Bank composite value is understated, and further accepting that such valuation indicates that at least one component cut is undervalued, it does not necessarily follow that Resid is undervalued with respect to the other cuts. Initial Decision P 138, JA 452-53.

The Administrative Law Judge explained that the Quality Bank achieves the methodological consistency required by *Oxy* and *Exxon* by including identical 20% capital recovery factors in the Light Distillate, Heavy Distillate and Resid processing cost adjustments. *Id.* P 127, JA 446-47. The Administrative Law Judge found that Flint Hills/Petro Star's proposal to remove the capital recovery factor from the Resid valuation violated the methodological consistency principles set forth in *Oxy*, 64 F.3d at 693-94, and *Exxon*, 182 F.3d at 38-40. Initial Decision PP

123-31, JA 443-49. *See also, e.g.*, *id.* PP 126, 131, 138, JA 445-46, 448-49, 452-53 (no comparative evidence offered by Flint Hills/Petro Star).

Although the ruling on the methodological consistency issue "renders it unnecessary to address Flint Hills' evidentiary presentation on the merits," the Administrative Law Judge nevertheless considered the evidence presented in order "to provide the Commission with a comprehensive investigative analysis." *Id.* P 131, JA 448-49. Based on the evidence, the Administrative Law Judge found that West Coast refiners are earning profits, and thus, recovering their capital investments. *See id.* P 144, JA 455-56 (noting that Flint Hills witness Verleger "concedes U.S. West Coast cokers are currently profitable, earning returns both of and on capital investment").

Accordingly, the record contradicted Petro Star/Flint Hills' contentions regarding a permanent market shift that allegedly caused refiners to "abandon[] any expectation they ever again will realize capital investment returns on their cokers . . . . " *See id.* P 120, JA 441. In particular:

> The record . . . contradicts any claim either that West Coast coking capacity or coker utilization rates have deteriorated since [the 2005 Order] was issued . . . The record similarly contradicts Mr. Verleger's claim there has been no significant new investment in West Coast coking capacity. Most important, the record establishes that while U.S. West Coast coking margins varied widely over the period from 2004 through 2013, they were never negative. West Coast average annual coking margins always exceeded $8.00/[barrel]. and were as high as $15.00/[barrel].

Id. P 144, JA 455-56 (citations omitted).

The Administrative Law Judge thus concluded that the inclusion of a capital recovery factor in the Quality Bank Resid valuation continued to be just and reasonable. As the Administrative Law Judge explained, "[I]t is axiomatic that a real world refiner will not invest in a coker unless the refiner has a reasonable long-term expectation it will earn a return both of and on its capital investment." *Id.* P 120, JA 441. And although a refiner's ability to realize such returns may be limited in certain market conditions, "it does not follow that refiners do not expect to realize returns on/of their substantial capital investments over the long term." *Id.* n.55, JA 441-42. Ultimately, "[t]he capital [recovery factor] is an enduring methodological acknowledgement that Resid cannot be . . . processed unless first there has been a significant capital investment in a coker . . . . [T]he QB Methodology cannot legitimately assume a coker without also assuming the capital investment required to build it." *Id.* P 119, JA 441.

C. The Commission's Affirming Order

Upon exceptions filed by Flint Hills, Petro Star, and Alaska, the Commission affirmed the Administrative Law Judge's Initial Decision "in its entirety." Affirming Order, Ordering Paragraph (A), JA 567.

The Commission summarized the Administrative Law Judge's findings regarding Petro Star's less-than-a-barrel theory, including the conclusion that the

claim is "simply wrong." *Id.* PP 73-74, JA 565 (citing Initial Decision PP 133-38, JA 449-53). The Commission also affirmed the Administrative Law Judge's findings, based on the record evidence, that refiners are earning profits and thus generating capital investment returns. *Id.* PP 78-80, JA 566-67. "[R]efiners still receive significant margins for investments in new coker facilities, and . . . coker facility utilization remains at historic levels." *Id.* P 80, JA 567. Thus, "[t]he evidence does not demonstrate that refiners have abandoned any expectation of return[s] on or of investment from cokers." *Id.*

In addition, the Commission affirmed the Administrative Law Judge's rejection of Flint Hills/Petro Star's proposal to eliminate the capital recovery factor from the Resid valuation as inconsistent with this Court's precedent. *Id.* PP 66-71, JA 563-65.

Finally, the Commission rejected Flint Hills/Petro Star's argument that the Administrative Law Judge impermissibly expanded the scope of the hearing beyond the Resid valuation. "The Commission finds no merit to the argument that this investigation was limited in scope to the value of Resid without any reference to the interrelation between valuations of other cuts within the common stream, especially given the *Oxy* court's specific guidance on methodological consistency." *Id.* P 71, JA 564-65.

STANDARD OF REVIEW

This Court reviews Commission actions under the Administrative Procedure Act's arbitrary and capricious standard. 5 U.S.C. § 706(2)(A). The Court's "inquiry under the arbitrary and capricious test is 'narrow and a court is not to substitute its judgment for that of the agency.'" *Exxon*, 182 F.3d at 37 (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Commission decisions will be upheld so long as the Commission "examined the relevant data and articulated a rational connection between the facts found and the choice made." *Tesoro Alaska Co. v. FERC*, 778 F.3d 1034, 1037 (D.C. Cir. 2015). The agency's factual findings, if supported by substantial evidence, are conclusive. *See Kaufman v. Perez*, 745 F.3d 521, 527 (D.C. Cir. 2014); 5 U.S.C. § 706(2)(E).

The Court "give[s] 'special deference' to FERC's expertise in ratemaking cases." *Tesoro*, 778 F.3d at 1037. This is because such cases "involve complex industry analyses and difficult policy choices." *Exxon Mobil Corp. v. FERC*, 430 F.3d 1166, 1172 (D.C. Cir. 2005) (internal quotations and citation omitted). *See also Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 532 (2008) ("The statutory requirement that rates be 'just and reasonable' is obviously incapable of precise judicial definition, and [the Court] afford[s] great deference to the Commission in its rate decisions."). Cases concerning the Quality Bank in

particular "require[] a high level of technical expertise," and thus the Court grants deference to the Commission's "informed discretion." *Exxon*, 182 F.3d at 37 (citation omitted).

Where the agency adopts the decision of an administrative law judge, the Court may affirm on the basis of the administrative law judge's reasoning. *See Cities of Bethany v. FERC*, 727 F.2d 1131, 1144 (D.C. Cir. 1984) (approving FERC's summary affirmance of a 60-page initial decision by an administrative law judge, where the initial decision "sufficiently addresse[d] the [petitioner's] losing arguments . . . and permits intelligent review by the court"). *See also Kenworth Trucks, Inc. v. NLRB*, 580 F.2d 55, 62-63 (3d Cir. 1978) (so long as administrative agency specifically indicates its adoption of the findings and reasoning of administrative law judge, agency is not required to provide an independent statement of reasons for its decision); *City of Frankfort v. FERC*, 678 F.2d 699, 708 & n.18 (7th Cir. 1982) (agency order stating that "[t]he initial decision is affirmed and the proceeding is terminated" is sufficient to indicate adoption of an administrative law judge's opinion for purposes of appellate review).

SUMMARY OF ARGUMENT

The Commission's Affirming Order, along with the detailed, 78-page Initial Decision issued by the FERC Administrative Law Judge, fully explain and justify the Commission's decision. Together, they articulate the Commission's reasons

for concluding that Petro Star failed to carry its burden of proving, first, that the existing Quality Bank methodology has become unjust and unreasonable because of changing market circumstances, and second, that Petro Star's proposed revision to the Quality Bank Resid formula constitutes a just and reasonable replacement.

Disappointed in the outcome of the agency proceedings, Petro Star now asserts on appeal that the Commission failed to address certain arguments, contrary to the requirements of the Administrative Procedure Act. As discussed below, however, the Commission appropriately relied on the Administrative Law Judge's decision and reasonably rejected Petro Star's proposal on two alternative, independent grounds. The Court may uphold the decision on either ground.

First, as discussed in section I below, the Commission and the Administrative Law Judge reasonably determined that Petro Star failed to meet its burden of demonstrating that the existing Quality Bank methodology no longer is just and reasonable.

As explained in section I.A, the Commission and the Administrative Law Judge reasonably found, based on substantial evidence in the record, that refiners were earning profits—and thus, returns on their capital investments—during the relevant period and at the time of the hearing. This finding contradicted Petro Star's contention that temporary changes in market conditions justified permanently eliminating the capital recovery factor from the Resid valuation.

(Petitioner Issue No. 3.)

As explained in section I.B, the Commission and the Administrative Law Judge reasonably determined that Petro Star's less-than-a-barrel theory did not justify revising the Resid valuation. As the Commission and the Administrative Law Judge found (and as Petro Star concedes on appeal), the so-called "less-than-a-barrel anomaly"—when the composite value of the Quality Bank cuts temporarily fell below the price of a barrel of Alaska North Slope crude—lasted only three years, from 2009 through 2012. (Petitioner Issue No. 1.)

Second, as discussed in section II below, the Commission and the Administrative Law Judge reasonably concluded that Petro Star's proposal did not represent a just and reasonable revision to the Quality Bank methodology. Petro Star's proposal violated the relative valuation principles set forth in *Oxy*, 64 F.3d at 693-94, and *Exxon*, 182 F.3d at 38. (Petitioner Issue No. 2.)

Finally, as discussed in section III below, Alaska's brief in intervention does not present grounds for granting the petition. Alaska's arguments are not properly before the Court because they address an issue not raised by Petitioner. In any event, the Commission adequately addresses the issues raised by Alaska, as presented in this case.

The petition should be denied.

ARGUMENT

It is well established in administrative law that "a reviewing court will uphold an agency action resting on several independent grounds if any of those grounds validly supports the result." *Pierce v. SEC*, 786 F.3d 1027, 1034 (D.C. Cir. 2015). Thus, "if an agency has justified an order on alternative grounds, one of which is dispositive, the reviewing court may uphold the agency action." *Id.* *See also Carnegie Natural Gas Co. v. FERC*, 968 F.2d 1291, 1294 (D.C. Cir. 1992) (same).

Here, the Commission rejected Petro Star's proposal to remove the capital recovery factor from the Quality Bank Resid valuation on two independent grounds, either of which is dispositive. *See* Initial Decision P 131, JA 449 (ruling on evidentiary issues, although "unnecessary" to do so). As described in section I below, the Commission reasonably found that the Resid valuation's capital recovery factor remains just and reasonable in light of the record evidence.

The Commission's factual findings regarding refinery market conditions, *see* section I.A, are conclusive and Petro Star's petition may be denied on this basis alone. *See, e.g., Dillmon v. NTSB*, 588 F.3d 1085, 1089 (D.C. Cir. 2009) (agency's factual findings may be adopted "as conclusive if supported by substantial evidence . . . even though a plausible alternative interpretation of the evidence would support a contrary view") (citation omitted). The Court need go no further.

Nevertheless, as we explain, the Commission also determined that Petro Star's less-than-a-barrel theory did not justify revising the Quality Bank methodology as Petro Star proposed (section I.B), and further rejected Petro Star's proposal as inconsistent with this Court's rulings in *Oxy*, 64 F.3d at 693-94, and *Exxon*, 182 F.3d at 38-40 (section II). These determinations are reasonable and fall comfortably within the Commission's discretion.

Because the Commission affirmed the Administrative Law Judge's Initial Decision in its entirety, the Court may review the agency's action on the basis of the reasoning set forth in both the Initial Decision and the Affirming Order. *See, e.g.*, *Cities of Bethany*, 727 F.2d at 1144.

I. THE COMMISSION REASONABLY FOUND THAT MARKET CONDITIONS DO NOT SUPPORT REMOVING THE CAPITAL RECOVERY FACTOR FROM THE RESID VALUATION

A. Substantial Evidence in the Record Establishes that Refiners Are Profitable and Are Earning Returns on Capital Investments

Petro Star does not dispute that it had the burden of proving—based on evidence of an alleged permanent market shift arising after FERC's adoption of the existing Resid valuation formula—that the capital recovery factor should be removed from the Resid valuation. *See* Initial Decision P 40, JA 404. The Affirming Order and Initial Decision decisively rejected the evidence proffered by Flint Hills in support of the Flint Hills/Petro Star proposal. *See* Affirming Order PP 78-80, JA 566-67; Initial Decision PP 118-120, 143-44, JA 441-43, 455-56.

There is no merit to Petro Star's contention on appeal that FERC failed to respond to its arguments. *See* Pet. Br. 48-57.

Petro Star did not present testimony or offer any evidence in the agency proceedings, choosing instead to rely on testimony and evidence introduced by Flint Hills. Relying on testimony by Flint Hills witness Verleger, Petro Star argued to the agency that the capital recovery factor should be removed from the Resid valuation because "permanent market changes" have compelled West Coast refiners "to abandon any reasonable expectation they ever again will realize capital investment returns on their cokers." Initial Decision P 143, JA 455. Thus, according to Petro Star, refiners consider their capital investments in coker units to be a "sunk cost." *Id.*

The Commission and the Administrative Law Judge found that the record contradicted Petro Star's arguments that market conditions dictated that cokers have become uneconomic. In particular, the Administrative Law Judge addressed the alleged market developments supporting Petro Star's "sunk cost" rationale: (1) excess West Coast coker capacity, as evidenced by reduced coker utilization rates, (2) an absence of new coker investment, and (3) severely depressed refining asset values. *Id.* P 144, JA 455-56. The Administrative Law Judge found that "[t]he record contradicts all three." *Id.*

As the Administrative Law Judge explained, "[t]he record . . . contradicts any claim either that West Coast coking capacity or coker utilization rates have deteriorated since [the 2005 Order] was issued . . . The record similarly contradicts [Flint Hills/Petro Star]'s claim there has been no significant new investment in West Coast coking capacity." *Id.* (citing various record items, including Ex. FHR-1 at 60-61, JA 222-23 (Flint Hills witness testimony); Ex. EM-47 at 33, JA 300 (Exxon Mobil witness testimony)).[10]

Significantly, the Administrative Law Judge found:

> Most important, the record establishes that while U.S. West Coast coking margins varied widely over the period from 2004 through 2013, they were never negative. West Coast average annual coking margins always exceeded $8.00/bbl. and were as high as $15.00/bbl.

Id. P 144, JA 455-56 (citing Ex. CPA-1 at 38-41, JA 167-70 (ConocoPhillips witness testimony)). Indeed, as the Administrative Law Judge noted, Flint Hills' main witness "concede[d] U.S. West Coast cokers are currently profitable, earning returns both of and on capital investment." *Id.* P 144, JA 455-56 (citing Tr. 507, 510-11, JA 348, 351-52 (Verleger hearing testimony); Ex. FHR-1 at 32-33, JA 213-14 ("data provided by Mr. Verleger for other purposes indicating West Coast coking refineries were profitable from 2009-2013")). The record thus confirmed

[10] The Administrative Law Judge noted: "[T]he hearing in this investigation was replete with instances in which testimony, data, graphs and other evidence purporting (and appearing on face) to establish certain facts or correlations proved misrepresentative/misleading when subjected to informed cross-examination." Initial Decision n.14, JA 392.

that refiners earned profits—and thus, returns on their capital investments—throughout the 2004-2013 time period, and at the time of the hearing before the Administrative Law Judge.

The Commission adopted these findings, stating that "[t]he record confirms that refiners still receive significant margins for investment in new coker facilities . . . . " Affirming Order P 80, JA 567. In sum, "[t]he evidence does not demonstrate that refiners have abandoned any expectation of return on or of investment from cokers." *Id.* "Thus, a capital investment allowance remains appropriate for purposes of the [Quality Bank] methodology." *Id.*

On appeal, Petro Star asserts that cokers cannot actually reap a 20% return on capital by coking Resid. Pet. Br. 52. However, as the Administrative Law Judge expressly noted, "while real world market conditions might not support the 20% capital [recovery factor] found in the Resid processing cost adjustment, Flint Hills/Petro Star make no argument the allowance should be reduced to some lower/more representative percentage." Initial Decision P 120, JA 442. Rather, "[t]hey argue it should be completely and permanently eliminated." *Id.*

The Commission thus reasonably rejected Petro Star's proposal to completely and permanently eliminate the capital recovery factor from the Resid valuation—*i.e.*, the argument actually made to the agency. To the extent Petro Star now argues that a lower capital recovery factor is warranted, it is barred from

doing so. *See Tesoro Refining & Mktg. Co. v. FERC*, 552 F.3d 868, 872 (D.C. Cir. 2009) ("A party must first raise an issue with an agency before seeking judicial review. . . . It is true that the [Interstate Commerce Act] contains no rehearing requirement. But *ExxonMobil* specifically rejected this as an excuse for failing to exhaust administrative remedies, stating that the petitioners' 'error was not failing to seek rehearing, but rather failing to raise the issue at all.'") (citing *ExxonMobil Oil Corp. v. FERC*, 487 F.3d 945, 962 (D.C. Cir. 2007)).

The Commission's factual findings, based on substantial evidence, that Petro Star failed to satisfy its burden of proving that the market conditions warranted removal of the capital recovery factor from the Resid valuation, are conclusive. The Court need go no further and may uphold on this ground alone. Nevertheless, we proceed to address Petro Star's remaining arguments.

B. The Temporary Price Inversion Cited by Petro Star Does Not Support Permanently Eliminating the Capital Recovery Factor from the Resid Valuation

Contrary to Petro Star's contentions, Pet. Br. 35-43, the Commission and the Administrative Law Judge reasonably addressed the so-called "less-than-a-barrel anomaly," and declined to permanently revise the Resid valuation on that basis. Examining the 2004-2013 data in the record, the Administrative Law Judge found that, for the three-year period from 2009-2012, the composite value of the Quality Bank cuts at times fell below the price of a barrel of Alaska North Slope crude.

See Initial Decision P 137 n.73, JA 452 ("The record indicates the Quality Bank composite cut valuation exceeded the . . . common stream market price for most of 2012 and 2013"). On appeal, Petro Star concedes the temporary nature of this price inversion. Pet. Br. 15-16 ("Beginning in 2009 . . . the expected relationship became suddenly reversed. . . . This reversed relationship stayed in place until at least 2012.").

The Commission thus reasonably declined to permanently eliminate the capital recovery factor from the Resid valuation on the basis of temporary market conditions arising after the 2008-2009 global recession. The Commission and the Administrative Law Judge's decisions demonstrate that the Quality Bank methodology is designed for the long run, and should not be changed in response to transient market conditions. *See, e.g.*, Pet. Br. 48-51. As the Administrative Law Judge explained, "[I]t is axiomatic that a real world refiner will not invest in a coker unless the refiner has a reasonable long-term expectation it will earn a return both of and on its capital investment." Initial Decision P 120, JA 441. Further, "It would be economically irrational for a refiner to invest significant capital in a coker with the sole expectation of realizing marginal processing revenues." *Id.* *See also* Affirming Order P 80, JA 567 (same).

Moreover, the market is not always as straightforward as Petro Star hypothesizes. As the Administrative Law Judge recognized, Petro Star's theory

rests on the unproven premise that simple distillation adds sufficient value such that the Quality Bank composite value must always exceed the price of a barrel of Alaska North Slope crude. But the record does not contain evidence proving this premise. Indeed, as the Administrative Law Judge noted, significant additional processing takes place after simple distillation in a typical refinery, during which advanced equipment is used to produce finished, marketable products out of crude oil. Initial Decision P 136, JA 451. The Quality Bank methodology does not reflect such value-adding additional processing. *See id.*

The Initial Decision further notes that "there are no simple distillation refineries operating on the U.S. West Coast," suggesting that refineries may not be able to cover the cost of distillation without additional processing. *Id.* P 136 n.71, JA 451 (citing Ex. EM-47 at 19, JA 286 (testimony of Exxon Mobil witness Keeley)). As Mr. Keeley explained in his testimony:

> It is not surprising that the value of the nine distillation cuts might have fallen below the value of the crude being distilled when the demand for refined products declined precipitously after the onset of the last recession. Although presumably distillation normally adds value, there are no distillation refineries operating on the West Coast—presumably because simple distillation refineries cannot, without further refining, cover the costs of distillation.

Ex. EM-47 at 20, JA 287.

Thus, contrary to Petro Star's view that "[t]he less-than-a-barrel anomaly was at the heart of this proceeding," Pet. Br. 37, the so-called anomaly was merely

one piece of evidence from which Petro Star sought to draw the inference that refiners are not recovering their capital investments. That inference was overwhelmingly rebutted by other evidence. The temporary price inversion may have warranted investigation when first presented in Flint Hills' complaint, but when taken in the context of the record as a whole developed in the course of that investigation, it did not compel the Commission to adopt a new formula under section 15(1) of the Interstate Commerce Act.

II. THE COMMISSION REASONABLY REJECTED PETRO STAR'S PROPOSAL TO REMOVE THE CAPITAL RECOVERY FACTOR FROM THE RESID VALUATION AS INCONSISTENT WITH THIS COURT'S PRECEDENT

Contrary to Petro Star's contention, Pet. Br. 43-48, the Commission did not err in concluding that Petro Star's proposal to remove the capital recovery factor from the Resid valuation—but not from the Light Distillate or Heavy Distillate cut valuations—violated the methodological consistency principles set forth in *Oxy*, 64 F.3d at 693-94, and *Exxon*, 182 F.3d at 38-40. *See* Affirming Order PP 66-71, JA 563-65; Initial Decision 123-31, JA 443-49.

The Administrative Law Judge explained that the Quality Bank methodology achieves the methodological consistency required by *Oxy* and *Exxon* by including identical 20% capital recovery factors in the Light Distillate, Heavy Distillate and Resid processing cost adjustments. Initial Decision P 127, JA 446-47. Petro Star's proposal would effectively unravel the careful balance achieved

by the current Quality Bank methodology after years of litigation, including the agency proceedings leading to the 2005 Order and appellate proceedings leading to this Court's 2008 *Petro Star* decision. *See supra* pp. 10-11 (explaining prior proceedings, including *Petro Star*'s affirmance of 2005 Order).

Petro Star offered no rationale justifying such a selective revision to the Quality Bank methodology. As the Administrative Law Judge pointed out, Flint Hills and Petro Star failed to offer any comparative analysis demonstrating that the Quality Bank methodology was assigning inaccurate *relative* valuations among the various cuts and crude oil streams. *See* Initial Decision PP 126, 131, 138, JA 445-46, 448-49, 452-53. "The complete absence of relative valuation evidence and analysis falls far short of satisfying the Flint Hills/Petro Star burden of proof on this issue." *Id.* P 138, JA 453. *See also id.* P 131, JA 448 ("[I]t conceivably *could* be the case U.S. West Coast cokers have lost their capital value while West Coast facilities processing Light Distillate and Heavy Distillate have not. . . . But there has been absolutely no demonstration—or attempt to demonstrate—any such disparate circumstances in this investigation.").

Moreover, the Commission and the Administrative Law Judge appropriately rejected Petro Star's argument that the Hearing Order limited the scope of the investigation to the Resid cut alone, thus leaving the parties free to propose revisions to the Resid valuation without concern for methodological consistency.

See Affirming Order PP 70-71, JA 564-65; Initial Decision PP 128-31, JA 447-49. The Hearing Order initiated the investigation of the Quality Bank's Resid valuation in response to a complaint filed by Flint Hills regarding the Resid valuation. Nothing in the Hearing Order, however, suggests that the Commission intended to consider revising the Quality Bank methodology's treatment of Resid in isolation from the other cuts. *See* Affirming Order P 71. In light of this Court's decisions in *Oxy*, 64 F.3d at 693-94, and *Exxon*, 182 F.3d at 38-40, Petro Star could not reasonably read it otherwise. *See also, e.g.*, *Alabama Mun. Elec. Auth. v. FERC*, 662 F.3d 571, 573 (D.C. Cir. 2011) (affording deference to agency's interpretations of its own orders).

To the extent that Petro Star proposes on appeal to remove the capital recovery factor from all three "pre-market" cuts (Resid, Light Distillate, and Heavy Distillate) to "achieve commensurate valuation" with the six "marketable" cuts, *see* Pet. Br. 21-22, 48-51, Petro Star failed to raise this argument below and cannot raise it now.[11] *See Tesoro Refining*, 552 F.3d at 872. And Petro Star's suggestion,

[11] *See* Petro Star Br. on Exceptions 45-53, R. 382, JA 510-18 (arguing that the capital investment allowance may be removed from the Resid valuation alone, and further arguing that Petro Star limited its arguments before the agency to Resid because of the Hearing Order); *see also* Initial Decision P 130, JA 448 ("Petro Star suggests Resid valuation accuracy is paramount here, and the Commission need not consider whether eliminating the 20% capital investment allowance from the Resid processing cost adjustment renders the Resid valuation inconsistent with the Light Distillate and Heavy Distillate valuations.").

Pet. Br. 44, that the expedited proceeding before the agency somehow deprived it of the opportunity to address the methodological consistency issue is meritless. Although the Commission directed the Administrative Law Judge to issue a decision in six months, the parties submitted evidence and testimony and participated in an evidentiary hearing. In any event, since Petro Star chose to rely on Flint Hills' evidence rather than sponsoring any witnesses or offering any evidence of its own, it is unlikely, and Petro Star does not demonstrate, that additional time would have substantially changed its presentation to the agency.

III. ALASKA'S ARGUMENT DOES NOT PROVIDE GROUNDS FOR GRANTING PETRO STAR'S PETITION

Alaska's intervenor brief takes no position on the merits of the Resid valuation issues raised by Petro Star. Alaska Br. 3. Rather, Alaska raises an entirely different issue concerning the showing that parties are permitted to make when challenging the Quality Bank methodology. *See* Alaska Br. 3. According to Alaska, the Commission failed to meaningfully respond to Alaska's argument that a party challenging the Quality Bank methodology "should be allowed to suggest an alternative, superior, pro-competitive methodology to replace the existing [Quality Bank] methodology." *Id.* at 17.

Alaska's arguments in intervention are not properly before the Court because they address an issue not raised by Petitioner. Except in extraordinary circumstances not present here, "[i]ntervenors may only argue issues that have

been raised by the principal parties; they simply lack standing to expand the scope of the case to matters not addressed by the petitioners in their request for review." *Nat'l Ass'n of Regulatory Util. Comm'rs v. ICC*, 41 F.3d 721, 729 (D.C. Cir. 1994); *Cal. Dep't of Water Res. v. FERC*, 306 F.3d 1121, 1126 (D.C. Cir. 2002) (same). Accordingly, Alaska's arguments do not present grounds for granting Petro Star's petition.

In any event, the Commission adequately addressed the issues raised by Alaska, as presented in this case. *See* Affirming Order P 52, JA 557. The Commission reasonably and correctly explained that parties are free to present analyses regarding alternative, superior methodologies when challenging the Quality Bank methodology. *Id.* P 55, JA 558. Simply demonstrating that an alternative is superior to the existing methodology, however, is not sufficient to meet the burden of proving that the existing methodology is unjust and unreasonable; more than one methodology may be just and reasonable under the circumstances. *Id.* PP 51-55, JA 556-58 (citing court and agency cases). Indeed, Petro Star conceded that it had the burden of proving that the existing Quality Bank methodology had ceased to be just and reasonable. Initial Decision P 40, JA 404.

With respect to Alaska's suggestion that "existing Quality Bank methodologies may be just and reasonable but still distort competition in ways that

the Commission must be able to address," Alaska Br. 12, section 15(1) of the Interstate Commerce Act expressly authorizes FERC to set aside rates that it finds to be unjustly discriminatory or otherwise unlawful. 49 U.S.C. App. § 15(1) (1988). This proceeding focuses on the unjust and unreasonable standard because it arises from a complaint alleging that the existing Quality Bank methodology no longer is just and reasonable. Nothing in the Commission's decision suggests it will not exercise its authority to address allegedly discriminatory or otherwise unlawful rates in appropriate circumstances.

CONCLUSION

For the foregoing reasons, the petition for review should be denied.

Respectfully submitted,

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November 12, 2015

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32(a), I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 8,675 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in Times New Roman 14-point font using Microsoft Word 2010.

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November 12, 2015

ADDENDUM

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STATUTES:

Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392; Pub. L. 94–574, §1, Oct. 21, 1976, 90 Stat. 2721.)

HISTORICAL AND REVISION NOTES

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

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

AMENDMENTS

1976—Pub. L. 94–574 provided that if no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer as defendant.

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392.)

HISTORICAL AND REVISION NOTES

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

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

§ 705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

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

HISTORICAL AND REVISION NOTES

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

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

§ 706. Scope of review

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

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

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

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

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

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

(D) without observance of procedure required by law;

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

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

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

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

HISTORICAL AND REVISION NOTES

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

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

ABBREVIATION OF RECORD

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

CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

HISTORICAL AND REVISION NOTES—CONTINUED

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
60301(e)	49 App.:1682a(d) (less words after ''subsection (a) of this section'' and before ''shall be sufficient'').	

In this section, the word ''prescribe'' is substituted for ''establish'' for consistency in the revised title and with other titles of the United States Code.

In subsection (a), the words ''(hereafter in this section referred to as the 'Secretary')'' and ''appropriate'' are omitted as surplus.

In subsection (b), the words ''after September 30, 1985'' are omitted as obsolete. The words ''imposed on each person'' are substituted for ''assessed to the persons'' for consistency in the revised title and with other titles of the Code. The words ''the jurisdiction of'' and ''assess and'' are omitted as surplus.

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

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

TRANSFER OF FUNCTIONS

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

STUDY AND REPORT ON USER FEE ASSESSMENT FACTORS

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

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

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

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

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

CHAPTER 605—INTERSTATE COMMERCE REGULATION

Sec.
60501. Secretary of Energy.
60502. Federal Energy Regulatory Commission.
60503. Effect of enactment.

§ 60501. Secretary of Energy

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

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

HISTORICAL AND REVISION NOTES

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

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

ABOLITION OF INTERSTATE COMMERCE COMMISSION AND TRANSFER OF FUNCTIONS

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

§ 60502. Federal Energy Regulatory Commission

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

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

HISTORICAL AND REVISION NOTES

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

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

ABOLITION OF INTERSTATE COMMERCE COMMISSION AND TRANSFER OF FUNCTIONS

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

ule proposed to be filed, and upon such request the Commission shall hold a hearing with respect to such schedule. Such hearing may be conducted without answer or other formal pleading, but reasonable notice shall be provided to interested parties. Unless, prior to the 180-day period following the filing of such notice of intention, the Commission determines, after a hearing, that the proposed schedule, or any part thereof, would be unlawful, such carrier may file the schedule at any time within 180 days thereafter to become effective after 30 days' notice. Such a schedule may not, for a period of 5 years after its effective date, be suspended or set aside as unlawful under section 1, 2, 3, or 4 of this Appendix, except that the Commission may at any time order such schedule to be revised to a level equaling the variable costs of providing the service, if the rate stated therein is found to reduce the going concern value of the carrier.

(Feb. 4, 1887, ch. 104, pt. I, § 15, 24 Stat. 384; June 29, 1906, ch. 3591, § 4, 34 Stat. 589; June 18, 1910, ch. 309, § 12, 36 Stat. 551; Feb. 28, 1920, ch. 91, §§ 418–421, 41 Stat. 484–488; Mar. 4, 1927, ch. 510, § 2, 44 Stat. 1447; June 19, 1934, ch. 652, § 602(b), 48 Stat. 1102; Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543; Sept. 18, 1940, ch. 722, title I, § 10(a)–(d), 54 Stat. 911, 912; Feb. 5, 1976, Pub. L. 94–210, title II, §§ 201, 202(c)–(e), 203(a), 206, title III, § 302, 90 Stat. 34–37, 39, 41, 48; Oct. 19, 1976, Pub. L. 94–555, title II, § 220(m), 90 Stat. 2630; Nov. 8, 1978, Pub. L. 95–607, title IV, § 401, 92 Stat. 3067.)

§ 15a. 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:

§ 15a. Fair return for carriers

(1) "Rates" defined

When used in this section, the term "rates" means rates, fares, and charges, and all classifications, regulations, and practices relating thereto.

(2) Ratemaking criteria; nonapplicability to common carriers by railroad subject to chapter

In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service. This paragraph shall not apply to common carriers by railroad subject to this chapter.

(3) Competition between carriers of different modes of transportation; nonapplicability to common carriers by railroad subject to chapter

In a proceeding involving competition between carriers of different modes of transportation subject to this Act, the Commission, in determining whether a rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic by the carrier or carriers to which the rate is applicable. Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act. This paragraph shall not apply to common carriers by railroad subject to this chapter.

(4) Revenue levels of common carriers by railroad; standards and procedures for establishment

With respect to common carriers by railroad, the Commission shall, within 24 months after February 5, 1976, after notice and an opportunity for a hearing, develop and promulgate (and thereafter revise and maintain) reasonable standards and procedures for the establishment of revenue levels adequate under honest, economical, and efficient management to cover total operating expenses, including depreciation and obsolescence, plus a fair, reasonable, and economic profit or return (or both) on capital employed in the business. Such revenue levels should (a) provide a flow of net income plus depreciation adequate to support prudent capital outlays, assure the repayment of a reasonable level of debt, permit the raising of needed equity capital, and cover the effects of inflation and (b) insure retention and attraction of capital in amounts adequate to provide a sound transportation system in the United States. The Commission shall make an adequate and continuing effort to assist such carriers in attaining such revenue levels. No rate of a common carrier by railroad shall be held up to a particular level to protect the traffic of any other carrier or mode of transportation, unless the Commission finds that such rate reduces or would reduce the going concern value of the carrier charging the rate.

(5) Consideration of allegations of change in rate relationships between commodities, ports, etc., and effect on competitive position of shippers or consignees by proposed rate increase or decrease

The Commission shall, in any proceeding which involves a proposed increase or decrease in railroad rates, specifically consider allegations that such increase or decrease would change the rate relationships between commodities, ports, points, regions, territories, or other particular descriptions of traffic (whether or not such relationships were previously considered or approved by the Commission) and allegations that such increase or decrease would have a significantly adverse effect on the competitive position of shippers or consignees served by the railroad proposing such increase or decrease. If the Commission finds that such allegations as to change or effect are substantially supported on the record, it shall take such steps as are necessary, either before or after such proposed increase or decrease becomes effective and either within or outside such proceeding, to investigate the lawfulness of such change or effect.

(6) Adjustment of interstate rates

(a) Duty of Commission; petitions; requirements and considerations

The Commission shall by rule, on or before August 1, 1973, establish requirements for petitions for adjustment of interstate rates of common carriers subject to this chapter based upon increases in expenses of such carriers resulting from any increases in taxes under the Railroad Retirement Tax Act, as amended [26 U.S.C. 3201 et seq.], occurring on or before January 1, 1975, or as a result of the enactment of the Railroad Retirement Amendments of 1973. Such requirements, established pursuant to section 553 of title 5 (with time for comment limited so as to meet the required date for establishment and subject to future amendment or revocation), shall be designed to facilitate fair and expeditious action on any such petition as required in subparagraph (b) of this paragraph by disclosing such information as the amount needed in rate increases to offset such increases in expenses and the availability of means other than a rate increase by which the carrier might absorb or offset such increases in expenses.

(b) Interim rates; public notice requirement

Notwithstanding any other provision of law, the Commission shall, within thirty days of the filing of a verified petition in accordance with rules promulgated under subparagraph (a) of this paragraph, by any carrier or group of carriers subject to this chapter, permit the establishment of increases in the general level of the interstate rates of said carrier or carriers in an amount approximating that needed to offset increases

over a period of 5 years and deposited into the Airport and Airway Trust Fund and available for projects eligible under chapter 471 of title 49, United States Code.

(2) The United States will not be responsible for any environmental cleanup of any land with respect to which such release is made.

(3) All airport and aviation-related equipment located at Rialto Municipal Airport and owned by the City of Rialto before the date of the release will be transferred to a commercial airport referred to in paragraph (1)(A).

SEC. 4409. CONFORMING AMENDMENTS.

Section 218 of title 23, United States Code, is amended—

(1) in subsection (a) by striking "prior to the date of the enactment of the reauthorization of the Transportation Equity Act for the 21st Century"; and

(2) by adding at the end the following:

"(c) For purposes of this section, the term 'Alaska Marine Highway System' includes all existing or planned transportation facilities and equipment in Alaska, including the lease, purchase, or construction of vessels, terminals, docks, floats, ramps, staging areas, parking lots, bridges and approaches thereto, and necessary roads.".

SEC. 4410. RALPH M. BARTHOLOMEW VETERANS' MEMORIAL BRIDGE.

(a) DESIGNATION.—The bridge joining the Island of Gravina to the community of Ketchican, Alaska, constructed pursuant to section 144(g)(1)(E) of title 23, United States Code, is designated as the "Ralph M. Bartholomew Veterans' Memorial Bridge".

(b) REFERENCES.—Any reference in law, map, regulation, document, paper, or other record of the United States to the bridge referred to in subsection (a) shall be deemed to be a reference to the "Ralph M. Bartholomew Veterans' Memorial Bridge".

SEC. 4411. DON YOUNG'S WAY.

(a) DESIGNATION.—The Knik Arm bridge in Alaska to be planned, designed, and constructed pursuant to section 117 of title 23, United States Code, as high priority project number 2465 under section 1702 of this Act, is designated as "Don Young's Way".

(b) REFERENCES.—Any reference in law, map, regulation, document, paper, or other record of the United States to the bridge referred to in subsection (a) shall be deemed to be a reference to "Don Young's Way".

SEC. 4412. QUALITY BANK ADJUSTMENTS.

(a) DEFINITION OF TAPS QUALITY BANK ADJUSTMENTS.—In this section, the term "TAPS quality bank adjustments" means monetary adjustments paid by or to a shipper of oil on the Trans Alaska Pipeline System through the operation of a quality bank to compensate for the value of the oil of the shipper that is commingled in the Pipeline.

(b) PROCEEDINGS.—

(1) IN GENERAL.—In a proceeding commenced before the date of enactment of this Act, the Federal Energy Regulatory Commission may not order retroactive changes in TAPS quality bank adjustments for any period before February 1, 2000.

(2) PROCEEDINGS COMMENCED AFTER THE DATE OF ENACTMENT.—In a proceeding commenced after the date of enactment

of this Act, the Commission may not order retroactive changes in TAPS quality bank adjustments for any period that exceeds the 15-month period immediately preceding the earliest date of the first order of the Federal Energy Regulatory Commission imposing quality bank adjustments in the proceeding.

(c) DEADLINE FOR CLAIMS.—

(1) IN GENERAL.—A claim relating to a quality bank under this section shall be filed with the Federal Energy Regulatory Commission not later than 2 years after the date on which the claim arose.

(2) FINAL ORDER.—Not later than 15 months after the date on which a claim is filed under paragraph (1), the Federal Energy Regulatory Commission shall issue a final order with respect to the claim.

SEC. 4413. TECHNICAL AMENDMENT.

Section 5006(d) of Public Law 101–380 is amended by inserting "annual" before "amount".

TITLE V—RESEARCH

Subtitle A—Funding

SEC. 5101. AUTHORIZATION OF APPROPRIATIONS.

(a) IN GENERAL.—The following sums are authorized to be appropriated out of the Highway Trust Fund (other than the Mass Transit Account):

(1) SURFACE TRANSPORTATION RESEARCH, DEVELOPMENT, AND DEPLOYMENT PROGRAM.—To carry out sections 502, 503, 506, 507, 509, and 510 of title 23, United States Code, and sections 5201, 5203, 5204, 5309, 5501, 5502, 5503, 5504, 5506, 5511, 5512, and 5513 of this title $196,400,000 for each of fiscal years 2005 through 2009 shall be available.

(2) TRAINING AND EDUCATION.—To carry out section 504 of title 23, United States Code, and section 5502 of this Act $26,700,000 for each of fiscal years 2005 through 2009.

(3) BUREAU OF TRANSPORTATION STATISTICS.—For the Bureau of Transportation Statistics to carry out section 111 of title 49, United States Code, $27,000,000 for each of fiscal years 2005 through 2009.

(4) UNIVERSITY TRANSPORTATION RESEARCH.—To carry out sections 5505 and 5506 of title 49, United States Code, $69,700,000 for each of fiscal years 2005 through 2009.

(5) INTELLIGENT TRANSPORTATION SYSTEMS (ITS) RESEARCH.—To carry out subtitle C of this title, and section 511 of title 23, United States Code, $110,000,000 for each of fiscal years 2005 through 2009.

(6) ITS DEPLOYMENT.—To carry out sections 5208 and 5209 of the Transportation Equity Act for the 21st Century (112 Stat. 458; 112 Stat. 460), $122,000,000 for fiscal year 2005.

(b) APPLICABILITY OF TITLE 23, UNITED STATES CODE.—Funds authorized to be appropriated by subsection (a) shall be available for obligation in the same manner as if such funds were apportioned under chapter 1 of title 23, United States Code; except that the Federal share of the cost of a project or activity carried out using such funds shall be 50 percent, unless otherwise expressly provided

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, on November 12, 2015, I served the foregoing brief on all parties to this proceeding through the Court's CM/ECF system.

/s/ Susanna Y. Chu
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