ORAL ARGUMENT NOT YET SCHEDULED

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

Nos. 16-1013, 16-1018, 16-1022, 16-1025 and 16-1026

BP PIPELINES (ALASKA) INC., *ET AL.*,
Petitioners,

v.

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

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

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

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November 14, 2016

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Respondents submit:

A. Parties and Amici

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

B. Ruling Under Review

BP Pipelines (Alaska) Inc., Order on Initial Decision, Opinion No. 544, 153 FERC ¶ 61,233 (2015), JA 855.

C. Related Cases

Other than the proceedings referenced in Petitioners' Certificate as to Parties, Rulings and Related Cases, counsel is not aware of any related cases pending before this Court or any other court.

/s/ Lona T. Perry
Lona T. Perry

November 14, 2016

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GLOSSARY

FERC or Commission	Federal Energy Regulatory Commission
Initial Decision	Initial Decision, *BP Pipelines (Alaska) Inc.*, 146 FERC ¶ 63,019 (2014), JA 924
Order	Order on Initial Decision, *BP Pipelines (Alaska) Inc.*, Opinion No. 544, 153 FERC ¶ 61,233 (2015), JA 855
Pipelines	Petitioners BP Pipelines (Alaska) Inc., ConocoPhillips Transportation Alaska, Inc., ExxonMobil Pipeline Co., Koch Alaska Pipeline Co., LLC, and Unocal Pipeline Co.
System	The Trans Alaska Pipeline System

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STATEMENT OF THE ISSUES

Petitioners[1] are pipelines that provided transportation service on the Trans Alaska Pipeline System at the time of Pipelines' 2009 and 2010 rate filings at issue in this appeal. Pipelines challenge an order of the Federal Energy Regulatory

[1] Petitioners (hereinafter "Pipelines") are BP Pipelines (Alaska) Inc., ConocoPhillips Transportation Alaska, Inc., ExxonMobil Pipeline Co., Koch Alaska Pipeline Co., LLC, and Unocal Pipeline Co. (hereinafter collectively "Pipelines"). All Pipelines were owners and transporters on the Trans Alaska Pipeline System ("System") at the time of the rate filings at issue in this appeal, but Koch and Unocal subsequently provided notice of their withdrawal from the System.

Commission ("FERC" or "Commission"), on review of an Administrative Law Judge's Initial Decision, excluding certain costs from Pipelines' cost of service for those years. *See BP Pipelines (Alaska) Inc.*, Opinion No. 544, 153 FERC ¶ 61,233 (2015), JA 854 ("Order"); *BP Pipelines (Alaska) Inc.*, 146 FERC ¶ 63,019 (2015), JA 924 ("Initial Decision"). The specific issues Pipelines raise are:

1. Whether the Commission reasonably excluded Pipelines' $ 113.4 million underpayment of 2006 ad valorem taxes from Pipelines' 2010 cost of service on two independent grounds: because recovery of 2006 costs in 2010 rates would violate the rule against retroactive ratemaking, and because the 2006 underpayment was a non-recurring cost that does not represent Pipelines' ad valorem tax expenses in 2010;

2. Whether the Commission reasonably excluded a portion of Pipelines' costs for the Strategic Reconfiguration Project from their cost of service as imprudent, because, based upon facts Pipelines knew or should have known at the time they approved the Project, Pipelines failed to reasonably evaluate the costs and benefits of the massive project; and

3. Whether Pipelines' due process claim relating to Pump Station 1 costs in the Strategic Reconfiguration Project is premature, given that the Commission declined to address recovery of Pump Station 1 costs in this proceeding, as those costs were not included in Pipelines' 2009 or 2010 rates.

STATUTORY PROVISIONS

Pertinent statutes and regulations are contained in the Addendum.

STATEMENT OF THE CASE

I. TRANS ALASKA PIPELINE SYSTEM RATE PROCEEDINGS

The Trans Alaska Pipeline System is an 800-mile pipeline that transports crude oil from Alaska's North Slope to the Port of Valdez. *Tesoro Alaska Co. v. FERC,* 778 F.3d 1034, 1035 (D.C. Cir. 2015). Pipelines jointly owned the Trans Alaska Pipeline System at the time of the 2009 and 2010 rate filings at issue in this appeal. Order P 2 & n.2, JA 858. The System is operated by Alyeska Pipeline Service Company, which is also jointly owned by Pipelines. *Id*. P 2, JA 859.

The original System rates were filed in 1977, which led to protracted litigation. *See Arctic Slope Reg'l Corp. v. FERC*, 832 F.2d 158, 160 (D.C. Cir. 1987). In 1985, Pipelines and Alaska reached a settlement establishing a rate-setting methodology that prevailed through 2004, but, beginning with Pipelines' 2005 and 2006 rates, FERC began to apply its general methodology for oil pipeline ratemaking. *Tesoro*, 778 F.3d at 1036.

The Commission orders setting Pipelines' 2005 and 2006 rates were affirmed by this Court. *See BP Pipelines (Alaska) Inc*., 125 FERC ¶ 61,215 PP 103, 115 (2008), *on reh'g*, 127 FERC ¶ 61,317 (2009), *aff'd sub nom. Flint Hill Res. Alaska LLC v. FERC*, 627 F.3d 881 (D.C. Cir. 2010). Pipelines' 2007 and

2008 rate filings were contested, *see BP Pipelines (Alaska) Inc.*, 127 FERC ¶ 61,047 P 17, *on reh'g*, 128 FERC ¶ 61,219 (2009), but the appeal of that order was voluntarily dismissed. *See Williams Alaska Petroleum, Inc. v. FERC*, 2011 WL 1768846 (D.C. Cir. Apr. 7, 2011) (granting voluntary dismissal).

This appeal concerns Pipeline rate filings made in 2009 and 2010. *See* Order PP 3 & n.4, 110, JA 859, 913; Initial Decision PP 22-61, JA 935-47 (describing the relevant rate filings).

II. PIPELINES' 2009 AND 2010 RATE FILINGS

In this appeal, Pipelines challenge three determinations made with regard to their 2009 and 2010 rate filings. Specifically, this appeal concerns whether Pipelines are able to recover in their 2010 rates additional amounts Pipelines were required to pay for 2006 ad valorem taxes; whether Pipelines were imprudent in approving the Strategic Reconfiguration Project; and whether Pipelines' due process claims regarding Pump Station 1 costs are premature as the Commission reached no conclusion regarding those costs in this proceeding.

A. Recovery Of 2006 Ad Valorem Taxes In 2010 Rates

Under Alaska law, municipalities may levy an annual tax on oil pipeline property, at the value assessed by the State Department of Revenue. *BP Pipelines (Alaska) Inc. v. State Dep't of Revenue*, 325 P.3d 478, 480 (Alaska 2014). A party may appeal that assessment to the State Assessment Review Board, whose

determination may be reviewed in a trial *de novo* before the Alaska Superior Court, which decision may be appealed to the Alaska Supreme Court. *Id*.

Prior to 2005, the Department of Revenue valued the Trans Alaska Pipeline System using an income valuation methodology. *See State Dep't of Revenue v. BP Pipelines (Alaska) Inc*., 354 P.3d 1053, 1056 (Alaska 2015). In 2005, the Department replaced the income valuation method with a so-called cost approach, which led to a System valuation of $3 billion. *Id*. The Assessment Review Board affirmed the $3 billion valuation and the use of the cost approach. *Id*. at 1056-57.

For 2006, the Department again used the cost methodology, and assessed the System value at $3.64 billion. *BP Pipelines (Alaska) Inc.*, 325 P.3d at 481. In May 2006, after a hearing, the Assessment Review Board rejected Pipelines' argument that the System should be valued using the income approach, and raised the valuation to $4.3 billion. *Id*. Pipelines and the taxing municipalities appealed the assessment to the Superior Court, with Pipelines arguing that the system should be valued under the income approach at $850 million, and the municipalities arguing that the assessed value under the cost approach should be $11.57 billion. *Id*. Following a trial *de novo*, in 2010 the Superior Court found the cost approach appropriate, and set the System value at $9.98 billion for the 2006 tax year. *Id*. The Alaska Supreme Court affirmed that determination in 2014. *Id*. at 496.

Based upon this valuation, the Superior Court determined that Pipelines underpaid their 2006 ad valorem taxes by $113.4 million. Order P 117, JA 915.

In the rate filings at issue in this appeal, Pipelines are attempting to recover the additional $113.4 million in assessed 2006 taxes in their 2010 rates. *Id*. The Commission affirmed the Initial Decision's determination that recovery of 2006 tax liability in going forward 2010 rates would violate the rule against retroactive ratemaking. *Id*. P 128, JA 917. The rule against retroactive ratemaking prohibits the Commission from adjusting current rates to compensate for previous over- or under-recovery of costs in prior periods. *Id*. (citing, *e.g*., *Town of Norwood v. FERC*, 53 F.3d 377, 381 (D.C. Cir. 1995)). Pipelines' 2006 costs, including their 2006 ad valorem tax liability, were to be recovered in the rates effective at that time. *Id*. The subsequent litigation regarding Pipelines' 2006 ad valorem tax liability does not convert the 2006 ad valorem taxes into a cost which may be recovered in rates in a future period. *Id*.

The Commission also alternatively found that the 2006 taxes could not be included in Pipelines' going forward 2010 rates because they were a non-recurring cost. *Id*. P 127, JA 917. The payment of back taxes from 2006 is a one-time expense that does not reflect Pipelines' future ad valorem tax levels. *Id*. (citing 18 C.F.R. § 346.2(a)(i)). Thus, these back taxes should not have been included in Pipelines' 2010 cost of service projections. *Id*.

B. The Prudence Of Approving The Strategic Reconfiguration Project

The Strategic Reconfiguration Project was the largest modification to the Trans Alaska Pipeline System since the pipeline was constructed in the 1970s. Order P 5, JA 860. The Project involved replacing gas turbine pumps at the four remaining System pump stations with new electric pumps, and automating the pump stations. *Id*. Although the existing gas turbines could remain operational well into the future, the Project was supposed to reduce personnel and major maintenance expenses by $1.1 billion over a 20-year period. *Id*. PP 5, 66, JA 860, 893.

Following preliminary engineering, Pipelines in March 2004 approved the Project, at a projected cost of $242 million, to be completed by the end of 2005. Order P 7, JA 861. The Project was plagued with delays and escalating costs. *Id*. At the close of the record in this proceeding, the reconfiguration of one pump station (Pump Station 1) was still not complete, and Project costs were projected to reach $786 million. *Id*.

After a lengthy hearing, the Initial Decision determined that Pipelines were imprudent in both approving and implementing the Strategic Reconfiguration Project. *Id*. P 4, JA 860. On exceptions to the Initial Decision, Pipelines did not challenge the determination that they imprudently implemented the Project, *id*. n.7,

JA 860, but they did challenge the finding that they were imprudent in approving the Project in the first instance. *Id*. P 7, JA 861.

The Commission extensively reviewed the record evidence, *see id*. PP 12-85, JA 864-902, and affirmed the determination of the Administrative Law Judge that Pipelines' decisions in approving the Project were imprudent. *See id*. P 85, JA 902. Prudent management requires considering the costs and benefits prior to initiating a project, particularly where, as here, the primary purpose of the Project was to create net cost savings. *Id*. PP 85, 88, JA 902, 905. The Commission found that the record demonstrated that Pipelines failed to perform a reasonable cost-benefit analysis. *Id*. P 85, JA 902. Prior to approval, Pipelines knew or should have known that their estimates of the costs and benefits of the Project were inaccurate. *Id*.

C. Recovery Of Costs Associated With Pump Station 1 In The Strategic Reconfiguration Project

Although the Administrative Law Judge concluded that all aspects of the Strategic Reconfiguration Project were imprudent -- including both approval and implementation -- as a matter of equity, the Administrative Law Judge permitted Pipelines to recover $229 million of Project investment costs, which represented early cost estimates for the Project. Order P 89, JA 906. The Commission affirmed this remedy, except that the Commission required removal of all costs associated with Pump Station 1 from the allowed $229 million in costs, because

Pump Station 1 had not entered into service prior to the end of the test period in this proceeding, and Pump Station 1-related costs were not part of the proposed 2009 and 2010 rates. *Id*. P 98, JA 909.

The Commission reversed the Initial Decision determination barring Pipelines from claiming costs for Project upgrades in any future rate case, particularly related to Pump Station 1, finding it premature to address future filings related to Pump Station 1 costs. *Id*. PP 105, 109, JA 911, 912. Accordingly, the Commission held it will address the appropriate recovery for Pump Station 1 costs if and when Pipelines make a subsequent rate filing to recover such costs. *Id*.

SUMMARY OF ARGUMENT

Denying Recovery of 2006 Back Taxes In 2010 Rates: The Commission reasonably affirmed the Initial Decision's determination that Pipelines could not recover in their 2010 rates a $113.4 million back payment of 2006 ad valorem taxes on two independent bases. Recovery of 2006 tax liability in going forward 2010 rates would violate the retroactive ratemaking doctrine, which prohibits the Commission from adjusting current rates to compensate for prior over- or under-recovery of costs. Pipelines' 2006 costs, including their 2006 ad valorem tax liability, were to be recovered in the rates effective at that time. That rate litigation ultimately restated the amount of Pipelines' 2006 ad valorem tax liability does not

convert the 2006 ad valorem taxes into a cost which may be recovered in rates in a future period.

The Commission alternatively found that the additional 2006 taxes could not be included in Pipelines' 2010 rates because they were non-recurring. The 2010 cost of service is meant to project Pipelines' costs going forward. The payment of back taxes from 2006 is a one-time expense that does not reflect Pipelines' future ad valorem tax levels. Thus, these back taxes should not have been included in Pipelines' 2010 cost of service projections.

Finding That Pipelines Imprudently Approved The Strategic Reconfiguration Project: The Commission reasonably affirmed the Initial Decision's conclusion that Pipelines imprudently approved the Strategic Reconfiguration Project. (Pipelines did not challenge the Initial Decision determination that they imprudently implemented the Project.) Prudent management requires considering the costs and benefits prior to initiating a project, particularly where, as here, the purpose of the Project was to provide net cost savings. Here, Pipelines committed to the Project based upon an unrealistic cost estimate (which was a mere third of the final cost) and similarly unsubstantiated estimates of the benefits in cost savings.

Pipelines contend that they were aware of flaws in the pre-approval cost and benefit estimates only in hindsight. The Commission to the contrary found that

Pipelines should have known of the flaws in the estimates at the time of approval based upon facts known to them or that should have been known to them in the exercise of reasonable diligence. Prior to Project approval, Pipelines knew that they had retained an engineering firm that lacked Alaska or Arctic experience, they had retained a Project manager with experience managing only much smaller projects, and they had adopted an aggressively accelerated schedule for project completion, all of which impaired Project planning, preliminary engineering and the ability to obtain accurate cost and benefit estimates. Additionally, prior to approval, Pipelines received reports from an outside consultant and internal complaints from Pipeline employees raising concerns about the pre-approval cost estimates and poor quality preliminary engineering.

Pipelines also made fundamental errors in the Project design, causing material understatement of cost projections, that could have been avoided had Pipelines exercised reasonable diligence: (i) Pipelines' cost estimates assumed that most Project work would be done off-site at non-operating facilities, when reconfiguring existing pump stations actually required extensive and expensive on-site work while the pump stations were operating; (ii) Pipelines assumed they would be able to avoid upgrades to fire suppression and gas systems, without determining the Alaska regulatory requirements; and (iii) Pipelines failed to verify

that the contractor hired to build the variable speed motors for the Project actually had successfully built such motors in the past.

The Commission also found that Pipelines failed to reasonably estimate the projected personnel and major maintenance cost savings from the Project. Pipelines did not raise to the Commission or on brief a challenge to the Initial Decision's finding that Pipelines imprudently estimated major maintenance savings resulting from the Project. The Commission also reasonably found that Pipelines' estimated personnel cost savings were based upon the same flawed preliminary engineering as the cost estimates, and rejected Pipelines' claim that the Project had actually produced personnel cost savings.

Accordingly, the Commission reasonably found that Pipelines, as sophisticated subsidiaries of major international energy companies, in the exercise of reasonable management, knew or should have known that their cost and benefits estimates for the Project were flawed prior to the time that Pipelines approved the Project. This is precisely the type of factual, record-based judgment, on a highly technical ratemaking subject, for which the Commission is entitled to deference.

Declining to Address Pump Station 1 Costs: The Commission reasonably reversed the Initial Decision determination that Pipelines are precluded by the imprudence determination in this proceeding from seeking recovery in future proceedings for costs related to Pump Station 1. Although the prudence

determinations made here logically apply to the Project as a whole, the Commission found it premature to address issues relating to recovery of Pump Station 1 costs, because those costs were not included in the rate filings at issue in this appeal. Accordingly, as the Commission expressly made no ruling in the challenged order on recovery of Pump Station 1 costs, Pipelines have suffered no injury with regard to recovery of Pump Station 1 costs, and their due process claim relating to those costs is premature.

ARGUMENT

I. STANDARD OF REVIEW

The Court reviews FERC orders under the Administrative Procedure Act's arbitrary and capricious standard. *See, e.g.*, *Sithe/Indep. Power Partners v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999); 5 U.S.C. § 706(2)(A). "The 'scope of review under the 'arbitrary and capricious standard is narrow.'" *FERC v. Elec. Power Supply Ass'n*, 136 S.Ct. 760, 782 (2016) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). "A court is not to ask whether a regulatory decision is the best one possible or even whether it is better than the alternatives." *Id*. "Rather, the court must uphold a rule if the agency has "'examine[d] the relevant [considerations] and articulate[d] a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made.'" *Id*. (quoting *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43).

"And nowhere is that more true than in a technical area like [] rate design: '[W]e afford great deference to the Commission in its rate decisions.'" *Id*. (quoting *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 532 (2008)). This is particularly true on review of the Commission's ratemaking decisions concerning the Trans Alaska Pipeline System. *See, e.g.*, *Tesoro*, 778 F.3d at 1037.

The Court upholds FERC's factual findings if they are supported by substantial evidence. *See, e.g., Exxon Co., USA v. FERC*, 182 F.3d 30, 38 (D.C. Cir. 1999). "Once assured the Commission has engaged in reasoned decisionmaking, it is not for [the Court] to reweigh the conflicting evidence or otherwise to substitute [its] judgment for that of the Commission." *Ind. Mun. Power Agency v. FERC*, 56 F.3d 247, 254 (D.C. Cir. 1995).

The challenged order affirmed certain determinations of an Administrative Law Judge. Where the Commission adopts an Administrative Law Judge's conclusion, it need not repeat the Administrative Law Judge's findings and reasoning. *See, e.g., Boroughs of Ellwood City v. FERC*, 731 F.2d 959, 967-68 (D.C. Cir. 1984).

II. THE COMMISSION'S RATE DETERMINATIONS IN THE CHALLENGED ORDER WERE REASONABLE.

This appeal concerns Commission determinations regarding Pipelines' proposed 2009 and 2010 rates. Pipelines bear the burden of demonstrating that their proposed rates are just and reasonable. Initial Decision P 102, JA 960 (citing Interstate Commerce Act §§ 1(5), 15(1), 15(7), 49 U.S.C. app. §§ 1(5), 15(1), 15(7) (1988)).[2] Here, Pipelines failed to carry their burden of showing that their 2006 tax liability was properly recoverable in their 2010 rates, or that their decision to approve the Strategic Reconfiguration Project was prudent. As for the costs of Pump Station 1 in the Strategic Reconfiguration Project, Pipelines' due process claim is premature as the Commission expressly declined in the challenged order to decide the issue of recovery of Pump Station 1 costs.

A. The Commission Reasonably Denied Recovery Of 2006 Ad Valorem Taxes In 2010 Rates.

An ad valorem tax is one imposed on property according to its value. *See Quinault Indian Nation v. Grays Harbor Cnty.*, 310 F.3d 645, 647 n.1 (9th Cir. 2002). Under Alaska Statute § 43.56.060, the Alaska Department of Revenue assesses the value of oil properties as of January 1 of the assessment year to determine the annual property taxes due the State of Alaska and taxing

[2] *See Frontier Pipeline Co. v. FERC*, 452 F.3d 774, 776 (D.C. Cir. 2006) (explaining citations to the 1988 appendix in FERC oil pipeline cases).

municipalities. *BP Pipelines (Alaska) Inc. v. State Dep't of Revenue*, 327 P.3d 185, 187 (Alaska 2014). This appeal involves the valuation of the Trans Alaska Pipeline System as of January 1, 2006, the lien date for assessment of 2006 ad valorem taxes. Initial Decision n.845, JA 1445.

The Alaska Department of Revenue originally assessed the 2006 System value at $3.34 billion. *BP Pipelines (Alaska) Inc.*, 327 P.3d at 187. The State Assessment Review Board increased the assessment in April 2006 to $4.3 billion. *Id*. at 188. In June 2006, Pipelines paid the assessed tax of $86 million (Alaska's 2 percent ad valorem tax rate multiplied by the $4.3 billion assessed value) and appealed the assessment to the Alaska Superior Court. *See* TAPS Carriers' Brief on Exceptions to Initial Decision, at 217-18, JA 4108-09.

On appeal, the taxing municipalities argued that the valuation should be increased to $11.57 billion, whereas Pipelines argued that it should be decreased to $850 million. *BP Pipelines (Alaska) Inc.*, 327 P.3d at 188. Following a trial *de novo*, the Superior Court issued a 2010 decision, subsequently affirmed by the Alaska Supreme Court, assessing the System's 2006 value at $9.98 billion. *Id*. *See also BP Pipelines (Alaska) Inc*., 325 P.3d at 480-82, 496. This resulted in an additional tax payment for 2006 of $113.4 million (the additional assessed value of $5.67 billion multiplied by the 2 percent tax rate). *See* TAPS Carriers' Brief on Exceptions to Initial Decision at 217, JA 4108.

As Pipelines made the supplemental 2006 tax payment in 2010 following the Superior Court's decision, Pipelines assert that they are entitled to recover that payment in their 2010 rates. The Commission reasonably affirmed the Initial Decision's rejection of this argument on two independent grounds. First, recovering 2006 costs in 2010 rates would violate the rule against retroactive ratemaking. Order P 128 & n.338, JA 917. Further, the supplemental payment of 2006 taxes was a non-recurring cost that is not representative of Pipelines' future tax costs and therefore it should not be embedded in Pipelines' going forward 2010 rates. *Id*. P 129, JA 918. These conclusions independently support the Commission's determination to exclude the supplemental 2006 tax payment from Pipelines' 2010 cost of service. *See, e.g., Pierce v. SEC*, 786 F.3d 1027, 1034 (D.C. Cir. 2015) ("a reviewing court will uphold an agency action resting on several independent grounds if any of those grounds validly supports the result"); *Carnegie Natural Gas Co. v. FERC*, 968 F.2d 1291, 1294 (D.C. Cir. 1992) (same).

1. The Commission Reasonably Concluded That The Rule Against Retroactive Ratemaking Prohibits Including 2006 Tax Costs In 2010 Rates.

a. As A Cost Of Providing 2006 Service, Pipelines' 2006 Ad Valorem Tax Liability Should Have Been Recovered In 2006 Rates.

Pipelines' rates for 2006 -- including costs for ad valorem tax liability -- were fully litigated before the Commission, *see BP Pipelines (Alaska) Inc*., 125

FERC ¶ 61,215 (2008), *on reh'g*, 127 FERC ¶ 61,317 (2009), and petitions for review of those orders were denied or dismissed by this Court in *Flint Hills Res. Alaska v. FERC*, 627 F.3d 881 (D.C. Cir. 2010).[3] Pipelines acknowledge that, under the rule against retroactive ratemaking, they could not now go back and include the $113.4 million in 2006 back taxes in their 2006 rates. *See* TAPS Carriers' Brief on Exceptions to Initial Decision at 10, JA 3901 ("All parties agree that, consistent with the rule against retroactive ratemaking, [Pipelines] could not go back and change their rates for 2006 to reflect the additional tax liability."). *See also* Initial Decision P 1630, JA 1447 ("The parties do not dispute that the filed rate doctrine and the rule against retroactive ratemaking bar [Pipelines] from altering 2006 rates or including in current rates expenses properly included in 2006 rates."). Accordingly, the question presented here is whether Pipelines can include their payment of back taxes for 2006 in their 2010 rates.

As the Commission found, Pipelines' 2006 costs -- including the annual 2006 ad valorem taxes -- were to be recovered in the rates effective at that time. Order PP 128, 129 n.339, JA 917, 918. Accordingly, the Commission reasonably affirmed the Initial Decision determination that Pipelines' recovery of 2006 ad

[3] Pipelines made subsequent rate filings for 2007 and later years, *see BP Pipelines (Alaska) Inc.*, 127 FERC ¶ 61,047 (2009) (addressing 2007 and 2008 rate filings), *on reh'g*, 128 FERC ¶ 61,219 (2009), so the rates approved for 2006 were effective only for 2006.

valorem tax costs in 2010 would violate the rule against retroactive ratemaking. Order P 128 & n.338, JA 917. "The retroactive ratemaking doctrine prohibits the Commission from authorizing 'a utility to adjust current rates to make up for past errors in projections. If a utility includes an estimate of certain costs in its rates and subsequently finds out that the estimate was too low, it cannot adjust *future* rates to recoup past losses.'" *Id*. n.338, JA 917 (quoting *Town of Norwood v. FERC*, 53 F.3d 377, 381 (D.C. Cir. 1995)).

Pipelines assert the 2006 rates were not based on an estimate of 2006 costs,[4] but rather on Pipelines' actual 2005 costs. Pipeline Brief at 24, 26. This ignores, of course, that actual 2005 costs were used as the "base period" for setting 2006 rates under the Commission's test period methodology. *See BP Pipelines (Alaska) Inc*., 125 FERC ¶ 61,215 P 103 & n.83.

The Commission sets a pipeline's cost of service by totaling operation and maintenance expenses, depreciation and taxes, including ad valorem taxes. *Williston Basin Interstate Pipeline Co. v. FERC*, 165 F.3d 54, 56 (D.C. Cir. 1999). "As it is ordinarily impossible for a pipeline to know at the time of filing what its actual costs will be during the effective period of the filed rates," the Commission

[4] In the 2006 rate proceeding, the Commission rejected Pipelines' request to use actual 2006 data, *see* Pipeline Brief at 26 n.6, because Pipelines had never included that data in the record, which prevented other parties from reviewing or challenging the data. *See BP Pipelines (Alaska) Inc*., 125 FERC ¶ 61,215 P 115.

uses a "test period" approach to set such costs, where rates are based upon actual experience over the most recent twelve-month period (the base period), adjusted for changes that are "known and measurable" occurring within the next nine months. *Id*. at 56-57.

Thus, in setting the pipeline's costs under this methodology, the Commission looks not at the actual costs incurred for the rate year in question, but rather what "one could have predicted those costs to be, based on what was known [during the test year]." *BP West Coast Products, LLC v. FERC*, 374 F.3d 1263, 1298-99 (D.C. Cir. 2004). *See also, e.g., Williston Basin*, 165 F.3d at 57 (test period approach uses "representative cost data available at the time of filing"). Specifically, "[t]he Commission's policy is that the latest actual [ad valorem] taxes incurred during the test period is the best evidence of future tax expense." *Williston Basin Interstate Pipeline Co*., 87 FERC ¶ 61,265 at 62,024 (1999) (cited Initial Decision P 1638 n.851, JA 1450). Accordingly, 2005 costs were used to set 2006 rates as the best available estimate of Pipelines' future ad valorem tax liability. That the 2006 rates as approved by the Commission (and affirmed by this Court) ultimately did not accurately estimate the 2006 ad valorem taxes does not change the fact that costs associated with providing service in 2006, including taxes, were to be covered by 2006 rates. Order PP 128, 129 & n.339, JA 917, 918.

See, e.g., Papago Tribal Util. Auth. v. FERC, 773 F.2d 1056, 1059 (D.C. Cir. 1985) (recognizing the "inexactness" of rates set by test period).

It should also be noted that, had Pipelines prevailed in the Alaska litigation on their claim that the $4.3 billion System assessment should be reduced to $850 million, *see BP Pipelines (Alaska) Inc*., 327 P.3d at 188, under the rule against retroactive ratemaking they would have had no obligation to refund the overcharges for ad valorem taxes. *See* Initial Decision PP 1640, 1652, JA 1451, 1455. The rule against retroactive ratemaking "prohibits the Commission from adjusting current rates to compensate for previous over- or under-recovery of costs in prior periods." Order P 128, JA 917. *See also, e.g., Pub. Utils. Comm'n of Cal. v. FERC*, 894 F.2d 1372, 1383 (D.C. Cir. 1990) (rule against retroactive ratemaking "is a two-way street"); *Williston Basin Interstate Pipeline Co*., 84 FERC ¶ 61,081 at 61,370 (1998) (no refund required if ad valorem tax varies due to litigation between pipeline and taxing authorities).

Accordingly, Pipelines' argument that the Commission's holding will discourage beneficial tax appeals has no applicability here. *See* Pipeline Brief at 28 (citing *Mountain States Tel. & Tel. Co. v. FCC*, 939 F.2d 1035, 1046-47 (D.C. Cir. 1991), and *Iroquois Gas Transmission Sys. v. FERC*, 145 F.3d 398 (D.C. Cir. 1998)). The only holding here is that the annual 2006 ad valorem taxes are not recoverable in 2010 rates. Moreover, Pipelines would have benefitted from the

cost over-recovery in the event that they had prevailed in the Alaska valuation litigation. The prospect of cost over-recovery in the event of success would be expected to provide incentive to engage in meritorious tax litigation.

b. The Fact That Back Taxes Were Assessed In 2010 Does Not Change This Analysis.

Pipelines assert that, "[a]lthough the supplemental tax relates to the 2006 tax year," the liability for the supplemental payment was not incurred until 2010, and therefore it should be recoverable as a 2010 cost. Pipeline Brief at 20-21. However, the fact that the supplemental payment was not determined until 2010 does not change the fact that assessed taxes for the 2006 tax year are a cost of providing service in 2006, and customers have already paid the filed rate for 2006 service. Order P 128 & n.338, JA 917 (citing *Pac. Gas & Elec. Co. v. FERC*, 373 F.3d 1315, 1320 (D.C. Cir. 2004)). In *Pacific Gas*, the Court found that the imposition of new charges that are tied to past jurisdictional services violates the rule against retroactive ratemaking. 373 F.3d at 1320. As customers "'have already paid the filed rate for this service,'" "'any imposition of new costs based on these previous transactions is prohibited.'" Order n.338, JA 917 (quoting *Pacific Gas*, 373 F.3d at 1320).

That Pipelines are not proposing to increase 2006 rates, but to include the supplemental tax payment prospectively in 2010 rates, Pipeline Brief at 21, does not change the analysis. "[E]ven charges that are imposed prospectively, and

therefore satisfy the filed rate doctrine, are improper if they are based on the pipeline's losses in a prior period." *Pub. Utils. Comm'n of the State of Cal. v. FERC*, 988 F.2d 154, 161 (D.C. Cir. 1993). "[T]he relevant inquiry [is] to 'identify the purchase decision to which the costs are attached.'" *Id*. at 160. As the Commission found, here, the 2006 ad valorem tax is a cost attached to 2006 purchases, and therefore the proposed recovery violates the retroactive ratemaking doctrine. Order P 128, JA 917.

Pipelines assert that the supplemental payment did not represent back taxes because the supplemental payment was not assessed until 2010 following the decision of the Superior Court. Pipeline Brief at 21. The Commission reasonably concluded that "[t]he subsequent litigation regarding [Pipelines'] 2006 ad valorem tax liability d[id] not covert the 2006 ad valorem taxes into a cost that may be recovered in rates in a future period." Order P 128, JA 918. Indeed, Pipelines made this same argument to the Alaska Supreme Court in an attempt to avoid paying interest on the supplemental payment. *BP Pipelines (Alaska) Inc*., 325 P.3d at 495-96. The Alaska Supreme Court rejected the argument, finding that "the superior court's judgment was not a new assessment but instead a reassessment of the original, mistaken assessed value of the pipeline. We agree with the superior court that interest on the additional taxes owed runs from the due date in the year of the original assessment." *Id*. at 496.

While Pipelines cite *Enbridge Pipelines (KPC)*, 100 FERC ¶ 61,260 at PP 303-06 (2002) for the proposition that ad valorem tax payments "become effective" when billed, Pipeline Brief at 23, in *Enbridge*, the tax bills were for the current tax year's ad valorem tax liability, not for a tax year four years in the past. *See* Initial Decision n.853, JA 1450. Likewise, costs to settle take or pay issues are included in current rates, *see* Pipeline Brief at 27 (citing *Transwestern Pipeline Co.*, 73 FERC ¶ 61,091 at 61,280-81 (1995)), because such settlement costs are incurred to terminate or reform gas purchase contracts, and thus the costs are presently incurred and relate to current or future service. Order n.339, JA 918 (citing *Pub. Utils. Comm'n*, 988 F.2d at 161). "Here, by contrast, the costs are for 2006 tax liabilities related to a liability incurred in 2006 and were covered by the then existing rates." *Id*.

2. 2006 Back Taxes Also Are Not Properly Recoverable In 2010 Rates Because They Are A Non-Recurring Cost.

In addition to the bar of the rule against retroactive ratemaking, the Commission reasonably concluded that the 2006 back taxes were unrecoverable in the 2010 rates because they were not a recurring cost that could properly be embedded in going forward rates. Order P 127, JA 917. The 2010 cost of service is intended to project future costs, and the payment of back taxes for 2006 does not reflect Pipelines' future ad valorem tax levels. *Id*. (citing 18 C.F.R. 346.2(a)(1)(i)) (the 12-month base period of actual experience must be adjusted to remove non-

recurring items)). For this independent reason, the back taxes for 2006 were improperly included in Pipelines' 2010 cost of service projections. *Id.*

Pipelines assert that the 2006 back tax payment is in fact a recurring expense because they have been charged with additional back taxes for 2007, 2008, and 2009. Pipeline Brief at 30. As the Commission found, however, the $113 million payment for back taxes from 2006 does not reflect an appropriate amount of ad valorem taxes to be included in the 2010 cost of service. Order P 127, JA 917. Treating the 2006 back taxes as recurring would embed that $113 million payment -- in addition to the cost of ad valorem taxes charged in 2010 -- in going forward 2010 rates. *See* Initial Decision P 1650, JA 1454.

In lieu of including the 2006 back taxes in the 2010 cost of service as a recurring item, Pipelines argue that the Commission should have approved a normalizing adjustment -- either a surcharge or the amortization of the costs over a set period -- to permit cost recovery. Pipeline Brief at 31-35.

The Commission reasonably rejected Pipelines' alternative proposals, finding that Pipelines cite cases related to various extraordinary events such as Hurricane Katrina and the September 11, 2001 attacks, in which alternative relief was permitted. Order P 129, JA 918. Furthermore, the cases on which Pipelines relied concerned the recovery of future costs, not a prior period tax liability. *Id.* *See* cases cited in Pipeline Brief at 32: *Chevron Pipe Line Co.*, 115 FERC

¶ 61,117 P 31 (2006) (approving surcharge for future costs of repairing hurricane damage); *Extraordinary Expenditures Necessary to Safeguard National Energy Supplies*, 96 FERC ¶ 61,299 at 62,129 (2001) (statement of policy regarding permissibility of rate recovery mechanisms, including surcharges, for the future costs of enhanced security measures following September 11, 2001); *SFPP, L.P.*, 118 FERC ¶ 61,267 P 6 (2007) (accepting surcharge to recover costs of compliance with Environmental Protection Agency regulations that are "extraordinary costs.")

Pipelines assert that surcharges have been approved in other cases based upon events not described as "extraordinary." Pipeline Brief at 33. However, as the Commission explained in one of Pipelines' cited cases, a surcharge may be appropriate where "the expense is of a type that is not expected to be continuously incurred over the life of the pipeline and is not of the type that would be periodically adjusted as part of a general rate case." *SFPP, L.P.*, 111 FERC ¶ 61,334 P 50 (2005) (cited Pipeline Brief at 32-35) (surcharge allowed for "unusually large, non-recurring legal expenses" (P 47) but denied for expenses of long-term reconditioning project commenced in the test year (PP 48-51)). *See, e.g., BP West Coast*, 374 F.3d at 1293-94 (litigation costs were unlikely to reoccur and therefore were properly recovered by a temporary surcharge instead of a permanent increase in rates).

The cases cited in Pipelines' Brief at 32-33 illustrate this point: *SFPP, L.P.*, 113 FERC ¶ 61,277 P 103 (2005) (amortization of test year write off for cancellation of central control software program); *Seaway Crude Pipeline Co., LLC*, 154 FERC ¶ 61,070 PP 119-22 (2016) (amortization of remediation costs incurred during the test year); *Lakehead Pipe Line Co.*, 71 FERC ¶ 61,338 at 62,316 (1995) (amortization of hydrostatic testing costs preventing oil spills, "benfit[ting] ratepayers in the future."). The expenses subject to surcharge or amortization in these cases were not of the type "continuously incurred over the life of the pipeline" nor "periodically adjusted as part of a general rate case." *SFPP, L.P.*, 111 FERC ¶ 61,334 P 50. Further, the surcharges or amortization were to recover current or future expenses. Order P 129, JA 918.

In contrast, here, ad valorem taxes are a standard part of the pipeline's annual cost of service, and estimates of ad valorem taxes are included in proposed rates based on a test period. *See* Initial Decision P 1651, JA 1455; *Williston Basin*, 165 F.3d at 56 (a pipeline's cost of service includes ad valorem taxes); 18 C.F.R. § 346.2(c)(2) (pipeline taxes are included in pipeline operating and maintenance expenses for cost of service purposes). Further, the 2006 ad valorem tax costs are not current but rather are a "prior period tax liability." Order P 129, JA 918.

Thus, as the Commission reasonably found, the failure to accurately estimate taxes is not an extraordinary event justifying a surcharge or amortization, nor are

such alternatives appropriate for current recovery of tax liability from a prior period. Order P 129, JA 918. That the Commission permitted Pipelines to recover litigation costs through a six-year surcharge in this case, Pipeline Brief at 34, is illustrative. In contrast to the ad valorem tax situation, the Commission found a surcharge appropriate for Pipelines' reasonable costs of litigating this rate proceeding because it was a "large and complex litigation initiated in 2009" that caused Pipelines to incur "unusually high litigation costs," and there was "significant uncertainty" whether those high costs would continue into future years. Order P 134, JA 919. Thus, the unusually-high litigation costs were both unlikely to be recurring and were current costs for litigating 2009 and 2010 rates that were properly recoverable in those rates. *Id*.

B. The Commission Reasonably Found Approval Of The Strategic Reconfiguration Project Imprudent.

The Strategic Reconfiguration Project -- the largest modification to the Trans Alaska Pipeline System since the pipeline's construction in the mid-1970s -- involved replacing gas turbine-driven pumps in the four operating pump stations (Nos. 1, 3, 4, and 9) with pumps driven by variable electric motors, and automating the pump stations. Order P 5, JA 860. Although the existing gas turbines were expected to remain operational well into the future, the Project was supposed to produce net cost savings in personnel and major maintenance expenses of $1.1 billion over a 20-year period. *Id*. PP 5, 88, JA 860, 905.

In October 2002, Pipelines formed the Strategic Reconfiguration Project Team and appointed John Barrett Project Manager. Order P 7, JA 861. Preliminary engineering was authorized in December 2002, and a preliminary engineering design report was produced in November 2003 by SNC-Lavalin Constructors Inc. (electrification of the pump stations) and Hinz Automation (automation of the pump stations). *Id*. In December 2003, based upon the contractors' cost estimates of $242 million, Alyeska requested authorization to construct the Project, with completion scheduled for the end of 2005. *Id*. PP 5 & n.10, 7, JA 860, 861; Pipeline Brief at 11. Pipelines approved the Project, and the project transitioned from preliminary engineering to implementation in March 2004. Order P 7, JA 861.

Subsequent to implementation, the Project suffered serious delays and costs escalated sharply. *Id*. P 8, JA 862. At the close of the record in this proceeding, Project facilities at Pump Stations 3, 4, and 9 had entered into service, but the upgrades at Pump Station 1 were not expected to enter into service until 2014. *Id*. The total estimated Project cost had reached $786 million. *Id*.

Following an extensive hearing, *see* Initial Decision PP 92-1464, JA 957-1392, the Administrative Law Judge found all aspects of the Project imprudent; Pipelines imprudently "sanctioned" (approved) the Project for construction and imprudently implemented the Project. Order PP 4, 89, JA 860, 906. The

Administrative Law Judge rejected, however, excluding all Project costs from Pipelines' rates as too harsh a remedy. Initial Decision P 1459, JA 1391. Instead, the Administrative Law Judge permitted Pipelines to include in their rates $229 million of Project costs, which amount represents the original cost estimates for the Project (the original approval of the Project and Supplement 1). *See* Order P 104 & n.296, JA 910. The Administrative Law Judge excluded recovery of subsequent expenditures, beginning with Supplement 2 in November 2005, which increased costs by $168 million. Initial Decision P 1458, JA 1390. The Administrative Law Judge determined that, by that time, delay of the Project schedule beyond the end of 2005 had eliminated economic drivers for Project benefits -- tax savings and avoidance of fire upgrades -- while costs had nearly doubled. *Id*. PP 1451-58, JA 1388-91. The Administrative Law Judge found that Pipelines should have reevaluated the economics of the Project at this point, but they did not. *Id*. P 1452, JA 1388. Accordingly, as a matter of equity, although all costs were found imprudent, Pipelines were only denied recovery of the costs for Supplement 2 and forward. *Id*. P 1458, JA 1390.

Before the Commission, Pipelines did not challenge the finding that they imprudently implemented the Project, which resulted in the disallowance of $153 million of Project costs. *See* Order PP 4 n.7, 90, JA 860, 906; Pipeline Brief at 14 & n.3. Pipelines did challenge the finding that they imprudently approved the

Project. Order P 4, JA 860; Pipeline Brief at 36. After a thorough review of the evidence, *see* Order PP 4-88, JA 860-905, the Commission reasonably affirmed the Administrative Law Judge's conclusion that Pipelines imprudently approved the Project. *Id*. PP 4, 12, JA 860, 864. The Commission also affirmed the remedy, except that the Commission required removal of all costs related to Pump Station 1 from the allowed $229 million of Project costs, because Pump Station 1 was not completed prior to the end of the test period and therefore its costs were not included in the rates at issue. *Id*. P 98, JA 909.

To determine the prudence of an investment, the Commission evaluates whether a "reasonable utility manager" would have made the same investment under the same circumstances. *Id*. P 12, JA 864 (citing *New England Power Co.*, 31 FERC ¶ 61,047 at 61,084 (1985), *order on reh'g*, 32 FERC ¶ 61,112, *aff'd sub nom. Violet v. FERC*, 800 F.2d 280 (1st Cir. 1986)). A prudence determination is based upon what the pipeline knew or should have known at the time a decision was made, without the benefit of hindsight. *Id*. (citing *New England*, 31 FERC ¶ 61,047 at 61,084).

The pipeline has the burden of proof to establish prudence. *Id*. P 13, JA 865. To ensure that rate cases are manageable, expenditures are presumed prudent until a challenging party creates "serious doubt" about an expenditure, at which point the pipeline has "'the burden of dispelling these doubts and proving the questioned

expenditure to have been prudent.'" *Id*. (quoting *Anaheim v. FERC*, 669 F.2d 799, 809 (D.C. Cir. 1981)).

Here, the Commission reasonably found Pipelines failed to dispel the serious doubt raised by the record regarding Pipelines' prudence in approving the Project. *Id*. P 14, JA 865. Prudent management requires a reasonable evaluation of the costs and benefits prior to incurring a financial commitment. *Id*. (citing *Entergy Servs., Inc.*, 130 FERC ¶ 61,023 at P 52 (2010); *Iroquois Gas Transmission Sys., L.P.*, 87 FERC ¶ 61,295 at 62,170 (1999)). This is particularly so here where the purpose of the Project was to create net cost savings. *Id*. P 88, JA 905. However, here, Pipelines' "improvident management caused them to commit to the [Strategic Reconfiguration] Project based upon an unrealistic cost estimate (which was a mere third of the final cost) and similarly unsubstantiated estimates of the benefits." *Id*. P 85, JA 903.

1. The Commission Reasonably Found Pipelines Imprudently Estimated Project Costs.

The Commission reasonably determined that Pipelines were imprudent in approving the Project because they knew or should have known at the time that the Project cost estimates were inaccurate. Order PP 15, 85, JA 866, 902. Pipelines were aware, prior to approval, that they had hired an engineer with no Alaska or Arctic experience, and a project manager that had only managed much smaller projects, and that they had set an aggressively accelerated schedule for completion,

all of which created an inherent risk that preliminary engineering would be poor and cost estimates unreliable. *Id*. PP 20-23, JA 870-73, PP 39-44, JA 881-84. Prior to Project approval, external consultant reports and internal employee emails warned that the cost estimate for the Project was unrealistic and the preliminary engineering poor. *Id*. PP 16-19, JA 866-70. Pipelines also made fundamental errors in the design of the Project, leading to material understatements of cost, that could have been corrected prior to approval with reasonable diligence. *Id*. PP 24-29, JA 873-76.

Thus, the Commission reasonably concluded that "significant evidence supports a finding that Pipelines did know or should have known that the [Strategic Reconfiguration] Project cost estimates were inaccurate, and thus, [Pipelines] failed to perform a reasonable cost-benefit analysis of the Project prior to approval." *Id*. P 37, JA 880. This is precisely the type of factual, record-based judgement for which the agency is entitled to respect. *See*, *e.g*., *Elec. Power Supply Ass'n*, 136 S.Ct. at 784 (deferring to the Commission's reasoned determination on a question involving both "technical understanding and policy judgment").

a. Pipelines Relied On SNC-Lavalin For Preliminary Engineering And Cost Estimates Knowing They Lacked Alaska And Arctic Experience.

Pipelines assert that they prudently selected and relied on SNC-Lavalin for the preliminary engineering because it is "a well-known engineering firm" with recent experience with similar pump station upgrades in Canada, that "achieved the highest ranking in the multi-factor contractor selection determination." Pipeline Brief at 44. As the Commission found, however, Pipelines knew at the time of selection that SNC-Lavalin, a Canadian firm, had no experience of Alaska standards or practices and no track record of work in Arctic conditions. Order P 43, JA 883. *See also* Initial Decision PP 660-63, JA 1141-42. In fact, SNC-Lavalin had only one engineer licensed in Alaska. Order P 40, JA 882. *See also* Initial Decision P 662, JA 1141 ("It defies logic that in a project as big as [Strategic Reconfiguration] one engineer was sufficient to review all the engineering packages. This is not the action of a reasonable utility manager.").

Pipelines complain that this is "hindsight-based second-guessing" focusing "myopically on one qualification." Pipeline Brief at 44. The Commission rejected this argument, however, finding that Pipelines -- as sophisticated subsidiaries of major energy companies -- should have appreciated the significance of SNC-Lavalin's lack of Alaska and Arctic experience at the time of selection. Order P 43, JA 883. *See also, e.g.*, Initial Decision PP 660-62, JA 1141. Further, having

retained a company with no Alaska or Arctic experience for the preliminary engineering, Pipelines failed to adequately question the company's cost estimates or to otherwise compensate for the lack of relevant experience. Order P 43, JA 883-84.

Pipelines themselves concluded that the selection of SNC-Lavalin -- in particular the lack of Alaska engineering experience -- was a major cause of Project cost overruns. *Id*. n.147, JA 883 (quoting SOA-277 at 1, JA 3225) (the "choice of SNC-Lavalin (Edmonton based) as primary detailed engineering contractor, procurement contractor and construction manager has been a major liability to this project. Poor cost estimation, weak Alaskan engineering and poor project management controls has contributed significantly to the unexpected costs experienced to date."); *id*. P 42, JA 883 (quoting SOA-383, JA 3227) ("SNC has turned out to be largely incompetent at designing, managing the fabrication and forecasting engineering, fabrication/construction costs. Their unfamiliarity with Alaska codes and regulations has been a liability from the beginning."). *See also id*. n.147, JA 883 (quoting SOA-11 at 28, JA 3349 (cost overruns "are due to insufficient or inaccurate preliminary engineering, and the choice of a contractor without sufficient Alaskan experience")); *id*. n.148, JA 883 (quoting SOA-166, JA 3207 (attributing cost overruns to "insufficient detailed engineering" at

approval and "to the choice of a program management contractor without Alaskan experience")).

b. Pipelines Received Pre-Approval Warnings Of Significant Issues With Cost Estimates And Preliminary Engineering.

Additionally, prior to Project approval, Pipelines received both external consultant reports and internal employee emails warning that the SNC-Lavalin cost estimate for the Project was unrealistic and the preliminary engineering poor. Order PP 16-19, JA 866-70.

(i). Pre-Approval Warnings from Larkspur

Alyeska retained Larkspur Associates LLC (a cost-estimating company with experience on Alaska's North Slope) to evaluate the Project cost estimate prior to approval. Order P 16, JA 866. Larkspur produced two reports, in December 2003 (SOA-222, JA 2498-2510) and January 2004 (SOA-223, JA 2609-23), warning Pipelines of potential inaccuracies in the cost estimates Pipelines relied on to approve the Project. Order P 16, JA 866. While the Project cost estimate stated it was accurate to within a range of plus or minus 15 percent, in the December 2003 Report Larkspur Associates concluded that the estimate did not in fact fall within the stated range of accuracy. *Id*. *See* SOA-222 at 1, 3, JA 2498, 2500. The report concluded that Larkspur had "major concerns that the project as currently designed could be built for the current estimate value." *Id*. (quoting SOA-222 at 13,

JA 2510). Larkspur further warned that the project's scope was "not clearly defined in detail" and that there was a "high degree of certainty that additional scope" would be required. *Id*. *See* SOA-222 at 9, JA 2506. *See also* Initial Decision PP 608-13, 667, 750, 840, JA 1124-25, 1143, 1172, 1199 (findings regarding 2003 Larkspur report).

In its second report in January 2004, Larkspur reiterated its "major concerns that the project as currently designed could be built for the current estimate value." SOA-223 at 14, JA 2622. *See* Order P 17, JA 866. "During the review of the estimate quantities, rates, etc., significant differences from past project experience were found and for these reasons [Larkspur does] not believe the accuracy level of this estimate falls within the stated accuracy range of +15%/-15%." SOA-223 at 2, JA 2610. Additionally, Larkspur stated that "[a]lthough the current scope of the project is changing rapidly since the original estimate was published, many if not all of the potential cost issues stated in this report still apply to the project." Order P 17, JA 866 (quoting SOA-223 at 14, JA 2622). Even though Larkspur requested a meeting with the Project Team, stating that it was "very important" to discuss these findings, there is no evidence of subsequent interaction related to these reports. *Id. See also* Initial Decision PP 750, 771, 841, 873, JA 1172, 1180, 1199, 1207 (findings regarding 2004 Larkspur report). The Commission reasonably concluded, based upon Larkspur's warnings and Pipelines' failure to address those

warnings, that Pipelines should have known that the preliminary engineering cost estimates were inaccurate. Order P 17, JA 867. *See also* Initial Decision P 873, JA 1207 (finding Pipelines "completely ignored" Larkspur concerns).

In challenging this finding, Pipelines point to the statement in the Larkspur Reports that the "scope contained in the Preliminary Engineering Report provided *an appropriate basis for*" the pre-approval cost estimate. Pipeline Brief at 46 (quoting SOA-222 at 2, JA 2499) (emphasis added by Pipelines). However, "the fact remains that Larkspur found the estimate to be inaccurate." Order n.55, JA 867.

(ii). Pre-Approval Warnings From Pipelines' Staff

Internal emails showed that Alyeska employees expressed concerns about SNC-Lavalin during the pre-approval preliminary engineering process. Order P 18, JA 867. *See also* Initial Decision PP 529-54, JA 1103-10 (describing emails). As SNC-Lavalin finalized its preliminary engineering report, in October 2003 Alyeska senior engineer Jerry DeHaas criticized SNC-Lavalin's preliminary engineering documents for containing several inaccuracies. Order P 18, JA 867 (citing SOA-284 at 2, JA 2314). He also questioned the expertise of SNC-Lavalin regarding the turbines and rotating equipment associated with the project, and the lack of detail underlying the cost figures. *Id*. *See also id*. at P 42, JA 883 (quoting SOA-284 at 2, JA 2314 ("[i]n regard to SNC Edmonton competence, I am not

overly impressed"); *id*. n.59, JA 868 (citing SOA-282 at 1, JA 2268 (in February 2003, complaining of "continual disagreement" with assumptions and figures coming out of the Strategic Reconfiguration Project); SOA-187 at 1, JA 2310 (in July 2003, finding portions of the electrification design "absurd")).

Alyeska's Vice President for Engineering and Projects, Lee Monthei, forwarded Mr. DeHaas' concerns, stating, "[f]our of our most knowledgeable engineers are not convinced this makes good economic sense and I agree with their concerns." Order P 18, JA 868 (quoting SOA-284 at 1, JA 2313). In October 2003, Greg Jones, Alyeska Senior Vice President, Operations & Maintenance stated that Alyeska engineering staff "believe there are errors in the analyses, including present value numbers …." *Id*. (quoting SOA-280 at 1, JA 2316).

Pipelines' employees and Project Team members also expressed concern regarding the rapidly changing scope, *id*. (citing SOA-183, JA 2453 (ExxonMobil President Mike Tudor November 2003 email expressing concern regarding unexplained scope and cost growth)), and cost estimates in October and November 2003. *Id*. (citing SOA-220, JA 2317) (Project Control Manager Dennis Ahrens expressing concern in October 2003 that Hinz Automation cost estimates had increased by 54 percent in 15 days). The Commission reasonably found that these warnings reveal that Pipelines should have known of, and anticipated the overruns

arising from, the flaws in the preliminary engineering and the related cost estimates. *Id*.

Moreover, the Commission found that Alyeska staff's concerns were not adequately considered. Order P 19, JA 868 (citing SOA-172 at 1, JA 4197). In an October 2003 email chain, SOA-284, JA 2313-15, Mr. DeHaas and Mr. Monthei complained that Alyeska engineers were inadequately consulted and their concerns were not considered. Order P 19, JA 868. *See also id*. (quoting SOA-280 at 1, JA 2316) (October 2003 email from Greg Jones, Alyeska Senior Vice President, Operations & Maintenance, complaining that Alyeska experts "are not consulted with early on, or if they are, their input is dismissed because it does not conform to preconceived views about the answers, including costs."); *id*. (quoting SOA-281 at 1, JA 2607) (January 2004 email from Mr. Jones expressing concern that the Project team was "pre-disposed" to answers that fit preliminary cost estimates, "disenfranchising" employees asked for their input). *See also* Initial Decision PP 632-38, JA 1130-32 (describing emails).

The Commission reasonably concluded that these emails demonstrate that Alyeska staff concerns regarding the quality of Project planning were disregarded in favor of preconceived outcomes. Order P 19, JA 868. *See also* Initial Decision PP 632, 755, JA 1130, 1174. This finding was corroborated by evidence that Pipelines deliberately marginalized Alyeska employees and Pipelines' own

conclusion that failure to integrate Alyeska personnel contributed to the dysfunctional planning. Order P 19 n.73, JA 870 (citing SOA-172, JA 4198). *See* Initial Decision PP 665-66, JA 1142-43 (finding that Pipelines set up the Project management team to be independent of Alyeska to avoid Alyeska's "red tape"). This evidence supports the conclusion that Pipelines should have known that the preliminary engineering cost estimates were inaccurate. Order P 19, JA 870.

(iii). Limitations Of The Supposedly-Corroborating 2004 Independent Project Analysis Report

Pipelines assert that a February 2004 report prepared by Independent Project Analysis, a construction consulting company, provides "strong evidence that [Pipelines] acted reasonably in relying on the degree of preliminary engineering SNC Lavalin had performed." Pipeline Brief at 45. Pipelines point to the report's conclusion that the Project was in the "good" range of project definition, and that the project's "engineering definition and project execution planning" were at the "Best Practical level." *Id*. at 45-46 (citing ATC-258 at 3, JA 3106).

The Commission found the Independent Project Analysis Report of limited significance based upon the "readily apparent" limitations of the analysis. Order PP 47-48, JA 885-86. First, Independent Project Analysis in November 2003 found that the Project status was "poor." *Id*. P 46, JA 885 (citing SOA-287 at 3, JA 2329). The February 2004 Report elevated the project assessment to "good" based upon a one-day interview in January 2004, *id*. P 48, JA 886 (citing ATC-258

at 3, JA 3106), not upon an in-depth analysis of the Project's preliminary engineering. *Id*.

Second, the Independent Project Analysis methodology is based upon comparison of the Project with other projects in the Independent Project Analysis data base. *See* ATC-258 at 8, JA 3111. Here, Independent Project Analysis compared the Project to two project data sets which differed significantly from the Project. Order P 48, JA 886. The data set of 27 similarly sized projects did not include any pipeline projects. *Id*. (citing ATC-258 at 9, JA 3112). The data set of 13 pipeline projects had an average cost of $3.8 million, far below any cost estimates for the Project. *Id*. (citing ATC-258 at 9, JA 3112). The Independent Project Analysis Report in fact stated that, due to the Project's "unique nature," "[Independent Project Analysis] does not possess a model that can credibly benchmark costs for projects like the [Strategic Reconfiguration Project]." Order P 50, JA 887 (quoting ATC-258 at 3, JA 3106).

Third, the report incorrectly stated the Project Team was following Alyeska's standard project management process, AMS-003. Order P 48, JA 886 (citing ATC-258 at 18, JA 3121). As Pipelines themselves explained, AMS-003 is a protocol designed for small projects, and was not applied to the Project. *Id*. (citing TAPS Carriers' Brief on Exceptions at 116 n.122, JA 4007).

Thus, the Commission reasonably concluded that the Independent Project Analysis Report provided little support for the prudence of approving the Project. *Id*. P 47, JA 885. Rather, Pipelines' emphasis on the Report as "strong evidence" that Pipelines acted prudently, Pipeline Brief at 45, only emphasizes the lack of support for the prudence of the Project at approval. *Id*. P 50, JA 887.

c. Pipelines Made Pre-Approval Management Decisions That Knowingly Increased Project Risk.

The Commission also reasonably found that Pipelines knowingly made pre-approval management decisions that impaired Pipelines' ability to obtain accurate preliminary engineering cost estimates for the Project. Order P 20, JA 870.

First, Pipelines set a very aggressive schedule for Project completion by December 31, 2005, to take advantage of a one-time tax benefit for property in service by that date, and under the (mistaken) assumption that it would permit them to avoid upgrading fire protection systems in 75 buildings. Initial Decision PP 648, 892, 908, JA 1135, 1212, 1218. Pipelines were aware at the time of approval that the aggressive schedule created inherent risks that planning and engineering would not be completed appropriately. Order P 21, JA 871. Prior to approval, Project Manager John Barrett was "very vocal about how tight the schedule was" and warned Pipelines' owners that completing the project within the scheduled time frame was "going to be very difficult to do." *Id*. (citing Hearing Transcript at 5663, JA 3845). *See also* Initial Decision PP 503, 893, JA 1095,

1212. The Project Team in February 2003 explained to Pipelines' owners that meeting the scheduling goals would require "flawless execution," that the "[s]chedule is aggressive with very little flexibility," and characterized the schedule as having "zero float." Order n.75, JA 871 (quoting SOA-197 at 9, JA 2235). *See also* Initial Decision P 690, JA 1150.

Pipelines were aware that such an accelerated project deadline created risks regarding project economics prior to approving the Project. Order P 21, JA 871. Mr. Barrett was aware when he became project manager that "speed destroys megaprojects," *id*. n.76, JA 871 (quoting Hearing Transcript at 5856, JA 3865), and he testified that Pipeline owners were aware of the risks of "fast tracking" the Project with only 30 percent of the engineering completed. *Id*. (quoting Hearing Transcript at 5806, JA 3852). *See also* Initial Decision P 692, JA 1151. While Pipelines now assert that they believed that the risks of the accelerated schedule were outweighed by the benefits, Pipeline Brief at 53, an April 2003 email from Chuck Hatley of ExxonMobil to P. Flood of Conoco, SOA-173, JA 2291, stated the following:

> [Independent Project Analysis] studies demonstrate that accelerating projects to meet earlier schedules so you can "start saving money soon" rarely pay out. Instead, what is typically seen is that project acceleration causes one to miss out on Value Improving Processes and you therefore are forced to live with a sub-optimized project.

Order P 21, JA 871. *See also* Initial Decision PP 520, 694, JA 1101, 1152.

Pipelines also failed to adopt appropriate measures to mitigate the risks associated with the aggressive schedule. Order P 21, JA 871. Insufficient time was allowed for planning, including preliminary engineering.[5] In October 2003, Greg Jones warned that "'[c]ost and schedule pressures to make the project 'a go' are permeating interactions with client teams….'" *Id*. (quoting SOA-280 at 1, JA 2316). As Pipelines later concluded, the rush to complete the Strategic Reconfiguration Project "'drove us forward with less detailed engineering than would normally be prudent.'" *Id*. (quoting SOA-166 at 1, JA 3207). In addition, the use of an accelerated schedule limited Pipelines' ability to proceed incrementally and to learn lessons from the experience at the prior pump stations. *Id*. Thus, the Commission reasonably concluded that Pipelines knew that the aggressive schedule created risk and contributed to the flawed preliminary engineering of the Project. *Id*. *See, e.g*., Initial Decision P 908, JA 1218 (citing testimony of D. Hisey at Hearing Transcript 3023, JA 3831).

Moreover, the Commission found there was little reason for the urgency. Order P 22, JA 872. The existing pumps remained in excellent condition and there was no operational reason for Pipelines to replace them prior to completing the

[5] *Id*. Project consultant Peter Flones found that preliminary engineering was allocated six months when preliminary engineering should have been allocated "'2-3 years.'" *Id*. n.77, JA 871 (quoting SOA-171, JA 4193). Similarly, Alaska expert witness Doyle Sanders testified that preliminary engineering for a project of this scope required 18-30 months. *Id*. (citing SOA-425 at 42, JA 3512).

proper engineering analysis. *Id*. *See also* Initial Decision P 697, JA 1154 (no reason to fast-track the Project as the legacy equipment was operating at 99 percent reliability). Accordingly, even if Pipelines believed the accelerated schedule would provide cost savings, Pipeline Brief at 53, the Commission found that this did not justify approving the project based upon "'insufficient upfront planning,'" "'inadequate scope definition,'" and, ultimately an "'estimate that was never realistic or achievable.'" Order P 22, JA 872 (quoting SOA-65 at 3, JA 3279). Indeed, Pipelines' incomplete engineering and failure to understand Alaska regulations caused them to exaggerate the expected cost savings. *Id*. n.82, JA 872.

Also increasing the risks associated with the Project, Pipelines hired an inexperienced project manager, John Barrett. Order P 23, JA 872. Mr. Barrett's sole prior experience as a project manager related to small pipeline projects with budgets under $2 million, in contrast to the $200 million-plus Project. *Id*. (citing Hearing Transcript at 5707-5708, JA 3847-48). *See also* Initial Decision P 502, JA 1095 (finding it "preposterous" that Pipelines selected Mr. Barrett as Project Manager knowing that he lacked pertinent experience with projects as large as the Project).

Pipelines respond that Mr. Barrett was one of ConocoPhillips' top project managers, Pipeline Brief at 43, but this does not change the fact that he had no experience managing such a substantial project. Pipelines themselves concluded

that his inexperience adversely affected the Project. Order P 23, JA 872 (quoting SOA-172, JA 4197) ("Lessons Learned" document stating that Mr. Barrett was ineffective and "simply didn't know how to run a project of this size and organizational complexity"). Pipelines themselves ultimately concluded that "[a] program [manager] with the appropriate skills and knowledge should have been appointed." *Id*.

d. Pipelines Made Pre-Approval Errors In Project Design That Could And Should Have Been Avoided With Reasonable Diligence.

The Commission also found that Pipelines made fundamental errors in the design of the Project that caused material understatements of cost that should have been corrected by reasonable diligence prior to approval. Order P 24, JA 873. These misconceptions are evidence that Pipelines should have known about the flaws in the engineering cost estimates prior to approval. *Id*. Pipelines themselves concluded that "a contractor with more Alaskan experience" could have anticipated the cost increases associated with the "brownfield" conditions for construction of the Project and the Alaskan regulatory environment and the fire code requirements. *See* SOA-166, JA 3207.

Pipelines materially underestimated the onsite work that would be required to integrate the Project into existing legacy facilities. Order P 25, JA 873. Pipelines' cost estimates assumed that the new electric motor, drive, and pump

would be manufactured into a module offsite, transported to the pipeline, and plugged into the existing equipment with relatively little work onsite. *Id*. (citing Initial Decision PP 656, 658, JA 1139, 1140 (citing Hearing Transcript at 3024, 3029-3030, 3065-3066, 3279, JA 3831, 3832-33, 3834-35, 3839); ATC-31 at 22-24, JA 3739-41; SOA-542 at 54-55, JA 3806-07; SOA-458 at 1, JA 3200)).

However, rather than a greenfield project (i.e., where project work occurs primarily in a non-operating environment such as an off-site modular fabrication facility), the Strategic Reconfiguration Project was a much more expensive brownfield project (i.e., where project work occurs primarily in an active operating environment, such as an actively-used pump station). *Id*. (citing, *e.g*., SOA-542 at 54-55, JA 3806-07). The module had to be integrated with existing buildings such as support facilities, warehouses and shops. New control systems had to be installed. The communications systems had to be changed out. A new control and communications center had to be constructed. Pilings had to be installed and new pipe run, as well as a tremendous amount of cable and wiring. All of this had to take place while the pipeline was operating. Initial Decision PP 656, 742, 744 & n.436, JA 1139, 1169, 1170. This significantly increased the costs of the Project. Order P 25, JA 873.

Pipelines assert that Alyeska Vice President James Johnson stated that the "brownfield aspects" of the Project were not understood until after the 2002-2003

time frame. Pipeline Brief at 42 (quoting Hearing Transcript at 8437, JA 3879). However, as the Commission found, Mr. Johnson testified that Pipelines *should have known* about "the larger brownfield aspect" at the time the Project was approved. Order P 25, JA 874 (citing Hearing Transcript at 8439, JA 3879). As the Initial Decision concluded, "the fundamental error in quantification of the brownfield work was only unforeseen by [Pipelines] because they had not done adequate preliminary engineering. . . . If [Pipelines] had not ignored the input of Alyeska employees who ran the day-to-day operations of [the System], they would have known this assumption was invalid." Initial Decision P 658, JA 1140.

The Commission cited to the testimony of former Alyeska Chief Operating Officer Dan Hisey, Order P 25 & n.91, JA 873 (citing Hearing Transcript at 3024-30, 3065-3066, 3279, JA 3831-33, 3834-35, 3839), who testified that "the risk was extremely well known" at the time of approval that "there was going to be opportunity for scope growth." Hearing Transcript at 3025, JA 3831. The cost estimate was based on the "greenfield" assumption that they would "just go buy a prefabricated module that's a pump and plug it into the pump station," when, in reality, it was like "changing out the jet engine while you are flying." *Id*. at 3024, JA 3831. Pipelines failed to explain why reasonable diligence would not have corrected the mistaken assumption that the Project was somehow akin to a greenfield project. Order P 25, JA 874.

In addition, Pipelines failed to verify that the large motors using variable frequency drives were proven technology. Order P 26, JA 874 (citing SOA-339 at 1, JA 3203). *See also* Initial Decision P 744 n.434, JA 1170 (electric motors were assumed to be "off-the-shelf" technology but in fact had never been built before). The Project Team hired Electric Machinery to build the motors based upon a false understanding that Electric Machinery had built such a variable speed motor previously. Order P 26, JA 874 (citing SOA-338 at 1, JA 3193). After work commenced, the new motors from Electric Machinery produced excessive vibration and required subsequent attempts at redesign. *Id*. (citing, *e.g.*, SOA-338 at 1, JA 3193). Electric Machinery built seven motors before testing the first motor. *Id.* n.96, JA 874 (citing SOA-338 at 3, JA 3195). Although Pipelines assert that it was prudent for Pipelines to rely on "reasonable assurances" from vendors, Pipeline Brief at 43, Pipelines cite no record evidence that Electric Machinery made false claims about their prior experience. The Commission found it implausible that reasonable diligence would not have corrected this misconception. *Id*. P 26, JA 874.

Pipelines also incorrectly assumed that the Project would enable them to avoid upgrades to the fire suppression and gas systems by letting 75 buildings go cold by December 2005. Order P 27, JA 874 (citing Initial Decision P 648, JA 1135). Pipelines provided no evidence that they conducted reasonable due

diligence in determining Alaska regulatory requirements. *Id*. In fact, a December 2003 Joint Pipeline Office Report[6] warned that the Project preliminary engineering design incorrectly stated the circumstances in which fire protection systems could be avoided. *Id*. (citing Initial Decision P 648, JA 1135 (citing ATC-233 at 9, JA 2519)). Pipelines also projected cost savings based upon the elimination of buildings that ultimately could not be removed because they contained essential controls. *Id*. (citing SOA-104 at 2, JA 3232).

2. The Commission Reasonably Found Pipelines Imprudently Estimated Project Benefits.

The primary purpose of the Strategic Reconfiguration Project was to create net cost savings of $1.1 billion over a 20-year period from personnel and major maintenance savings. Order PP 5, 88, JA 860, 905. The Commission reasonably found that Pipelines imprudently estimated the projected savings. *See id*. PP 66-71, 85, JA 893-96, 902.

Pipelines estimated savings from major maintenance expenses to be $384 million over a 20-year planning horizon. Initial Decision P 678 n.396, JA 1146 (citing SOA-60 at 9, 17, JA 2599, 2604). The Commission affirmed the Initial Decision determination that this estimate was imprudent. Order P 71, JA 896. *See* Initial Decision PP 678-85, 1340-44, JA 1146-49, 1344-46. Pipelines do not

[6] The Joint Pipeline Office is a consortium of state and federal agencies that have regulatory oversight for the Trans Alaska Pipeline.

challenge the Commission's finding on brief to this Court, nor did they challenge the Initial Decision finding before the Commission. Order P 71, JA 896. Pipelines must first raise an issue with the Commission before seeking judicial review. *See, e.g.*, *ExxonMobil Oil Corp. v. FERC*, 487 F.3d 945, 962 (D.C. Cir. 2007). The failure to raise an argument in Pipelines' opening brief also waives that argument. *See, e.g., Petit v. U.S. Dep't of Educ.*, 675 F.3d 769, 779 (D.C. Cir. 2012). Pipelines have therefore waived any objection to the Commission's finding that they imprudently estimated major maintenance cost savings from the Project.

Pipelines also estimated Project personnel savings based on a staff reduction of 285 people. Initial Decision P 674, JA 1145 (citing SOA-60 at 15, JA 2602). The Commission found that Alyeska Vice President Mr. Johnson's personnel estimates were based upon the same flawed preliminary engineering that undermined Project cost estimates. Order P 68, JA 894. Indeed, the Initial Decision gave Mr. Johnson's staffing analysis no weight at all, as it was based on "incorrect assumptions of buildings and infrastructure being replaced by truckable prewired modules that would be fully automated." Initial Decision P 687, JA 1150. The Commission further rejected Pipelines' claim that the Project had actually realized personnel cost savings. Order PP 69-70, JA 894-95. On brief to this Court, Pipelines do not challenge this finding except to argue that it is based

on impermissible hindsight. Pipeline Brief at 55. That argument fails, as demonstrated below.

3. The Commission's Finding Of Imprudence Did Not Rest On Impermissible Hindsight.

To be prudent, Pipelines must have acted as a reasonable manager, which includes performing a meaningful evaluation of the costs and benefits before committing to the Project. Order P 85, JA 902. This is particularly so here where the Project was built to create net cost savings; the Project was not designed to address safety or environmental concerns, nor did it increase capacity or enable access to new markets or supplies. *Id*. P 88 & n.275, JA 905. The Commission reasonably concluded Pipelines failed to act as a reasonable manager because -- prior to approving the Project -- Pipelines "knew or *should have known*" that their estimates of the costs and benefits of the Project were inaccurate. *Id*. P 36, JA 879 (citing *Panhandle Eastern Pipeline Co. v. FERC*, 777 F.2d 739, 745 (D.C. Cir. 1985); *Violet v. FERC*, 800 F.2d 280, 282 (1st Cir. 1986)).

Pipelines assert that the prudence determinations in *Panhandle* and *Violet* rested on what the entity "should have known" based on facts available to it at the time, whereas here the Commission's decision was based, allegedly, on facts "that surfaced after the [approval] decision." *See* Pipeline Brief at 48-51. To the contrary, the Commission's determination rested on facts that were known to Pipelines -- or should in the exercise of reasonable diligence have been known to

Pipelines -- at or before Project approval. Order P 36, JA 879. Pipelines were aware, prior to approval, that they had hired an engineer with no Alaska or Arctic experience, and a project manager that had only managed much smaller projects, and that they had set an aggressively accelerated schedule for completion, all of which created an inherent risk that preliminary engineering would be poor and cost estimates unreliable. *Id*. PP 20-23, JA 870-73, PP 39-44, JA 881-84. Prior to Project approval, external consultant reports and internal employee emails warned that the cost estimate for the Project was unrealistic and the preliminary engineering poor. *Id*. PP 16-19, JA 866-70. Pipelines also made fundamental errors in the design of the Project, leading to material understatements of cost, that could have been corrected prior to approval with reasonable diligence. *Id*. PP 24-29, JA 873-76.

As the Commission found, "[a]s subsidiaries of major international energy companies, Pipelines were aware of the obvious -- that proper engineering and a well-defined scope were fundamental pre-requisites to any economic analysis of the project's costs and benefits." Order P 36, JA 880. Thus, the Commission reasonably concluded that "significant evidence supports a finding that Pipelines did know or should have known that the [Strategic Reconfiguration] Project cost estimates were inaccurate, and thus, [Pipelines] failed to perform a reasonable cost-benefit analysis of the Project prior to approval." *Id*. P 37, JA 880. *Compare, e.g.*,

Duquesne Light Co. v. Barasch, 488 U.S. 299, 302-03 (1989) (plans to build nuclear generating capacity were prudent, even though they ultimately had to be canceled, based upon projections of growing demand at the time the plans were made, which were later "confounded" by intervening, unpredictable events).

Pipelines complain that the Commission improperly relied upon documents created after the fact in reaching its imprudence determination. Pipeline Br. at 40-41. The Commission reasonably rejected the argument that the "no hindsight rule" precluded consideration of documents created after the Project was approved. Order P 36 & n.127, JA 879-80. To the extent that later-created documents bear on what Pipelines knew or should have known at the time they committed to Project expenses, it is fully consistent with the prudence standard to consider those documents. *Id*. n.127, JA 880.

The Commission further reasonably found that the post-approval documents support a finding of imprudence here. *Id*. P 36 & n.121, JA 879. If a pipeline fails to conduct the appropriate inquiries prior to beginning a project and thus "*should have known*" about a potential problem, then the pipeline has acted imprudently. *Id*. P 36, JA 879. Pipelines' internal documents support a finding that they "should have known" the Project cost estimates were inaccurate. *Id*. Pipelines themselves concluded that they failed to complete the engineering and planning necessary to provide a defined scope and a valid understanding of costs,

which supports the determination that the Strategic Reconfiguration Project was imprudent. *Id*. As the Initial Decision found, many of the "lessons learned" documents reflect facts that Pipelines knew at the time of approval but ignored, such as the risks inherent in hiring an unqualified engineering firm and project manager, and fast-tracking such a major project. Initial Decision PP 1120-25, JA 1282-85. It should also be noted that several of the documents cited by Pipelines were authored before Pipelines approved Supplement 2 in November 2005. *See* Pipeline Brief at 41 (citing, *e.g*., SOA-11, JA 3322 (August 2005); SOA-65, JA 3277 (August 2005); SOA-166, JA 3207 (February 2005); SOA-172, JA 4197 (undated, but authored in September 2005 (*see* Initial Decision P 1013, JA 1249)). Thus, these documents reflect Pipelines' knowledge of Project issues preceding the Commission's disallowance of costs. *See* Initial Decision P 1458, JA 1390 (disallowing Project costs from Supplement 2 and forward); Order P 98, JA 909 (affirming remedy).

Nor does this conclusion raise a particular risk of dissuading pipeline investment. Pipeline Brief at 52-53. The prudence standard itself is a necessary check on pipeline discretion, and is intended to dissuade utilities from making imprudent investments. Order P 88, JA 905. The determination here was "highly fact-specific and based upon the facts and circumstances presented by a particular record." *Id*. Contrary to Pipelines' assertions, the record here did not show that

Pipelines "complied with industry norms for [pre-approval] due diligence" in approving the Project, nor was the Project approval shown to be imprudent based on "subsequent events." Pipeline Brief at 52. Rather, the Commission's finding of imprudence was based upon facts known to the Pipelines -- or that should have been known to the Pipelines -- prior to Project approval. Order P 36, JA 879. "[I]gnorance that resulted from 'insufficient upfront planning' or 'incomplete engineering' provides no defense against an imprudence allegation." *Id*. That Pipelines reached the same conclusion in their internal documents supports the Commission's conclusion. *Id*.

C. Pipelines' Due Process Claim Relating To Pump Station 1 Costs Is Premature As Pump Station 1 Costs Are Not At Issue In This Proceeding.

While finding the Strategic Reconfiguration Project imprudent, the Initial Decision determined as a matter of equity that it would permit Pipelines to recover the investment costs associated with the original cost estimate for the Project and the first supplemental funding request, which totaled $229 million. Order P 89, JA 906. The Commission affirmed this remedy, except that the Commission required the removal of all costs related to Pump Station 1 from the allowed $229 million of costs, because Pump Station 1 had not entered into service prior to the end of the test period in this proceeding, and therefore its costs were not part of Pipelines' proposed rates. *Id*. P 98, JA 909.

The Commission further reversed the Initial Decision determination barring Pipelines from claiming in any future case Strategic Reconfiguration Project upgrades, particularly related to Pump Station 1. *Id*. P 105, JA 911. The Commission recognized that the imprudence finding was made with respect to the Project as a whole, considering upgrades made at all pump stations. *Id*. P 108, JA 912. The Commission nevertheless found it premature to address future filings related to Pump Station 1 costs. *Id*. P 109, JA 912. The rate filings at issue did not include costs for Pump Station 1, and the Commission adjusted the remedy accordingly. *Id*. "If [Pipelines] make a subsequent rate filing to recover Pump Station 1 costs, the Commission will address the appropriate recovery for Pump Station 1 costs at that time." *Id*. "Generally, the Commission has been reluctant to exclude imprudently incurred costs until they have been put into rates because the imprudence is not yet having an effect on customers and the speculative nature of the harm." *Id*. (citing *City of New Orleans v. FERC*, 67 F.3d 947, 955 (D.C. Cir. 1995)).

Because the Commission declined to address the recovery of costs relating to Pump Station 1, Pipelines' claim (Pipeline Brief at 56-59) that due process precludes Commission reliance on this imprudence finding in a future rate case on Pump Station 1 costs is premature. *See* Order P 109, JA 912 (finding premature protesters' claims that the issue of imprudence relating to Pump Station 1 is *res*

judicata). As this Court found in *Wisconsin Public Power, Inc. v. FERC*, 493 F.3d 239, 268 (D.C. Cir. 2007), where the Commission reserves an issue for future proceedings, the issue is not ripe for immediate review. *See also, e.g., Ala. Mun. Distribs. Grp v. FERC*, 312 F.3d 470, 473 (D.C. Cir. 2002) (where any rate effect would occur only in a future rate case, petitioner fails to demonstrate sufficient injury for standing).

Further, even if the Commission had predetermined the issue of imprudence, this Court has "repeatedly held that this sort of 'injury' is insufficient to establish standing." *Wis. Pub. Power*, 493 F.3d at 268. "A petitioner's 'interest in the Commission's legal reasoning and its potential precedential effect does not by itself confer standing where, as here, it is 'uncoupled' from any injury in fact caused by the substance of [FERC's] adjudicatory action.'" *Id*. (quoting *Telecomms. Research & Action Ctr. v. FCC*, 917 F.2d 585, 588 (D.C. Cir. 2007)). *See also, e.g., New England Power Generators Ass'n, Inc. v. FERC*, 707 F.3d 364, 369 (D.C. Cir. 2013) ("neither a FERC decision's legal reasoning nor the precedential effect of such reasoning confers standing unless the substance of the decision itself gives rise to an injury in fact"); *Exxon Mobil Corp. v. FERC*, 571 F.3d 1208, 1219 (D.C. Cir. 2009) ("a mere interest in FERC's legal reasoning and the possibility of a 'collateral estoppel effect' are insufficient to confer a cognizable injury in fact"); *Ala. Mun. Distribs. Grp.*, 312 F.3d at 474 ("neither

standing nor ripeness could properly grow out of a harm predicated on a potential collateral estoppel effect"). Here, as the Commission expressly declined to reach any determination regarding recovery of Pump Station 1 costs, Order P 109, JA 912, Pipelines have suffered no immediate injury from the Commission's determination.

In short, Pipelines have suffered no injury from the Commission's statement, and there will be adequate opportunity to address any future application of estoppel if and when Pump Station 1 costs are found unreasonable on this basis.

CONCLUSION

For the foregoing reasons, the petitions for review, to the extent they are not dismissed as premature, should be denied.

Respectfully submitted,

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November 14, 2016

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 13,947 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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ADDENDUM

STATUTES AND REGULATIONS

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injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

(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(a).	June 11, 1946, ch. 324, § 10(a), 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 removed the defense of sovereign immunity as a bar to judicial review of Federal administrative action otherwise subject to judicial review.

§ 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. 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. 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

§ 801. Congressional review

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

(i) a copy of the rule;

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

(iii) the proposed effective date of the rule.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(5) Notwithstanding paragraph (3), the effective date of a rule shall not be delayed by operation of this chapter beyond the date on which either House of Congress votes to reject a joint resolution of disapproval under section 802.

(b)(1) A rule shall not take effect (or continue), if the Congress enacts a joint resolution of disapproval, described under section 802, of the rule.

(2) A rule that does not take effect (or does not continue) under paragraph (1) may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule.

(c)(1) Notwithstanding any other provision of this section (except subject to paragraph (3)), a rule that would not take effect by reason of subsection (a)(3) may take effect, if the President makes a determination under paragraph (2) and submits written notice of such determination to the Congress.

TITLE 49, APPENDIX—TRANSPORTATION

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

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

§ 1. Repealed. Pub. L. 95-473, § 4(b), (c), Oct. 17, 1978, 92 Stat. 1466, 1470; Pub. L. 96-258, § 3(b), June 3, 1980, 94 Stat. 427

Section repealed subject to an exception related to transportation of oil by pipeline. Section 402 of Pub. L. 95-607, which amended par. (14) of this section by adding subdiv. (b) and redesignating existing subdiv. (b) as (c) subsequent to the repeal of this section by Pub. L. 95-473, was repealed by Pub. L. 96-258. For disposition of this section in revised Title 49, Transportation, see Table at beginning of Title 49. See, also, notes following Table.

Prior to repeal, section read as follows:

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

(1) Carriers subject to regulation

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

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or

(b) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water; or

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

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

(2) Transportation subject to regulation

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

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

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

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

(3) Definitions

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

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

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

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

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

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

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

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

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

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

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

(5½) Exchange of services

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

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

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

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

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

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

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

(9) Switch connections and tracks

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

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

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

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

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

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

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

Prior to repeal, section read as follows:

§ 14. Reports and decisions of Commission

(1) Reports of investigations by Commission

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

(2) Record of reports; copies

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

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

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

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

§ 15. Repealed. Pub. L. 95-473, § 4(b), (c), Oct. 17, 1978, 92 Stat. 1466, 1470; Pub. L. 96-258, § 3(b), June 3, 1980, 94 Stat. 427

Section repealed subject to an exception related to transportation of oil by pipeline. Section 401 of Pub. L. 95-607, which amended par. (8)(c) and (d) of this section subsequent to the repeal of this section by Pub. L. 95-473, was repealed by Pub. L. 96-258, effective July 1, 1980, as provided by section 3(c) of Pub L. 96-258. For disposition of this section in revised Title 49, Transportation, see Table at beginning of Title 49. See, also, notes following Table.

Prior to repeal, section read as follows:

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

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

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

(2) Orders of Commission

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

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

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

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

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

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

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

(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

any issue that is the subject of negotiation by other parties.

[Order 578, 60 FR 19505, Apr. 19, 1995]

PART 344—FILING QUOTATIONS FOR U.S. GOVERNMENT SHIPMENTS AT REDUCED RATES

Sec.
344.1 Applicability.
344.2 Manner of submitting quotations.

AUTHORITY: 42 U.S. 7101–7352; 49 U.S.C. 1–27.

§ 344.1 Applicability.

The provisions of this part will apply to quotations or tenders made by all pipeline common carriers to the United States Government, or any agency or department thereof, for the transportation, storage, or handling of petroleum and petroleum products at reduced rates as permitted by section 22 of the Interstate Commerce Act. Excepted are filings which involve information, the disclosure of which would endanger the national security.

[Order 561, 58 FR 58778, Nov. 4, 1993]

§ 344.2 Mannerof submitting quotations.

(a) The quotation or tender must be submitted to the Commission concurrently with the submittal of the quotation or tender to the Federal department or agency for whose account the quotation or tender is offered or the proposed services are to be rendered.

(b) [Reserved]

(c) *Filing procedure.* (1) The quotation must be filed with a letter of transmittal that prominently indicates that the filing is in accordance with section 22 of the Interstate Commerce Act.

(2) All filings pursuant to this part must be filed electronically consistent with §§ 341.1 and 341.2 of this chapter.

(d) *Numbering.* The copies of quotations or tenders which are filed with the Commission by each carrier must be numbered consecutively.

(e) *Supersession of a quotation or tender.* A quotation or tender which supersedes a prior quotation or tender must, by a statement shown immediately under the number of the new document, cancel the prior document number.

[Order 561, 58 FR 58778, Nov. 4, 1993, as amended by Order 714, 73 FR 57537, Oct. 3, 2008]

PART 346—OIL PIPELINE COST-OF-SERVICE FILING REQUIREMENTS

Sec.
346.1 Content of filing for cost-of-service rates.
346.2 Material in support of initial rates or change in rates.
346.3 Asset retirement obligations.

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

§ 346.1 Content of filing for cost-of-service rates.

A carrier that seeks to establish rates pursuant to § 342.2(a) of this chapter, or a carrier that seeks to change rates pursuant to § 342.4(a) of this chapter, or a carrier described in § 342.0(b) of this chapter that seeks to establish or change rates by filing cost, revenue, and throughput data supporting such rates, other than pursuant to a Commission-approved settlement, must file, consistent with the requirements of §§ 341.1 and 341.2 of this chapter:

(a) A letter of transmittal which conforms to §§ 341.2(c) and 342.4(a) of this chapter;

(b) The proposed tariff; and

(c) The statements and supporting workpapers set forth in § 346.2.

[59 FR 59146, Nov. 16, 1994, as amended by Order588, 61 FR 38569, July 25, 1996; Order 714, 73 FR 57537, Oct. 3, 2008]

§ 346.2 Material in support of initial rates or change in rates.

A carrier that files for rates pursuant to § 342.2(a) or § 342.4(a) of this chapter, or a carrier described in § 342.0(b) that files to establish or change rates by filing cost, revenue, and throughput data supporting such rates, other than pursuant to a Commission-approved settlement, must file the following statements, schedules, and supporting workpapers. The statement, schedules, and workpapers must be based upon an appropriate test period.

(a) *Base and test periods defined.* (1) For a carrier which has been in operation for at least 12 months:

(i) A base period must consist of 12 consecutive months of actual experience. The 12 months of experience must be adjusted to eliminate nonrecurring items (except minor accounts). The filing carrier may include appropriate normalizing adjustments in lieu of nonrecurring items.

(ii) A test period must consist of a base period adjusted for changes in revenues and costs which are known and are measurable with reasonable accuracy at the time of filing and which will become effective within nine months after the last month of available actual experience utilized in the filing. For good cause shown, the Commission may allow reasonable deviation from the prescribed test period.

(2) For a carrier which has less than 12 months' experience, the test period may consist of 12 consecutive months ending not more than one year from the filing date. For good cause shown, the Commission may allow reasonable deviation from the prescribed test period.

(3) For a carrier which is establishing rates for new service, the test period will be based on a 12-month projection of costs and revenues.

(b) *Cost-of-service summary schedule.* This schedule must contain the following information:

(1) Total carrier cost of service for the test period.

(2) Throughput for the test period in both barrels and barrel-miles.

(3) For filings pursuant to § 342.4(a) of this chapter, the schedule must include the proposed rates, the rates which would be permitted under § 342.3 of this chapter, and the revenues to be realized from both sets of rates.

(c) *Content of statements.* Any cost-of-service rate filing must include supporting statements containing the following information for the test period.

(1) *Statement A—total cost of service.* This statement must summarize the total cost of service for a carrier (operating and maintenance expense, depreciation and amortization, return, and taxes) developed from Statements B through G described in paragraphs (c)(2) through (7) of this section.

(2) *Statement B—operation and maintenance expense.* This statement must set forth the operation, maintenance, administration and general, and depreciation expenses for the test period. Items used in the computations or derived on this statement must consist of operations, including salaries and wages, supplies and expenses, outside services, operating fuel and power, and oil losses and shortages; maintenance, including salaries and wages, supplies and expenses, outside services, and maintenance and materials; administrative and general, including salaries and wages, supplies and expenses, outside services, rentals, pensions and benefits, insurance, casualty and other losses, and pipeline taxes; and depreciation and amortization.

(3) *Statement C—overall return on rate base.* This statement must set forth the rate base for return purposes from Statement E in paragraph (c)(5) of this section and must also state the claimed rate of return and the application of the claimed rate of return to the overall rate base. The claimed rate of return must consist of a weighted cost of capital, combining the rate of return on debt capital and the real rate of return on equity capital. Items used in the computations or derived on this statement must include deferred earnings, equity ratio, debt ratio, weighted cost of capital, and costs of debt and equity.

(4) *Statement D—income taxes.* This statement must set forth the income tax computation. Items used in the computations or derived on this statement must show: return allowance, interest expense, equity return, annual amortization of deferred earnings, depreciation on equity AFUDC, underfunded or overfunded ADIT amortization amount, taxable income, tax factor, and income tax allowance.

(5) *Statement E—rate base.* This statement must set forth the return rate base. Items used in the computations or derived on this statement must include beginning balances of the rate base at December 31, 1983, working capital (including materials and supplies, prepayments, and oil inventory), accrued depreciation on carrier plant, accrued depreciation on rights of way, and accumulated deferred income taxes; and adjustments and end balances for original cost of retirements, interest during construction, AFUDC

adjustments, original cost of net additions and retirements from land, original cost of net additions and retirements from rights of way, original cost of plant additions, original cost accruals for depreciation, AFUDC accrued depreciation adjustment, original cost depreciation accruals added to rights of way, net charge for retirements from accrued depreciation, accumulated deferred income taxes, changes in working capital (including materials and supplies, prepayments, and oil inventory), accrued deferred earnings, annual amortization of accrued deferred earnings, and amortization of starting rate base write-up.

(6) *Statement F—allowance for funds used during construction.* This statement must set forth the computation of allowances for funds used during construction (AFUDC) including the AFUDC for each year commencing in 1984 and a summary of AFUDC and AFUDC depreciation for the years 1984 through the test year.

(7) *Statement G—revenues.* This statement must set forth the gross revenues for the actual 12 months of experience as computed under both the presently effective rates and the proposed rates. If the presently effective rates are not at the maximum ceiling rate established under § 342.3 of this chapter, then gross revenues must also be computed and set forth as if the ceiling rates were effective for the 12 month period.

[59 FR 59146, Nov. 16, 1994, as amended by Order 588, 61 FR 38569, July 25, 1996; Order 606, 64 FR 44405, Aug. 16, 1999]

§ 346.3 Asset retirement obligations.

(a) A carrier that files material in support of initial rates or change in rates under § 346.2 and has recorded asset retirement obligations on its books must provide a schedule, as part of the supporting workpapers, identifying all cost components related to the asset retirement obligations that are included in the book balances of all accounts reflected in the cost of service computation supporting the proposed rates. However, all cost components related to asset retirement obligations that would impact the calculation of rate base, such as carrier property and related accumulated depreciation and accumulated deferred income taxes, may not be reflected in rates and must be removed from the rate base calculation through a single adjustment.

(b) A carrier seeking to recover nonrate base costs related to asset retirement costs in rates must provide, with its filing under § 346.2 of this part, a detailed study supporting the amounts proposed to be collected in rates.

(c) A carrier who has recorded asset retirement obligations on its books but is not seeking recovery of the asset retirement costs in rates, must remove all asset retirement obligations related cost components from the cost of service supporting its proposed rates.

[Order 631, 68 FR 19625, Apr. 21, 2003]

PART 347—OIL PIPELINE DEPRECIATION STUDIES

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

§ 347.1 Material to support request for newly established or changed property account depreciation studies.

(a) *Means of filing.* Filing of a request for new or changed property account depreciation rates must be made with the Secretary of the Commission.

(b) All filings under this Part must be made electronically pursuant to the requirements of §§ 341.1 and 341.2 of this chapter.

(c) *Transmittal letter.* Letters of transmittal must give a general description of the change in depreciation rates being proposed in the filing. Letters of transmittal must also certify that the letter of transmittal (not including the information to be provided, as identified in paragraphs (d) and (e) of this section) has been sent to each shipper and to each subscriber. If there are no subscribers, letters of transmittal must so state.

(d) *Effectiveness of property account depreciation rates.* (1) The proposed depreciation rates being established in the first instance must be used until they are either accepted or modified by the Commission. Rates in effect at the

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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 14th day of November 2016, served the foregoing upon the counsel listed in the Service Preference Report via the Court's CM/ECF system or via U.S. Mail, as indicated below:

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