

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 09-60947

**WESTERN REFINING SOUTHWEST, INC., *ET AL.*,
PETITIONERS,**

v.

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

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

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

**CHRISTINE A. VARNEY
ASSISTANT ATTORNEY GENERAL**

**THOMAS R. SHEETS
GENERAL COUNSEL**

**JOHN J. POWERS, III
ROBERT J. WIGGERS
ATTORNEYS**

**ROBERT H. SOLOMON
SOLICITOR**

**ROBERT M. KENNEDY
ATTORNEY**

**FOR RESPONDENT
UNITED STATES OF AMERICA
U.S. DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530**

**FOR RESPONDENT
FEDERAL ENERGY
REGULATORY COMMISSION
WASHINGTON, D.C. 20426**

**JUNE 7, 2010
CORRECTED BRIEF: JULY 8, 2010**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the Certificate of Interested Persons contained in the Brief of Petitioners Western Refining Southwest, Inc., *et al.* lists the persons and entities described in Fifth Circuit Rule 28.2.1 that have an interest in the outcome of this case. These representations are made in order that judges of this Court may evaluate possible disqualification or recusal.

/s/ Robert J. Wiggers

Robert J. Wiggers
Attorney of Record for Respondent
United States of America

/s/ Robert M. Kennedy

Robert M. Kennedy
Attorney of Record for Respondent
Federal Energy Regulatory
Commission

July 8, 2010

STATEMENT REGARDING ORAL ARGUMENT

Contrary to the assertion in Petitioners' Statement Regarding Oral Argument, this case does not involve, grandly, "the extent to which the [Interstate Commerce Act] requires the FERC to exercise jurisdiction over the transportation of petroleum under contracts." That issue is well-settled and undisputed. In this case, the Commission simply determined that, under the circumstances presented, the parties' business arrangement did not involve a contract for the transportation of petroleum, but rather a lease of pipeline facilities best suited for state adjudication. And because the Interstate Commerce Act does not vest the Commission with jurisdiction over lease agreements (and other forms of market entry), the Commission dismissed the Petitioners' complaint.

Nonetheless, the Commission submits that oral argument would be helpful to the Court's disposition. Oral argument would provide an opportunity for the Court to question counsel generally about the scope of the Commission's jurisdiction under the Interstate Commerce Act or, more specifically, about the business transaction at issue here.

TABLE OF CONTENTS

STATEMENT REGARDING JURISDICTION	1
STATEMENT OF THE ISSUES.....	2
STATEMENT OF THE CASE.....	2
STATEMENT OF FACTS	4
I. STATUTORY BACKGROUND	4
A. The Commission’s Jurisdiction Under The Interstate Commerce Act.....	4
B. Complaint Procedures Under The Interstate Commerce Act.....	6
II. THE PARTIES’ CONTRACTUAL RELATIONSHIP	7
A. The Acquisition Of Giant Industries	7
B. The Capacity Lease Agreement	8
C. The Crude Purchase Agreement.....	11
D. The Parties’ Performance Under The Agreements	11
1. Tariff filings	11
a. Waiver of filing requirements for the Giant entities	11
b. Western Pipeline’s tariff filings.....	12
c. TEPPCO Pipeline’s tariff filings	13
2. Events leading to the parties’ dispute	13
E. Proceedings Before The Commission.....	15

1.	The Western Parties’ complaints	15
a.	The initial complaint.....	15
b.	The amended complaint.....	16
2.	TEPPCO Pipeline’s answer and motion to dismiss	17
3.	The Dismissal Order	17
4.	The Rehearing Order.....	19
F.	The Parties’ Ongoing State Court Litigation	20
	SUMMARY OF ARGUMENT	21
	ARGUMENT	22
I.	THE WESTERN PARTIES’ PETITION IS NOT RIPE FOR REVIEW	22
II.	THE COMMISSION REASONABLY CONCLUDED THAT THE PARTIES’ DISPUTE DID NOT FALL WITHIN ITS JURISDICTION UNDER THE INTERSTATE COMMERCE ACT	24
A.	Standard Of Review	24
B.	Under The Interstate Commerce Act, The Commission’s Jurisdiction Is Limited To Oil Pipeline Transportation	26
1.	Unlike the Federal Power Act and Natural Gas Act, the Interstate Commerce Act does not require Commission approval of lease agreements.....	28
2.	Under the Interstate Commerce Act, intercarrier arrangements are regulated separately from carrier-shipper relations	29

3.	The Western Parties misleadingly suggest that FERC has sweeping jurisdiction over oil pipeline companies	31
C.	The Commission Reasonably Determined That The Parties’ Dispute Did Not Relate To The Transportation Of Oil By A Common Carrier.....	32
1.	The Commission reasonably determined that the Capacity Lease Agreement created a lessor/lessee relationship between the parties.....	32
a.	The Commission’s conclusion is consistent with FERC precedent.....	33
b.	The Commission’s conclusion is consistent with judicial precedent.....	35
2.	The Commission reasonably found that none of the Western Parties’ other allegations established a common carrier/shipper relationship with TEPPCO Pipeline.....	36
a.	The exchange of information between Western Refining and TEPPCO Pipeline does not establish a common carrier/shipper relationship	36
b.	The tariffs filed by the Western Parties do not establish a common carrier/shipper relationship with TEPPCO Pipeline	39
D.	The Commission’s Holding Does Not Sanction Discriminatory Conduct By Pipeline Companies	40
III.	THE COMMISSION REASONABLY FOUND THAT, EVEN IF IT COULD EXERCISE DISCRETIONARY JURISDICTION OVER THE WESTERN PARTIES’ COMPLAINT, IT WOULD DECLINE TO DO SO.....	41

IV. THE COMMISSION REASONABLY ANALYZED
AND DISMISSED THE WESTERN PARTIES' COMPLAINT..... 43

CONCLUSION 48

TABLE OF AUTHORITIES

COURT CASES:

<i>Ass'n of Oil Pipelines v. FERC</i> , 83 F.3d 1434 (D.C. Cir. 1996)	26
<i>Armour Packing Co. v. United States</i> , 209 U.S. 56 (1908)	39
<i>Brazos Elec. Power Coop., Inc. v. FERC</i> , 205 F.3d 235 (5th Cir. 2000)	24
<i>Burlington Truck Lines, Inc. v. United States</i> , 371 U.S. 156 (1962)	25
<i>Cajun Elec. Power Co-op, Inc. v. FERC</i> , 28 F.3d 173 (D.C. Cir. 1994)	46
<i>Chatham Condo Ass'ns v. Century Vill., Inc.</i> , 597 F.2d 1002 (5th Cir. 1979)	47
<i>Chevron U.S.A., Inc. v. Natural Resources Def. Council, Inc.</i> , 467 U.S. 837 (1984)	25, 26
<i>Dillon v. Rogers</i> , 596 F.3d 260 (5th Cir. 2010)	47
<i>El Paso Elec. Co. v. FERC</i> , 201 F.3d 667 (5th Cir. 2000)	25
<i>Exxon Pipeline Co. v. United States</i> , 725 F.2d 1467 (D.C. Cir. 1984)	45
<i>Farmers Union Cent. Exch., Inc. v. FERC</i> , 584 F.2d 408 (D.C. Cir. 1978)	6
<i>Farmers Union Cent. Exch., Inc. v. FERC</i> , 734 F.2d 1486 (D.C. Cir. 1984)	28, 31
<i>Fed. Power Comm'n v. East Ohio Gas Co.</i> , 338 U.S. 464 (1950)	27
<i>Friends of Keeseville, Inc. v. FERC</i> , 859 F.2d 230 (D.C. Cir. 1988)	23
<i>Frontier Pipeline Co. v. FERC</i> , 452 F.3d 774 (D.C. Cir. 2006)	4
<i>Hi-Tech Furnace Systems, Inc. v. FCC</i> , 224 F.3d 781 (D.C. Cir. 2000)	45, 46

<i>La. Env'tl. Action Network v. EPA</i> , 382 F.3d 575 (5th Cir. 2004)	26
<i>La. Pub. Serv. Comm'n v. FCC</i> , 476 U.S. 355 (1986)	44
<i>Lichoulas v. FERC</i> , No. 08-1373, 2010 U.S. App. LEXIS 10970 (D.C. Cir. May 28, 2010)	46
<i>Mobil Producing Texas & New Mexico, Inc. v. FERC</i> , 886 F.2d 745 (5th Cir. 1989)	46
<i>Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto Ins. Co.</i> , 463 U.S. 29 (1983)	25
<i>National Steel Corp. v. Michigan Pub. Serv. Comm'n</i> , 919 F.2d 38 (6th Cir. 1990)	26
<i>Oklahoma Natural Gas Co. v. FERC</i> , 28 F.3d 1281 (D.C. Cir. 1994).....	25
<i>Orix Credit Alliance, Inc. v. Wolfe</i> , 212 F.3d 891 (5th Cir. 2000)	23
<i>Pac. Gas & Elec. Co. v. FERC</i> , 106 F.3d 1190 (5th Cir. 1997).....	25
<i>Phillips Pipe Line Co. v. Diamond Shamrock Refining and Marketing Co.</i> , 50 F.3d 864 (10th Cir. 1995)	35
<i>Roark & Hardee LLP v. City of Austin</i> , 522 F.3d 533 (5th Cir. 2008).....	23
<i>Shaw Warehouse Co. v. S. Ry. Co.</i> , 288 F.2d 759 (5th Cir. 1961)	26
<i>Simmons v. ICC</i> , 871 F.2d 702 (7th Cir. 1989)	30
<i>Southern California Edison Co. v. FERC</i> , 502 F.3d 176 (D.C. Cir. 2007).....	42
<i>Southern Railway Co. v. Seaboard Allied Milling Corp.</i> , 442 U.S. 444 (1979).....	45
<i>Tex. Office of Pub. Util. Counsel v. FCC</i> , 265 F.3d 313 (5th Cir. 2001)	25
<i>Toca Producers v. FERC</i> , 411 F.3d 262 (D.C. Cir. 2005)	23

<i>Transit Comm’n v. United States</i> , 289 U.S. 121 (1933).....	30
<i>United States v. Ohio Oil Co.</i> , 234 U.S. 548 (1914).....	31
<i>United States v. Baltimore & Ohio R.R.</i> , 333 U.S. 169 (1948)	31
<i>Wetmore v. Rymer</i> , 169 U.S. 115 (1898).....	47

ADMINISTRATIVE CASES:

<i>ARCO Pipe Line Co.</i> , 66 F.E.R.C. ¶ 61,159 (1994)	27
<i>Arkansas Louisiana Gas Co.</i> , 7 F.E.R.C. ¶ 61,175 (1979).....	41, 43
<i>Enogex, LLC</i> , 131 F.E.R.C. ¶ 62,066 (2010).....	34
<i>Giant Pipeline Co., et al.</i> , 120 F.E.R.C. ¶ 61,275 (2007).....	12, 40
<i>Gulf S. Pipeline Co.</i> , 120 F.E.R.C. ¶ 61,291 (2007).....	28
<i>Islander E. Pipeline Co.</i> , 100 F.E.R.C. ¶ 61,276 (2002)	34
<i>Kinder Morgan Cochin LLC</i> , 127 F.E.R.C. ¶ 61,205 (2008)	13
<i>Midcontinent Express Pipeline, LLC</i> , 124 F.E.R.C. ¶ 61,089 (2008)	34
<i>Mobil Pipe Line Company</i> , 128 F.E.R.C. ¶ 63,008 (2009)	8
<i>Rocky Mountain Pipeline System, LLC</i> , 126 F.E.R.C. ¶ 61,301 (2009).....	27
<i>SFPP, L.P.</i> , 86 F.E.R.C. ¶ 61,022 (1999).....	27
<i>Texaco Oil Pipeline, Inc.</i> , 74 F.E.R.C. ¶ 61,071 (1996).....	40, 41
<i>Texas E. Transmission Corp.</i> , 94 F.E.R.C. ¶ 61,139 (2001)	34
<i>Texas Gas Transmission, LLC</i> , 113 F.E.R.C. ¶ 61,185 (2005)	34

<i>Western Refining Pipeline Co.</i> , 122 F.E.R.C. ¶ 61,210 (2008)	13
<i>Western Refining Southwest, Inc., et al.</i> , 127 F.E.R.C. ¶ 61,288 (2009).....	<i>passim</i>
<i>Western Refining Southwest, Inc., et al.</i> , 129 F.E.R.C. ¶ 61,053 (2009).....	<i>passim</i>

STATUTES:

FEDERAL POWER ACT

16 U.S.C. § 824b(a)(1)(A).....	28
--------------------------------	----

INTERSTATE COMMERCE ACT

49 U.S.C. app. § 1(1)(b)	2, 4
49 U.S.C. app. § 1(5)	5
49 U.S.C. app. § 1(18)	5, 29, 30
49 U.S.C. app. § 1a	5, 29
49 U.S.C. app. § 3(1)	5
49 U.S.C. app. § 4(1)	5
49 U.S.C. app. § 5	6, 29, 30
49 U.S.C. app. § 6	5
49 U.S.C. app. § 8	6
49 U.S.C. app. § 9	6
49 U.S.C. app. § 13(1)	6, 45

49 U.S.C. app. § 15(1) 6

49 U.S.C. app. § 20..... 5

NATURAL GAS ACT

15 U.S.C. §§ 717f 28

REGULATIONS:

18 C.F.R. § 343.2(c) 7

18 C.F.R. § 385.206(b) 7

GLOSSARY

Capacity Lease Agreement	Lease Agreement between TEPPCO Crude and Giant Pipeline Co., dated Aug. 26, 2006, attached as Exhibit A to the Western Parties' Complaint
Cockrell Decl.	Declaration of J. M. Cockrell, dated Mar. 18, 2009, and submitted with TEPPCO Pipeline's Answer and Motion to Dismiss
Commission or FERC	Federal Energy Regulatory Commission
Crow Decl.	Declaration of C. L. Crow, dated Feb. 6, 2009, and submitted as Attachment 2 to the Western Parties' Complaint
Dismissal Order	<i>Western Refining Southwest, Inc., et al.</i> , 127 F.E.R.C. ¶ 61,288 (2009) (JA 1)
Rehearing Order	<i>Western Refining Southwest, Inc., et al.</i> , 129 F.E.R.C. ¶ 61,053 (2009) (JA 12)
Supp. Wheatley Decl.	Supplemental Declaration of M. Wheatley, dated Mar. 3, 2009, attached as Attachment 3 to the Western Parties' Amended Complaint
TEPPCO Pipeline	Intervenor Enterprise Crude Pipeline, L.L.C. (formerly known as TEPPCO Crude Pipeline, L.L.C.)
Western Parties	Petitioners Western Refining Southwest, Inc. and Western Refining Pipeline Company
Western Pipeline	Western Refining Pipeline Company
Western Refining	Western Refining Southwest, Inc.
Wheatley Decl.	Declaration of M. Wheatley, dated Feb. 6, 2009, attached as Attachment 1 to the Western Parties' Complaint

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STATEMENT REGARDING JURISDICTION

Petitioners Western Refining Southwest, Inc. (“Western Refining”) and Western Refining Pipeline Company (“Western Pipeline”) (collectively, the “Western Parties”) ask the Court to direct the Federal Energy Regulatory Commission (“FERC” or “Commission”) to assert jurisdiction over their dispute with Enterprise Crude Pipeline, LLC, formerly known as TEPPCO Crude Pipeline, LLC (“TEPPCO Pipeline”). But as explained more fully in Part I of the Argument, the current appeal is not ripe for immediate judicial review by this Court. There is an ongoing Texas state court proceeding between the Western Parties and TEPPCO Pipeline regarding the same set of facts sought to be adjudicated before

the Commission. That proceeding permits the Western Parties an opportunity to raise their allegations regarding TEPPCO Pipeline's conduct and obtain adequate relief. If the Western Parties prevail in that ongoing proceeding, this Court may never have to consider the issues raised by the instant petition.

STATEMENT OF THE ISSUES

1. Whether the Commission reasonably concluded that a complex business dispute arising out of the performance of a lease agreement regarding pipeline facilities did not fall within the Commission's jurisdiction over interstate oil transportation by common carriers under the Interstate Commerce Act.

2. Whether the Commission reasonably exercised its discretion in determining that, even if it possessed jurisdiction under the Interstate Commerce Act, it would not exercise that jurisdiction in light of the availability of a state judicial forum that could adequately resolve a dispute arising from a lease agreement governed by state law that did not involve any issues of federal regulatory import.

STATEMENT OF THE CASE

The Interstate Commerce Act vests the Commission with jurisdiction over common carriers engaged in "the transportation of oil . . . by pipe line." 49 U.S.C. app. § 1(1)(b). This case concerns Commission's interpretation of the scope of that jurisdictional grant, as well as the need to exercise any existing jurisdiction to

adjudicate a complex business dispute arising out of a lease of capacity on an oil pipeline facility.

The dispute underlying the challenged orders was presented to the Commission in a complaint filed by the Western Parties against TEPPCO Pipeline. The complaint explained that Western Pipeline had contracted with TEPPCO Pipeline to lease capacity on TEPPCO Pipeline's facilities. The Western Parties alleged that TEPPCO Pipeline had breached the parties' agreement and violated the Interstate Commerce Act by reversing the flow of one of the pipelines at issue and illegally retaining crude oil belonging to the Western Parties, while continuing to collect lease payments.

After reviewing the parties' pleadings, declarations and exhibits, the Commission determined that allegations in the complaint did not "involve the Commission's jurisdiction over oil pipeline transportation," but rather arose from "a private contract governing property rights that is solely within the jurisdiction of the appropriate state court to resolve." *Western Refining Southwest, Inc., et al.*, 127 F.E.R.C. ¶ 61,288, P 25 (2009) (R. 14)¹ ("Dismissal Order"), JA 7.

The Western Parties sought rehearing, which the Commission denied. *Western Refining Southwest, Inc., et al.*, 129 F.E.R.C. ¶ 61,053 (2009) (R.18)

¹ "R" refers to the item number in the certified index to the record. Citations to "Br." refer to Petitioners' opening brief. "P" refers to the internal paragraph number within a FERC order, and "JA" refers to the joint appendix. Other capitalized terms are defined in the Glossary at p. x.

(“Rehearing Order”), JA 12. In doing so, the Commission reiterated that “the contract in question is for the lease of pipeline facilities and not for the ‘transportation of oil,’ [and thus] the Commission has no jurisdictional authority over the contractual dispute between the Western Parties and TEPPCO.” *Id.* P 7, JA 14. The Commission further explained that, even if it possessed jurisdiction under the Interstate Commerce Act, it would decline to exercise that jurisdiction to the exclusion of the appropriate judicial forum. The parties’ dispute does not raise any issues within the special expertise of the Commission, nor any questions that call for uniformity of interpretation from a federal regulatory perspective. *Id.* P 9, JA 14. To the contrary, the capacity lease agreement is “a private contract governing property rights that is subject to state law.” *Id.*

STATEMENT OF FACTS

I. STATUTORY BACKGROUND

The pertinent statutory and regulatory provisions are contained in Appendix A to this brief.

A. The Commission’s Jurisdiction Under The Interstate Commerce Act

The Hepburn Act of 1906, Pub. L. No. 59-337, § 1, 34 Stat. 584, extended the Interstate Commerce Act to “common carriers engaged in . . . the transportation of oil . . . by pipe line.” 49 U.S.C. app. § 1(1)(b) (1988). In 1977, Congress transferred the Interstate Commerce Commission’s authority over oil pipelines to

the newly created FERC. Department of Energy Reorganization Act, Pub. L. No. 95-91, § 402(b), 91 Stat. 565, 584 (codified in substance at 49 U.S.C. § 60502).

The next year, Congress repealed much of the Interstate Commerce Act, but provided that transportation of oil by pipeline companies would be subject to “[t]he laws . . . as they existed on October 1, 1977.” Act of Oct. 17, 1978, Pub. L. No. 95-473, § 4(c), 92 Stat. 1337, 1470.²

Pipeline companies are required to meet a number of the same obligations imposed upon rail common carriers by the Interstate Commerce Act. For instance, pipeline companies, like rail carriers, must establish, file and publish reasonable, nondiscriminatory rates subject to regulatory approval, avoid imposing unjust and unreasonable tariff terms and conditions upon shippers, *see e.g.*, 49 U.S.C. app. §§ 1(5), 3(1), 4(1), 6, and file certain financial reports and follow certain accounting procedures, *id.* §§ 20(1), (2), (4) and (5).

But pipeline companies are not subject to all of the provisions applicable to rail carriers. In particular, they are not subject to the regulation of market entry and exit under section 1(18) and 1a, or acquisitions of control (including that

² The 1977 version of the Interstate Commerce Act was, but is no longer, reprinted in the appendix to title 49 of the United States Code. Accordingly, citations to the Interstate Commerce Act are to the 1988 edition of the U.S. Code, which is the last such edition that reprinted the Interstate Commerce Act as it appeared in 1977. *See, e.g., Frontier Pipeline Co. v. FERC*, 452 F.3d 774, 776 (D.C. Cir. 2006) (explaining history of oil pipeline regulation under, and unusual citation to, the Interstate Commerce Act). A copy of the 1977 version of the Act may be found at: <http://www.ferc.gov/legal/maj-ord-reg/ica.pdf>.

accomplished through leases) under section 5(2)-(13). *See id.* § 5(14) (defining “carrier” for purposes of provisions regarding unifications, mergers, and acquisitions of control to mean “a carrier by railroad . . . a motor carrier, . . . and a water carrier”). This dichotomy indicates a “congressional intent to allow a freer play of competitive forces among oil pipeline companies than in other common carrier industries.” *Farmers Union Cent. Exch., Inc. v. FERC*, 584 F.2d 408, 413 (D.C. Cir. 1978).

B. Complaint Procedures Under The Interstate Commerce Act

The Interstate Commerce Act permits shippers to challenge pipeline rates and practices by filing a complaint with the Commission. *See* 49 U.S.C. app. § 13(1) (providing for complaints against common carriers).³ Section 15(1) of the Act permits the Commission, after determining that a practice “is or will be unjust or unreasonable,” to “prescribe . . . what . . . practice is or will be just, fair and reasonable, to be thereafter followed” *Id.* § 15(1). Common carriers who are found to have violated the Act “shall be liable to the person or persons injured thereby for the full amount of any damages sustained in consequence of any such violation” *Id.* § 8.

The Commission implemented procedural rules for Interstate Commerce Act complaints in 18 C.F.R. Part 343. Those rules provide that, in order to state a valid

³ Such challenges may also be brought “in any district court of the United States of competent jurisdiction.” 49 U.S.C. app. § 9.

cause of action, a party “must allege reasonable grounds for asserting that the [pipeline’s] operations or practices violate a provision of the Interstate Commerce Act, or of the Commission regulations.” 18 C.F.R. § 343.2(c)(3). The complaint must “[e]xplain how the action or inaction violates applicable statutory standards or regulatory requirements.” *Id.* § 385.206(b)(2). Any complaint that does not meet these requirements “will be dismissed.” *Id.* § 343.2(c)(4).

II. THE PARTIES’ CONTRACTUAL RELATIONSHIP

A. The Acquisition Of Giant Industries

The contractual agreements underlying the parties’ dispute were originally entered into by affiliates of Giant Industries, Inc., which was subsequently acquired by Western Refining, Inc. on May 31, 2007. Dismissal Order P 2, JA 1. As a result of that acquisition, Giant Industries Arizona, Inc. became Western Refining and Giant Pipeline Company became Western Pipeline. *Id.*

Western Refining owns and operates two oil refineries located in Gallup, New Mexico and Bloomfield, New Mexico. Western Pipeline owns two intrastate pipelines – running from Hobbs, New Mexico to Jal, New Mexico, and from Jal, New Mexico to Bisti, New Mexico – capable of bringing crude oil to these refineries. *See* Decl. of M. Wheatley, dated Feb. 6, 2009 (“Wheatley Decl”), at ¶ 2, Attachment 1 to Complaint (R. 1), JA 247; Decl. of C. L. Crow, dated Feb. 6, 2009 (“Crow Decl”), at ¶ 2, Attachment 2 to Complaint, JA 256.

Intervenor TEPPCO Pipeline operates an interstate pipeline system that includes two parallel lines running between Hobbs, New Mexico and Midland, Texas. *See* Decl. of J. M. Cockrell, dated Mar. 18, 2009 (“Cockrell Decl.”), at ¶¶ 3-4, attached to Answer and Motion to Dismiss (R. 9), JA 273. One line, which is used primarily for the transportation of sour crude, is bi-directional and can be used to provide transportation service in either direction. *Id.* at ¶ 4, JA 273. The second line, which is used to transport “WTI” or “sweet”⁴ crude was converted from a north-south line (*i.e.*, Hobbs to Midland) to a bi-directional line capable of providing service in a northerly direction (*i.e.*, Midland to Hobbs). *Id.*

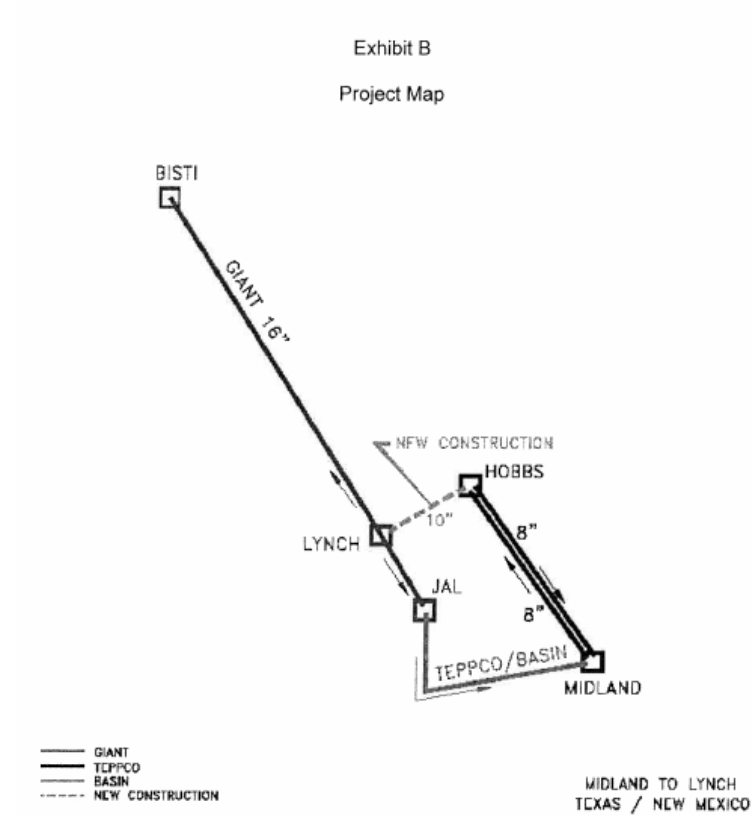
B. The Capacity Lease Agreement

On August 25, 2006, Giant Pipeline Company (now Western Pipeline) entered into an agreement with TEPPCO Pipeline pursuant to which it leased capacity on TEPPCO Pipeline’s facilities “sufficient . . . to transport 15,000 barrels per day of crude oil as a common carrier.” Lease Agreement between TEPPCO Crude and Giant Pipeline Co., dated Aug. 25, 2006, § 2, Exhibit A to Complaint (R. 1), JA 197 (“Capacity Lease Agreement”). The capacity was obtained on TEPPCO Pipeline’s WTI/sweet crude line, whose flow TEPPCO agreed to maintain in a northerly direction from Hobbs to Midland. *Id.* In addition,

⁴ “Sweet” crude oil contains less than 0.5 percent sulfur, while “sour” crude contains more than 0.5 percent sulfur. *See Mobil Pipe Line Company*, 128 F.E.R.C. ¶ 63,008, P 109 n.27 (2009). “WTI” refers to West Texas Intermediate, which is a type of sweet crude oil. *Id.* at P 230 n.53.

TEPPCO Pipeline agreed to construct a pipeline from Hobbs, New Mexico to Lynch, New Mexico where it would intersect with Giant Pipeline Company's (now Western Pipeline's) pipeline running between Jal, New Mexico and Bisti, New Mexico. *Id.* § 18(c), JA 204-05. TEPPCO Pipeline retained the remaining capacity on these lines. Cockrell Decl. ¶ 8, JA 274.

Exhibit B to the Capacity Lease Agreement (JA 209) depicts the facilities that were the subject of the parties' contractual arrangement as follows:



The parties agreed that once the Agreement took effect, Giant Pipeline would be responsible for operating the leased capacity in its own name as a common carrier:

[Giant Pipeline] shall use its Leased Capacity in the Pipeline solely as an individual common carrier facility. [Giant Pipeline] shall separately maintain tariffs in its own name in accordance with any applicable state and federal laws and regulations covering the Leased Capacity and shall collect for its own account all revenues payable by shippers under such tariffs. [TEPPCO Pipeline] shall not be an agent for [Giant Pipeline] in connection with the acceptance of tenders from shippers for shipment of crude oil.

Capacity Lease Agreement, § 5(f), JA 201. In exchange for obtaining capacity on the pipelines, Giant Pipeline agreed to make monthly rental payments, “whether or not in fact [Giant Pipeline] uses the Base Capacity in that month.” *Id.* § 3(a), JA 198.

In the Capacity Lease Agreement, the parties arranged for an alternative route that would allow TEPPCO Pipeline to continue to transport crude oil from Hobbs to Midland, now that the flow of its WTI/sweet crude pipeline had been reversed. Under this alternative route, TEPPCO Pipeline would transport crude (a) via the unleased capacity it retained in the new Hobbs-to-Lynch line, and then (b) through leased capacity from Giant Pipeline’s Lynch-to-Jal pipeline, and finally through (c) TEPPCO’s interest in another pipeline running from Jal to Midland. *Id.* § 18(c), JA 204-05. In order to effectuate this alternative routing, the parties entered into a second lease agreement under which TEPPCO Pipeline leased capacity in Giant Pipeline’s Lynch to Jal segment. *See* Lease Agreement, dated Apr. 18, 2007, Exhibit E to Complaint (R. 1), JA 233.

C. The Crude Purchase Agreement

As part of the overall business arrangement between the parties, TEPPCO Crude, an affiliate of TEPPCO Pipeline, and Giant Industries Arizona (now Western Refining) – which was the anticipated shipper over the leased capacity – entered into a contract pursuant to which Giant Industries Arizona would purchase crude in Midland, Texas from TEPPCO Crude. Dismissal Order P 4, JA 2. The agreement specified that Giant Industries Arizona was to buy a minimum of 10,000 barrels per day for the first two years, with declining requirements over the agreement’s ten-year term. *Id.*

D. The Parties’ Performance Under The Agreements

1. Tariff filings

a. Waiver of filing requirements for the Giant entities

In July 2007, Giant Pipeline and Giant Industries Arizona sought a waiver of the tariff filing and reporting requirements imposed by the Interstate Commerce Act for transportation service from Midland, Texas to Bisti, New Mexico. The service would be accomplished through the use of the capacity obtained through the Capacity Lease Agreement, and Giant Pipeline’s own TexNew Mex Pipeline which runs from Jal to Bisti (with an interconnection at Lynch, New Mexico). Giant Pipeline explained that the arrangement would allow it to provide “seamless transportation of its own crude oil from Midland, Texas northward” to Giant’s

refineries in Star Lake and Bisti, New Mexico. *Giant Pipeline Co., et al.*, 120 F.E.R.C. ¶ 61,275, P 3 (2007).

The Commission granted the waiver in light of the representation that the only expected shipper on the Midland-to-Lynch route would be Giant Industries Arizona. *Id.* P 8 (tariff filing and reporting requirements are “not necessary to protect anyone because the pipeline [is] not being used . . . for the transportation of oil for an unaffiliated third party”). The Commission explained, however, that if Giant Pipeline received a request for transportation from an unaffiliated shipper, it would have to file “a tariff with the Commission for movements over its leased capacity from Midland, Texas to Lynch, New Mexico.” *Id.* P 9.

b. Western Pipeline’s tariff filings

On March 7, 2008 – after Western Refining, Inc.’s acquisition of Giant Industries, Inc. – Western Pipeline filed tariffs in order “to establish common carrier service between the Midland, Texas origin; and Star Lake and Bisti, New Mexico destinations.” *See* letter dated Feb. 8, 2008 from Western Refining to FERC, Exhibit C to Complaint (R. 1), JA 212. Such transportation would take place on the capacity leased from TEPPCO Pipeline (from Midland to Hobbs to Lynch) and Western Pipeline’s TexNew Mex Pipeline (from Lynch to Star Lake and Bisti). *See* Crow Decl. at ¶ 11, JA 259. In an order issued on March 7, 2008, the Commission accepted the tariffs filed by Western Pipeline. *Western Refining*

Pipeline Co., 122 F.E.R.C. ¶ 61,210 (2008).

c. TEPPCO Pipeline’s tariff filings

During the relevant time period, TEPPCO Pipeline also had tariffs on file with respect to its parallel pipelines between Hobbs and Midland. One tariff (FERC Tariff No. 20) offered service from Midland to Hobbs, while the other (FERC Tariff No. 21) offered service from Hobbs to Midland. *See* Exhibits 2 and 3 to TEPPCO Pipeline’s Answer and Motion to Dismiss (R. 9), JA 285-92. *See also* Dismissal Order P 7, JA 3.

2. Events leading to the parties’ dispute

Between June and August 2007, in preparation for the commencement of transportation service, Giant Pipeline (now Western Pipeline) began to place “line fill” into the pipelines.⁵ Dismissal Order P 8, JA 3. Giant Pipeline supplied 26,000 barrels as line fill for the Midland-to-Hobbs segment, 9,275 barrels to fill the tank bottoms (*i.e.*, working stock) in Hobbs, and 13,600 barrels as line fill for the Hobbs-to-Lynch segment. *Id.* *See also* Supplemental Declaration of M. Wheatley, dated Mar. 3, 2009, at ¶ 3, Attachment 3 to Amended Complaint (R. 6), JA 265-66 (“Supp. Wheatley Decl.”). Giant Pipeline also filled its own line from Lynch to Bisti with 495,000 barrels of line fill. Dismissal Order P 8, JA 3.

⁵ “Line fill” is the “volume of product required in a pipeline system at all times in order to maintain pressure and ensure uninterrupted flow or transportation and delivery.” *Kinder Morgan Cochin LLC*, 127 F.E.R.C. ¶ 61,205, P 1 n.1 (2008).

One year later, in June 2008, Western Pipeline purged the line fill from its Lynch-to-Bisti pipeline and replaced it with nitrogen. *Id.* P 9, JA 3. As a result, Western Pipeline could not have used the capacity leased from TEPPCO Pipeline without first putting its Lynch-to-Bisti line back in service. *Id.* In addition, Western Pipeline failed to notify TEPPCO Pipeline of any transportation activity on the leased capacity for June 2008. *Id.* In order to make use of this idle capacity, TEPPCO Pipeline reversed the flow of the Midland-to-Hobbs line so that it could transport crude from Hobbs directly to Midland, rather than through the circuitous alternative route described in the Capacity Lease Agreement. *Id.* In conjunction with this change, TEPPCO Pipeline pumped the line fill supplied by the Western Parties to a storage tank in Midland, Texas. *Id.*

In September 2008, Western Pipeline notified TEPPCO Pipeline that it sought to pull 46,200 barrels from its inventory on the TEPPCO system. *Id.*, JA 3-4. TEPPCO Pipeline advised that it could pull 20,200 barrels, but that the remainder (26,000) was required as line fill under the terms of the Capacity Lease Agreement. *Id.* See also email dated Sept. 12, 2008 from TEPPCO Pipeline to Western Refining, Exhibit 2 to Wheatley Decl. (R. 1), JA 270. In October 2008, TEPPCO Pipeline delivered the 20,200 barrels to Western Refining in Midland, Texas. Dismissal Order P 9, JA 4.

In a letter dated February 9, 2009, the Western Parties terminated the

Capacity Lease Agreement, the agreement under which TEPPCO Pipeline leased capacity on Western Pipeline’s Lynch-to-Jal segment, and the crude oil purchase agreement, due to what it perceived to be TEPPCO Pipeline’s material breaches of those agreements. *See* Complaint, Ex. F (R. 1), JA 241-45.

E. Proceedings Before The Commission

1. The Western Parties’ complaints

a. The initial complaint

Simultaneous with the termination of the lease agreements, the Western Parties filed a complaint with the Commission – accompanied by two affidavits and thirteen exhibits – alleging that TEPPCO Pipeline had acted in an unjust and illegal manner by reversing the flow of the Hobbs-to-Midland pipeline and seizing the line fill, while continuing to bill Western Pipeline for lease payments. The complaint asserted that TEPPCO Pipeline had breached “its contractual obligations to Western Pipeline,” Complaint at ¶ 7, JA 32, and violated its statutory and regulatory obligations under the Interstate Commerce Act, as well as the terms and conditions tariffs on file with the Commission. *See id* at ¶¶ 35-61, JA 43-52; Dismissal Order PP 15-16, JA 4-5. The complaint alleged that TEPPCO Pipeline engaged in this conduct in order to force Western Refining to renegotiate the crude oil purchase agreement with its affiliate, TEPPCO Crude. Complaint at ¶¶ 72-74, JA 55-56.

The Complaint sought damages on behalf of Western Pipeline in an amount equal to the lease payments made during the period when the flow of the Hobbs-to-Midland pipeline was reversed (June 2008 through December 2008). Complaint ¶¶ 66-68, JA 54. Western Refining sought damages in an amount equal to the value of the 26,000 barrels of line fill that was alleged to have been illegally retained. *Id.* ¶¶ 63-65, JA 53-54. *See also* Dismissal Order PP 16-17, JA 5.

b. The amended complaint

On March 4, 2009, the Western Parties filed an amended complaint – accompanied by an affidavit and four exhibits – which further alleged that TEPPCO Pipeline had illegally retained: (a) 9,275 barrels of crude that had been supplied to fill TEPPCO Pipeline’s tank in Hobbs, New Mexico, and (b) 13,600 barrels that had been supplied as line fill for the Hobbs-to-Lynch pipeline. Amended Complaint at ¶¶ 74D-74M (R. 6), JA 67-72. The Western Parties alleged that TEPPCO Pipeline violated the Interstate Commerce Act and its tariffs by refusing to honor their request to transport the tank bottom volumes to Midland, Texas and the line fill volumes to Lynch, New Mexico. *Id.* ¶¶ 74I-74M, JA 70-72. *See also* Dismissal Order P 19, JA 5-6.

2. TEPPCO Pipeline’s answer and motion to dismiss

On March 20, 2009, TEPPCO Pipeline filed an answer to the Western Parties’ complaint – which attached two affidavits and ten exhibits – and moved to

have it dismissed on the ground that it represented “a private contract action that should have been filed in state court.” Answer and Motion to Dismiss, at ¶ 1 (R. 9), JA 85. TEPPCO Pipeline asserted that the matters complained of by the Western Parties are governed by the Capacity Lease Agreement, and that the only FERC-jurisdictional common carrier/shipper relationship was between Western Pipeline and Western Refining. *See, e.g., id.* at ¶¶ 3, 52-59, JA 85-86, 103-107. *See also* Dismissal Order PP 21-23, JA 6-7.

The Western Parties filed a response to TEPPCO Pipeline’s Answer, which was accompanied by an affidavit and two lengthy exhibits. *See* Response of Western Refining Southwest, Inc., *et al.* (R. 11), JA 117. TEPPCO Pipeline submitted a reply to that response, and the Western Parties subsequently filed an answer to that reply. *See* Reply of TEPPCO Crude Pipeline, LLC (R. 12), JA 136; Answer of Western Refining Southwest, Inc., *et al.* (R. 13), JA 154.

3. The Dismissal Order

In an order issued on June 22, 2009, the Commission dismissed the Western Parties’ complaint for lack of jurisdiction. The Commission explained that its jurisdiction under the Interstate Commerce Act is limited to matters involving the transportation of oil. Dismissal Order P 25, JA 7-8. Unlike the more expansive jurisdictional grants in the Natural Gas Act and Federal Power Act, governing the conduct of natural gas companies and electric utilities, the Interstate Commerce

Act does not provide the Commission with authority over the disposition and leasing of oil pipeline facilities. *Id.*

The Commission determined that the foundation of the parties' dispute – the Capacity Lease Agreement – “created property and contractual rights allowing Western Pipeline to operate its own pipeline within TEPPCO Pipeline facilities,” rather than a common carrier/shipper relationship. *Id.* P 27, JA 9. And because each of the matters complained of by the Western Parties – the reversal of pipeline flow, the retention of line fill and tank inventory, and the lease payments – is addressed in the Capacity Lease Agreement, their claims “must be resolved with reference to [that] lease agreement rather than any FERC Tariff that TEPPCO Pipeline had on file with the Commission.” *Id.*

The Commission also examined the shipping and billing information submitted by the Western Parties and determined that it did “not show that Western Refining had a common carrier/shipper relationship with TEPPCO Pipeline.” *Id.* P 28, JA 9. The billing invoices demonstrated that “the various charges being paid by Western Pipeline were incurred pursuant to the lease agreement.” *Id.* And most important, they “show that no transportation charges were assessed as would occur if either of the Western Parties received common carrier service [from TEPPCO Pipeline] pursuant to FERC Tariffs.” *Id.*

4. The Rehearing Order

On rehearing, the Commission again explained that it had “investigated the complaint by examining all the pleadings, affidavits and exhibits submitted . . . and properly determined that the alleged unlawful conduct of TEPPCO did not arise from . . . activity within the Commission’s jurisdiction.” Rehearing Order P 7, JA 13-14.

The Commission went on to explain that, even if it did have jurisdiction to hear the Western Parties’ complaint, it would decline to do so. Resolution of the parties’ dispute does not require the application of any “special expertise which makes the case peculiarly appropriate for Commission decision.” *Id.* P 9, JA 14. To the contrary, the Capacity Lease Agreement expresses the parties’ desire to have their rights and obligations resolved “in accordance with Texas law.” *Id.* P 11, JA 15. And because “the issues arising from the complaint do not concern oil pipeline transportation . . . it is not important to the regulatory responsibilities of the Commission.” *Id.* P 9, JA 15.

The Commission also rejected the assertion that it was required to take evidence or hold a hearing to resolve the jurisdictional issues raised by the Western Parties’ complaint. The Commission explained that both sides had submitted “numerous pleadings in this proceeding including affidavits and exhibits.” *Id.* P 17, JA 17. In light of this “extensive record,” the Commission “was able to base

its decision on the written pleadings.” *Id.*

F. The Parties’ Ongoing State Court Litigation

On July 8, 2009 – three months before issuance of the Rehearing Order – TEPPCO Pipeline and TEPPCO Crude filed a complaint against the Western Parties in Texas state court concerning the same set of operative facts addressed in the Western Parties’ complaint before the Commission. (A copy of the state court complaint is attached as Appendix B to this brief.) The complaint alleged that Western Pipeline wrongfully terminated the Capacity Lease Agreement, wrongfully held line fill supplied by TEPPCO Pipeline, and failed to make required rental payments. *See* Appendix B at ¶¶ 17-19. In addition to damages, TEPPCO Pipeline sought a declaration from the Texas court that: (1) it did not breach the Capacity Lease Agreement by refusing to return the Western Parties’ line fill and re-routing the Hobbs-to-Midland pipeline, and (2) the Western Parties were not entitled to terminate the Capacity Lease Agreement and crude oil purchase agreement. *See id.* at ¶¶ 21-24.

The Western Parties have generally denied TEPPCO Pipeline’s claim. (A copy of the Western Parties’ answer is attached as Appendix C.) The Commission understands that the Texas state court litigation is currently in the discovery stage.

SUMMARY OF ARGUMENT

The Western Parties' appeal is not yet ripe for review. The ongoing Texas state court litigation between the parties concerns the same factual allegations raised in the Western Parties' complaint before the Commission. That ongoing proceeding provides the Western Parties with a full opportunity to pursue their damage claims against TEPPCO Pipeline. Accordingly, it is premature and potentially unnecessary for the Court to address the jurisdictional issues raised by the Western Parties' appeal.

If the Court decides to address the merits of the Western Parties' petition, it should uphold the challenged orders. The Western Parties' brief is largely directed against a straw man; specifically, the contention that FERC held "that it does not have jurisdiction over the interstate transportation of petroleum if it takes place under a contract." Br. 20. The challenged orders contain no such holding.

Instead, the Commission found that the basis of the parties' dispute – the Capacity Lease Agreement – is *not* a contract in which TEPPCO Pipeline agreed to transport oil. Rather than creating a common carrier/shipper relationship, the agreement creates a lessor/lessee relationship, pursuant to which Western Pipeline obtained property rights that allowed it to operate its own pipeline within TEPPCO Pipeline's facilities. And because the Interstate Commerce Act does not provide the Commission with jurisdiction over oil pipeline lease agreements (or other

forms of market entry), a business dispute relating to such agreements is properly subject to state court jurisdiction.

The Commission's conclusion is supported by the terms of the Capacity Lease Agreement itself, which expressly states that Western Pipeline (not TEPPCO Pipeline) would "maintain tariffs in its own name" for the leased capacity and operate that capacity "as an individual common carrier facility." Capacity Lease Agreement § 5(f), JA 201. It is also consistent with other FERC and court cases finding that capacity lease agreements create lessee/lessor relationships, rather than common carrier/shipper relationships.

The Commission also reasonably found in the alternative that, even if it possessed discretionary jurisdiction under the Interstate Commerce Act, it would decline to exercise that jurisdiction. The Commission found – and the Western Parties do not seriously dispute – that the complaint does not raise any issues requiring the Commission's expertise. To the contrary, the Capacity Lease Agreement expresses the parties' desire to have their performance adjudicated in a judicial forum in accordance with Texas law.

ARGUMENT

I. THE WESTERN PARTIES' PETITION IS NOT RIPE FOR REVIEW.

The current appeal is not ripe for review because the outcome of the ongoing state court proceeding may obviate the need for this Court to consider the

jurisdictional issues raised by the Western Parties' petition.

“The basic rationale behind the ripeness doctrine is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.” *Roark & Hardee LLP v. City of Austin*, 522 F.3d 533, 544 (5th Cir. 2008) (internal quotations omitted). In determining whether a matter is ripe for judicial review, the Court considers “the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.” *Orix Credit Alliance, Inc. v. Wolfe*, 212 F.3d 891, 895 (5th Cir. 2000).

Here, the issues raised by the Western Parties' petition relating to the Commission's jurisdiction under the Interstate Commerce Act are not fit for judicial resolution now by this Court because they may become moot. In the ongoing state court proceedings, the Western Parties can raise counterclaims that would, if successful, vindicate the rights they sought to assert in their complaint before the Commission. If successful, the Western Parties would not need to seek federal appellate review of the jurisdictional issues raised in their petition. Dismissing the instant appeal would thus conserve judicial resources. *See Toca Producers v. FERC*, 411 F.3d 262, 266 (D.C. Cir. 2005) (holding that there is “a substantial judicial interest in deferring resolution of the petition” because the questions raised “may not require adjudication at all” depending on the outcome of other litigation); *Friends of Keeseville, Inc. v. FERC*, 859 F.2d 230, 235 (D.C. Cir.

1988) (finding petition is unripe because “if the issue is not adjudicated at this time, it may not require adjudication at all” due to the possible outcome of ongoing administrative proceedings.)

The Western Parties will suffer no hardship by postponing review since the ongoing state court proceeding provides an adequate forum for resolving their allegations. Likewise, the denial of their preferred forum (*i.e.*, the Commission) imposes no hardship since the Commission “does not possess some special expertise” that places it in a better position than a court to resolve claims arising from “a private contract governing property rights that is subject to state law.” Rehearing Order P 9, JA 14. To the contrary, a Texas state court is in a better position to carry out the parties’ desire to have the “performance [and] interpretation” of their agreement adjudged in accordance with “the laws of the State of Texas.” Capacity Lease Agreement, § 13, JA 202.

II. THE COMMISSION REASONABLY CONCLUDED THAT THE PARTIES’ DISPUTE DID NOT FALL WITHIN ITS JURISDICTION UNDER THE INTERSTATE COMMERCE ACT.

A. Standard Of Review

The Court reviews FERC orders under the Administrative Procedure Act’s arbitrary and capricious standard. *See, e.g., Brazos Elec. Power Coop., Inc. v. FERC*, 205 F.3d 235, 240 (5th Cir. 2000). A court must satisfy itself that the agency “articulate[d] a satisfactory explanation for its action including a ‘rational

connection between the facts found and the choice made.’” *Motor Vehicle Mfrs. Ass’n of United States, Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

The two-step standard of review set forth in *Chevron U.S.A., Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837 (1984), applies to the Commission’s interpretation of its statutory authority under the Interstate Commerce Act in the challenged orders. *See, e.g., Pac. Gas & Elec. Co. v. FERC*, 106 F.3d 1190, 1196 (5th Cir. 1997) (applying *Chevron* deference in assessing whether “FERC imposed a reasonable construction on the description of its statutory powers” in the Natural Gas Act); *El Paso Elec. Co. v. FERC*, 201 F.3d 667, 669-70 (5th Cir. 2000) (applying *Chevron* deference to FERC’s determination of its statutory authority under the Federal Power Act). *See also Oklahoma Natural Gas Co. v. FERC*, 28 F.3d 1281, 1283-84 (D.C. Cir. 1994) (FERC interpretation of its own jurisdiction entitled to *Chevron* deference) (citing application of *Chevron* principles to interpretation of Interstate Commerce Act in *Railway Labor Executives’ Ass’n v. United States*, 987 F.2d 806, 813 (D.C. Cir. 1993)).

Under the first step, if Congress “has spoken directly on the precise question at issue,” the Court “must ‘give effect to [Congress’] unambiguously expressed intent.’” *Tex. Office of Pub. Util. Counsel v. FCC*, 265 F.3d 313, 320 (5th Cir.

2001) (quoting *Chevron*, 467 U.S. at 843). If Congress has not spoken directly, however, the court moves to the second step of *Chevron* and assesses “whether the agency interpretation is a ‘permissible construction of the statute.’” *La. Env’tl. Action Network v. EPA*, 382 F.3d 575, 581-81 (5th Cir. 2004) (quoting *Chevron*, 467 U.S. at 843). If the agency’s interpretation is permissible, “[d]eference is warranted” so long as the agency’s construction is not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Id.* at 582. *See also Ass’n of Oil Pipelines v. FERC*, 83 F.3d 1434, 1440 (D.C. Cir. 1996) (“the court has no occasion to assign a meaning to the [Interstate Commerce Act] where that meaning would contravene a reasonable interpretation by the [FERC, which is] responsible for administering the statute”).

B. Under The Interstate Commerce Act, The Commission’s Jurisdiction Is Limited To Oil Pipeline Transportation.

The Commission’s jurisdiction under the Interstate Commerce Act “is far from extensive in scope.” *National Steel Corp. v. Michigan Pub. Serv. Comm’n*, 919 F.2d 38, 41 (6th Cir. 1990). Rather than providing comprehensive regulatory authority over oil pipeline companies, the Act limits the Commission’s jurisdiction to matters relating to “the transportation of oil . . . by pipe line” 49 U.S.C. app. § 1(1)(b). *See also Shaw Warehouse Co. v. S. Ry. Co.*, 288 F.2d 759, 766 (5th Cir. 1961) (noting that the Interstate Commerce Act applies to “discrimination only with respect to transportation”). Specifically, the Interstate Commerce Act

empowers the Commission to ensure that oil pipelines, as common carriers, provide transportation upon reasonable request, at just and reasonable rates and terms, in a manner that is not unduly discriminatory. *See ARCO Pipe Line Co.*, 66 F.E.R.C. ¶ 61,159, 61,313 (1994) (discussing scope of FERC jurisdiction under the Interstate Commerce Act).

In the Dismissal Order, the Commission explained that, “[u]nlike [its] jurisdiction over natural gas pipelines and electric utilities,” the Commission possesses limited authority over oil pipeline companies. Dismissal Order P 25, JA 7-8. For instance, under the Natural Gas Act – which is “far more comprehensive” than the Interstate Commerce Act, *Fed. Power Comm’n v. East Ohio Gas Co.*, 338 U.S. 464, 469 n.9 (1950) – the Commission must evaluate and approve the proposed construction and operation of interstate natural gas pipelines and storage facilities. But under the Interstate Commerce Act, the Commission lacks jurisdiction with respect to various forms of market entry by oil pipelines. *See, e.g., Rocky Mountain Pipeline System, LLC*, 126 F.E.R.C. ¶ 61,301, P 10 (2009) (“The Commission does not have jurisdiction over the commencement . . . of service on an oil pipeline”); *SFPP, L.P.*, 86 F.E.R.C. ¶ 61,022, at 61,077 (1999) (“Construction [and] entry . . . of service by oil pipelines are not subject to the Commission’s jurisdiction.”). Likewise, natural gas companies must obtain FERC approval before abandoning their interstate transportation service or facilities. 15

U.S.C. § 717f(b). Oil pipelines, however, “may abandon service at will.” *Farmers Union Cent. Exch., Inc. v. FERC*, 734 F.2d 1486, 1509 n.51 (D.C. Cir. 1984).

1. Unlike the Federal Power Act and Natural Gas Act, the Interstate Commerce Act does not require Commission approval of lease agreements.

The most pertinent difference between the Federal Power Act and Natural Gas Act on the one hand, and the Interstate Commerce Act on the other, relates to Commission’s jurisdiction over lease agreements. Section 203 of the Federal Power Act provides that no FERC-regulated electric utility “shall sell, lease, or otherwise dispose of” or “acquire” jurisdictional facilities with a certain value “without first having secured an order of the Commission authorizing it do so.” 16 U.S.C. § 824b(a)(1)(A).

Similarly, under Section 7 of the Natural Gas Act, parties seeking to enter into lease agreements involving natural gas facilities must obtain from the Commission a certificate of public convenience (for the lessee) and approval of abandonment (for the lessor). 15 U.S.C. §§ 717f(b), (c). *See also Gulf S. Pipeline Co.*, 120 F.E.R.C. ¶ 61,291, P 16 (2007) (the “acquisition of capacity by lease [is] subject to the requirement of section 7(c) of the NGA” and the “abandonment of capacity” by lease “is subject to the requirement of section 7(b).”).

The Interstate Commerce Act does not contain any comparable provisions applicable to oil pipeline leases of capacity or facilities. Rehearing Order P 13,

JA 16. While Sections 1a and 1(18) of the Act set forth certain requirements relating to market entry and exit, those sections were only made applicable to railroads, not common carriers in general (nor oil pipelines specifically). 49 U.S.C. app. §§ 1a, 1(18). And while Section 5(2) of the Act discusses the regulatory approval process applicable to the acquisition of a carrier's property via "purchase, lease, or contract to operate," 49 U.S.C. app. § 5(2), that section is likewise inapplicable to pipeline companies. *Id.* § 5(14).

2. Under the Interstate Commerce Act, intercarrier arrangements are regulated separately from carrier-shipper relations.

The Western Parties' fundamental error is their attempt to amalgamate the regulation of contracts between pipelines and carrier-shipper transactions. They argue that the Commission's jurisdiction is the same whether transportation "takes place under a contract between a shipper and an interstate petroleum pipeline or between two pipelines." Br. 20. But the Interstate Commerce Act has never subjected intercarrier agreements to the same regulation applicable to carrier-shipper dealings. To the extent intercarrier arrangements have been regulated at all, they have been treated quite differently.

Among railroads, for example, trackage rights agreements are probably the closest analogy to pipeline capacity leases, in that the owner (Carrier A) allows another carrier (Carrier B) to share the use of its facilities to provide common

carrier service to Carrier B’s shippers, while Carrier A also continues to use and operate the facilities. *See, e.g., Simmons v. ICC*, 871 F.2d 702, 712 (7th Cir. 1989). The acquisition of trackage rights has never been required to be reflected in a tariff filing. Instead, it was (and remains) subject to regulatory approval under section 5(2)(a)(ii), 49 U.S.C. app. § 5(2)(a)(ii), and if it resulted in an extension of a rail carrier’s market, to entry regulation under section 1(18), *id.* § 1(18).⁶ *See Transit Comm’n v. United States*, 289 U.S. 121, 128-29 (1933) (applying section 1(18) to “trackage rights” agreements).⁷ Those provisions do not apply to oil pipelines. *See* 49 U.S.C. app. § 1(18) (“No carrier by railroad . . .”); § 5(14) (omitting pipelines from coverage).

In refusing to extend those intercarrier regulations to oil pipelines, Congress did not by implication make such interpipeline transactions subject to carrier-shipper regulation. The result is that intercarrier arrangements between pipelines, such as capacity leases, are not subject to full common carrier regulation under the Interstate Commerce Act, a fact determinative of this case.

⁶ The current versions of sections 1(18) and 5(a)(2) are codified at 49 U.S.C. § 10901, and § 11323(a)(2), respectively.

⁷ At the time of the *Transit Commission* case, section 1(18) of the Interstate Commerce Act addressed both market entry and exit. The Railroad Revitalization and Regulatory Reform Act of 1976 transferred the market exit provisions from section 1(18) to section 1a.

3. The Western Parties misleadingly suggest that FERC has sweeping jurisdiction over oil pipeline companies.

At the outset of their brief, the Western Parties acknowledge that the Interstate Commerce Act only “place[s] interstate oil pipeline transportation under Federal regulatory jurisdiction.” Br. 24-25. They go on to contend, however, that the Act grants the Commission “sweeping” authority over oil pipeline companies. *Id.* at 28. But the cases cited by the Western Parties fail to support this contention.

For instance, the Western Parties cite two Supreme Court cases that stand for the undisputed principles that oil pipelines must provide common carrier service at the request of third parties, *United States v. Ohio Oil Co.*, 234 U.S. 548, 561-62 (1914), and may not discriminate against shippers. *United States v. Baltimore & Ohio R.R.*, 333 U.S. 169, 175 (1948). The Western Parties also cite the D.C. Circuit’s opinion in *Farmers Union*, which addressed the similarly undisputed – and irrelevant – principle that oil pipeline transportation rates must be just and reasonable. 734 F.2d at 1500-10. Rather than establishing that the Interstate Commerce Act vests the Commission with pervasive authority over all activities conducted by oil pipeline companies, the D.C. Circuit observed that “oil pipelines have none of the special obligations imposed upon the vehicular regulatees under the Act concerning acquisitions, [and] mergers” *Id.* at 1486 n.51 (internal quotations omitted).

C. The Commission Reasonably Determined That The Parties' Dispute Did Not Relate To The Transportation Of Oil By A Common Carrier.

In tacit recognition of the Commission's limited jurisdiction under the Interstate Commerce Act, the Western Parties contend that their complaint simply concerns a dispute arising from the transportation of oil under contract. Br. 6. But the Commission reasonably found that the contract in question – the Capacity Lease Agreement – does not implicate “the Commission's jurisdiction over oil pipeline transportation.” Dismissal Order P 25, JA 7. Rather, it constitutes a “private contract governing property rights,” and any disputes arising out of that agreement are “solely within the jurisdiction of the appropriate state court to resolve.” *Id.*

1. The Commission reasonably determined that the Capacity Lease Agreement created a lessor/lessee relationship between the parties.

The Capacity Lease Agreement expressly provides that, in exchange for monthly “rental” payments, TEPPCO Pipeline agrees to “lease[] to” Western Pipeline “sufficient capacity in the Pipeline to transport 15,000 barrels per day of crude oil” Capacity Lease Agreement, §§ 2, 3, JA 197-98. The agreement contemplates that the leased capacity will be used by “Lessee's shippers” (*i.e.*, Western Pipeline's shippers), *id.* § 5, JA 200, and imposes upon Western Pipeline the obligation to “comply with all valid laws . . . regulations . . . and rights of way

provisions that . . . may be applicable to use” of the leased capacity. *Id.* § 4, JA 200.

The parties further specified that Western Pipeline – not TEPPCO Pipeline – would use the leased capacity “as an individual common carrier facility” and would be responsible for “maintain[ing] tariffs in its own name . . . covering the Leased Capacity.” *Id.* § 5(f), JA 201. Any “revenues payable by shippers under such tariffs” would be collected by Western Pipeline “for its own account.” *Id.* *See also* Dismissal Order P 27, JA 8-9 (discussing pertinent provisions of Capacity Lease Agreement).

These provisions establish the reasonableness of the Commission’s conclusion that the parties’ business arrangement created “certain contractual and property rights,” rather than a “common carrier/shipper relationship between [Western Pipeline] and TEPPCO Pipeline.” Dismissal Order P 26, JA 8. In essence, the Capacity Lease Agreement permitted “Western Pipeline to operate its own pipeline within the TEPPCO Pipeline facilities.” *Id.* P 27, JA 9. Because such an arrangement “does not implicate oil pipeline transportation,” the Commission found that it lacked jurisdiction to adjudicate the parties’ dispute. *Id.*

a. The Commission’s conclusion is consistent with FERC precedent.

The Commission’s conclusion that the Capacity Lease Agreement concerns property rights, rather than transportation services, is consistent with its treatment

of capacity leases on natural gas pipelines. “Historically, the Commission views lease arrangements differently from transportation services under rate contracts.” *Texas Gas Transmission, LLC*, 113 F.E.R.C. ¶ 61,185, P 10 (2005). Lease arrangements reflect “an acquisition of a property interest in the capacity of the lessor’s pipelines.” *Id.* And once acquired, the lessee “owns that capacity and the capacity is subject to the lessee’s tariff” and is “allocated for use by the lessee’s customers.” *Id.*⁸ Accordingly, “[l]esseees are not treated as shippers and the Commission does not consider them to be similarly situated to interstate shippers on the lessor’s pipeline.” *Midcontinent Express Pipeline, LLC*, 124 F.E.R.C. ¶ 61,089, P 51 (2008).

Consistent with this precedent, the Commission understandably found that the Capacity Lease Agreement was “a private contract governing property rights that is within the jurisdiction of the appropriate state court,” rather than a contract “for the ‘transportation of oil’” within the Commission’s jurisdiction under the Interstate Commerce Act. Rehearing Order P 7, JA 14.

⁸ See also *Enogex, LLC*, 131 F.E.R.C. ¶ 62,066, P 5 (2010) (“Because the capacity leased by Enogex to KPC is used for the transportation of natural gas in interstate commerce under KPC’s tariff as if it were part of KPC’s interstate system, the capacity lease agreement, amendments thereto and Enogex’s operation of the capacity are subject to the jurisdiction of the Commission and the requirements of subsection (c) of section 7 of the NGA.”); *Islander E. Pipeline Co.*, 100 F.E.R.C. ¶ 61,276, P 89 (2002) (“the lease arrangement is a property interest that requires NGA section 7 certificate authorization”); *Texas E. Transmission Corp.*, 94 F.E.R.C. ¶ 61,139, 61,530 (2001) (“since the Commission views leased capacity as an acquisition of a property interest, a pipeline seeking to lease capacity on another pipeline must file an NGA section 7(c) application”).

b. The Commission's conclusion is consistent with judicial precedent.

The Commission's conclusion is also consistent with judicial precedent. In *Phillips Pipe Line Co. v. Diamond Shamrock Refining and Marketing Co.*, 50 F.3d 864 (10th Cir. 1995), the Tenth Circuit examined a contract containing notification and payment procedures pursuant to which Diamond Shamrock could utilize Phillips's excess capacity on an oil pipeline which the parties co-owned. *Id.* at 866.

Phillips argued that this arrangement constituted a contract for the transportation of oil and that, pursuant to the requirements of the Interstate Commerce Act, tariff rates must be charged for such service. *Id.* at 867. Diamond Shamrock argued that the contract reflected an agreement to lease Phillips's excess capacity, rendering the charges in Phillips's tariff irrelevant. *Id.* The case thus "turn[ed] upon whether the relationship between the parties is that of shipper and carrier or lessee and lessor." *Id.*

The Tenth Circuit observed that the parties' arrangement: (1) provided for a fixed term, with Phillips retaining a residual interest in its excess capacity, and (2) required Diamond Shamrock to pay for all of the excess capacity, regardless of whether the entire amount was actually used. *Id.* at 868-69. The Court found these terms to be "wholly consistent with conditions of a true lease," resulting in "the lessee's becoming a carrier, not a shipper." *Id.* at 868.

Here too, the Capacity Lease Agreement: (1) is for a ten-year, fixed term, with TEPPCO Pipeline retaining a residual interest in the facilities, Capacity Lease Agreement, § 1, JA 197, and (2) requires Western Pipeline to make monthly rental payments for 15,000 barrels/day of capacity, “whether or not in fact Lessee uses [that capacity] in that month.” *Id.* § 3, JA 198. *See also* Dismissal Order P 27, JA 8-9 (discussing term and rental payment provisions of Capacity Lease Agreement). Consistent with the Tenth Circuit’s approach, the Commission concluded that the parties’ contract established a “lessor/lessee relationship rather than a common carrier/shipper relationship.” Dismissal Order P 26, JA 8.

2. The Commission reasonably found that none of the Western Parties’ other allegations established a common carrier/shipper relationship with TEPPCO Pipeline.

In both their complaint and opening brief, the Western Parties point to various aspects of their dealings with TEPPCO Pipeline as evidencing a common carrier/shipper relationship. The Commission reasonably found, however, that the Western Parties’ effort in this regard was simply an “attempt[] to artificially create common carrier/shipper relationships where none exist in an effort to create jurisdiction over a private contractual dispute.” Rehearing Order P 11, JA 15.

a. The exchange of information between Western Refining and TEPPCO Pipeline does not establish a common carrier/shipper relationship.

For instance, the Western Parties claim that TEPPCO Pipeline acted as a


common carrier for Western Refining (which is not a signatory to the Capacity Lease Agreement) because Western Refining submitted scheduling information to TEPPCO Pipeline. Br. 11. But the submission of such information was required by the Capacity Lease Agreement, which made TEPPCO Pipeline responsible for scheduling shipments over its own capacity as well as the capacity leased to Western Pipeline. *See* Lease Agreement, § 5(e), JA 201 (requiring Western Pipeline to provide notice of its “transportation activity in the Base Capacity” and requiring TEPPCO Pipeline to “issue monthly operating schedules, which include activity in the Leased Capacity”). And as the Commission found, the fact that TEPPCO Pipeline accepted the scheduling information from Western Refining (rather than Western Pipeline) “simply acknowledged and accommodated the close relationship between the affiliated entities.” Dismissal Order P 28, JA 9.

The Western Parties also point to the fact that TEPPCO Pipeline submitted invoices to Western Refining. *Id.* But as Western Pipeline’s own witness stated, the invoices were simply “incorrectly addressed” and it was “Western Pipeline, [as] the holder of the lease on TEPPCO system . . . [that] made all lease payments.” Crow Decl. at ¶ 12 n.7, JA 260.

Most telling, “the bills show that the various charges being paid by Western Pipeline were incurred pursuant to the lease agreement.” Dismissal Order P 28, JA 9. The invoices typically set forth three line items:

- “Monthly Space Rental – Midland to Lynch,” which is the rental charge established by Section 3 of the Capacity Lease Agreement;
- “Crude Pumpover West Texas,” which is the charge assessed under a Texas Railroad Commission tariff for moving crude locally within Midland to the origin of the pipeline; and
- “Crude Transportation WTX,” which is the charge that would have been assessed if TEPPCO Pipeline had been providing common carrier service.

But, as reflected in the August 2007 invoice excerpted below (JA 355), no charges were assessed under this third line item:

	TEPPCO CRUDE PIPELINE, L.L.C.	
	Invoice Summary August 2007	
210 PARK AVENUE - SUITE 1600 OKLAHOMA CITY, OK 73102		Invoice Number : 69182 Invoice Date : Sep 14, 2007 Due Date : Sep 24, 2007
Phone: (405) 239-5701 Fax: (405) 604-5801		
GIANT REFINING COMPANY Attn: Rosie Gill 6500 TROWBRIDGE EL PASO, TX 79905	<u>Remittance Address:</u> TEPPCO CRUDE PIPELINE, L.L.C. P O BOX 201405 DALLAS, TX 75320-1405	<u>Wire Transfer Address:</u> TEPPCO CRUDE PIPELINE, L.L.C. C/O WELLS FARGO BANK ABA # 121000248 San Francisco, CA ACCT#1018204349 TAXID# 76-0595S22

Category	BBLs	Amount	Surcharge	Rate	Amount
8/07 MONTHLY SPACE RENTAL - MIDLAND TO LYNCH	0.00	\$210,180.00			\$0.00
Crude Pumpover West Texas	284,292.00	\$22,743.36			\$0.00
Crude Transportation WTX	283,725.40				\$0.00
Total		\$232,923.36			\$0.00

Total Amount / (Credit) Due
\$232,923.36

The absence of such charges is critical since they would have been assessed “if either of the Western Parties received common carrier service pursuant to [TEPPCO Pipeline’s] FERC Tariffs.” Dismissal Order P 28, JA 9. *See also* Exhibit 2 to the Western Parties’ Response to TEPPCO’s Answer and Motion to Dismiss, JA 340-471 (reflecting that no transportation charges were assessed on

invoices spanning the period June 2007 through February 2009).

b. The tariffs filed by the Western Parties do not establish a common carrier/shipper relationship with TEPPCO Pipeline.

The Western Parties also contend that their filing of tariffs with respect to the pipeline facilities at issue establishes that “the capacity lease . . . was always subject to the regulatory jurisdiction of the FERC.” Br. 8. But such filings are consistent with the contract’s requirement that Western Pipeline “separately maintain tariffs in its own name . . . covering the Leased Capacity.” Capacity Lease Agreement § 5(f), JA 201. *See also* Dismissal Order P 27, JA 8-9 (same). And as the Western Parties note, those tariffs “discuss in great detail the manner in which *Western Pipeline* will operate its capacity so as to comply with the Interstate Commerce Act and FERC regulatory requirements.” Br. 9 (emphasis added).

The tariffs thus establish that interstate transportation on the leased capacity is subject to the Commission’s jurisdiction. But they do not establish that Western Pipeline’s acquisition of that capacity via the Capacity Lease Agreement, and any disputes relating to that acquisition, are also subject to the Commission’s jurisdiction under the Interstate Commerce Act.⁹

⁹ If the Capacity Lease Agreement were subject to the Commission’s jurisdiction, its terms would have been (a) subject to filing as a tariff under section 6 of the Interstate Commerce Act, (b) subject to unilateral change by TEPPCO Pipeline at any time simply by filing a new tariff, and (c) made available to any other shipper over the covered pipeline. *See, e.g., Armour Packing Co. v. United States*, 209 U.S. 56 (1908) (criminal prosecution of shippers who accepted unfiled contract rates).

D. The Commission’s Holding Does Not Sanction Discriminatory Conduct By Pipeline Companies.

The Western Parties contend that the Commission’s interpretation of its jurisdiction under the Interstate Commerce Act is “astonishing” because it permits an interstate pipeline company to “confer special deals on preferred shippers” through capacity leases that purportedly insulate them “from the adverse impact of prorationing.”¹⁰ Br. 32. The Western Parties misconstrue the import of the Commission’s ruling.

In the challenged orders, the Commission simply explained that, under the particular terms of the parties’ agreement, Western Pipeline acquired a property interest in TEPPCO Pipeline’s facilities. *See, e.g.*, Dismissal Order P 27, JA 9 (“The lease agreement created property and contractual rights allowing Western Pipeline to operate its own pipeline within the TEPPCO Pipeline facilities.”). With that property interest came common carrier obligations. One such obligation is the requirement that the leased capacity be prorated in the event of sufficient third party demand. *See Giant Pipeline*, 120 F.E.R.C. ¶ 61,275, at P 9 (requiring Giant Pipeline to file a tariff for the leased capacity in the event it receives a request for transportation or if TEPPCO’s facilities become subject to prorationing); *Texaco Oil Pipeline, Inc.*, 74 F.E.R.C. ¶ 61,071, at 61,202 (1996) (rejecting proposed tariff

¹⁰ When transportation demand exceeds capacity, oil pipeline companies “prorate” their capacity among shippers.

which would have exempted high volume shippers from prorationing as an “unreasonable preference” for a “special class of shippers”).¹¹

III. THE COMMISSION REASONABLY FOUND THAT, EVEN IF IT COULD EXERCISE DISCRETIONARY JURISDICTION OVER THE WESTERN PARTIES’ COMPLAINT, IT WOULD DECLINE TO DO SO.

The Western Parties contend (at 38-40) that the Commission unreasonably declined to assert jurisdiction over their complaint under the primary jurisdiction doctrine, which considers those circumstances under which the agency should exercise its authority when it possesses concurrent jurisdiction with other tribunals. *See Arkansas Louisiana Gas Co.*, 7 F.E.R.C. ¶ 61,175, 61,322-23 (1979). The Western Parties first argue that the Commission failed to “provide a reasoned decision as to whether it would exercise jurisdiction.” Br. 38. But this ignores the Commission’s detailed discussion of why it would decline to exercise discretionary jurisdiction over the parties’ dispute, even if it possessed it in the first instance.

First, the Commission explained that it did “not possess some special expertise which makes the case peculiarly appropriate for Commission decision.” Rehearing Order P 9, JA 14. While the parties’ dispute is related to the use of

¹¹ The Western Parties appear to contend that the *Texaco* decision demonstrates that the Commission has exercised jurisdiction over capacity lease agreements between carriers. Br. 26-27. But *Texaco* involved a tariff filing addressing proposed prorationing policies applicable to shippers who enter into contracts for transportation. 74 F.E.R.C. at 61,202. It has nothing whatsoever to do with capacity lease agreements, much less what tribunal must adjudicate a business dispute arising under such an agreement.

pipeline facilities, the agreement at issue “is still a private contract governing property rights.” *Id.* And because the Commission lacks jurisdiction over the “disposition of oil pipeline facilities, there is no reason that the contract needs to be interpreted by the Commission rather than the appropriate state court.” *Id.*

Second, the Commission explained that, because the parties’ dispute related to property rights, rather than oil transportation or FERC tariffs, the “case is not important in relation to [its] regulatory responsibilities with respect to oil pipelines.” Rehearing Order P 9, JA 15. For these same reasons, there is “no need for uniformity of interpretation of the type of question raised by the dispute.” *Id.*, JA 14. This is particularly true given the parties’ expressed intent to have their “rights and obligations . . . decided according to state contract law,” *id.*, JA 15, in a judicial forum:

The validity, performance, interpretation and effect of this Lease shall be governed by the laws of the State of Texas

* * *

[T]he parties will attempt in good faith to negotiate an agreement for alternative dispute resolution procedures to be used to attempt to resolve the Dispute before initiating an action for *judicial relief*.

Capacity Lease Agreement § 13, JA 202-03 (emphasis added). *See also* Rehearing Order P 9, JA 15. *Cf. Southern California Edison Co. v. FERC*, 502 F.3d 176, 181 (D.C. Cir. 2007) (Commission must give effect to agreement’s choice of law provision, providing for interpretation under state law).

The Western Parties do not challenge any of these findings. Instead, they claim that the Commission’s analysis is flawed because FERC “had already erroneously concluded that it did not have any jurisdiction.” Br. 39. But this misapprehends the alternative nature of the Commission’s findings. In the challenged orders, the Commission found in the alternative that, even if it could assert discretionary jurisdiction over the Western Parties’ complaint under the Interstate Commerce Act, it would decline to do so. *See* Dismissal Order P 27, JA 9; Rehearing Order P 9, JA 14-15. Had the Commission simply concluded that it lacked jurisdiction, there would have been no need to discuss the primary jurisdiction doctrine, which is premised on FERC having the discretion to decline to exercise jurisdiction to the exclusion of the courts. *See Arkansas Louisiana Gas*, 7 F.E.R.C. at 61,322 (primary jurisdiction doctrine considers “[w]hether the Commission should assert jurisdiction over contractual issues otherwise litigable in state courts”).

IV. THE COMMISSION REASONABLY ANALYZED AND DISMISSED THE WESTERN PARTIES’ COMPLAINT.

The Commission was presented with an extensive record upon which to review the Western Parties’ claims. That record included:

- a detailed complaint filed by the Western Parties that was accompanied by two declarations and twelve exhibits (totaling 165 pages), JA 21-79, 211-63;
- the Western Parties’ amended complaint, which was accompanied by a supplemental declaration and four exhibits, JA 65-79, 264-72;

- TEPPCO Pipeline’s answer and motion to dismiss, which included two declarations and ten exhibits (totaling more than 80 pages), JA 80-115, 273-322;
- the Western Parties’ response to TEPPCO Pipeline’s answer and motion to dismiss, which included a second supplemental declaration and three exhibits (totaling 157 pages), JA 116-35, 323-479;
- TEPPCO Pipeline’s reply to the Western Parties’ response, JA 136-52; and
- the Western Parties’ answer to TEPPCO Pipeline’s reply, JA 153-61.

On the basis of its investigation of these pleadings, declarations and exhibits, the Commission concluded that “the alleged unlawful conduct of TEPPCO did not arise from . . . activity within the Commission’s jurisdiction” and dismissed the Western Parties’ complaint. Rehearing Order P 7, JA 14.

The Western Parties contend that dismissal was procedurally improper because the Commission “was required by the Interstate Commerce Act to investigate and consider [the complaint] on its merits.” Br. 33. *See also id.* at 34 (“FERC does not have discretion to simply dismiss a complaint”). But, of course, the Commission would be exceeding its statutory mandate if it were to address non-jurisdictional matters on the merits. *See, e.g., La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986) (“an agency literally has no power to act . . . unless and until Congress confers power upon it”). Moreover, the Commission did not, as the Western Parties’ contend, merely dismiss the complaint without considering the arguments presented. Rather, based upon its consideration of the papers presented, the Commission reasonably concluded that the arguments presented did not

compel the Commission to assert jurisdiction to decide the merits of the complaint.

The Western Parties similarly contend that the Interstate Commerce Act mandates a particular type of hearing – an evidentiary, trial-type hearing – regarding its claims. Br. 34-35 (“the Commission must investigate” an alleged violation of the Interstate Commerce Act “and set it for hearing”). But nothing in the Act constrains the manner in which the Commission can address complaints brought before it. Section 13(1) requires the Commission to “investigate the matters complained of” when “there shall appear to be any reasonable ground” for believing that a “common carrier” has acted “in contravention of the provisions” of the Interstate Commerce Act. 49 U.S.C. app. § 13(1). Rather than requiring the Commission to “set [a complaint] for hearing,” Br. 34-35, the Act provides that the investigation shall take place “in such manner and by such means as [the Commission] shall deem proper.” *Id.*¹² As the D.C. Circuit observed when considering the identical passage in the Communications Act of 1934, nothing in the language of the provision or the Administrative Procedure Act “entitles a party to the specific procedures [it] demands.” *Hi-Tech Furnace Systems, Inc. v. FCC*, 224 F.3d 781, 789 (D.C. Cir. 2000). And “the Supreme Court has firmly

¹² The Western Parties (at 34) attempt to bolster their argument with citations to *Southern Railway Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444 (1979) and *Exxon Pipeline Co. v. United States*, 725 F.2d 1467 (D.C. Cir. 1984). But neither case holds that Section 13(1) requires an evidentiary hearing or bars the Commission from dismissing complaints raising matters beyond its jurisdiction.

instructed . . . that ‘courts are not free to impose upon agencies specific procedural requirements that have no basis in the APA’ or statute.” *Id.* at 790 (quoting *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 654 (1990)).

This is consistent with the “broad discretion” enjoyed by the Commission “in structuring its proceedings.” *Mobil Producing Texas & New Mexico, Inc. v. FERC*, 886 F.2d 745, 748 (5th Cir. 1989). “In general, FERC must hold an evidentiary hearing only when a genuine issue of material fact exists, and even then, FERC need not conduct such a hearing if [the disputed issues] may be adequately resolved on the written record.” *Cajun Elec. Power Co-op, Inc. v. FERC*, 28 F.3d 173, 177 (D.C. Cir. 1994).

Here, the Western Parties fail to identify any genuine issue of material fact that was not adequately addressed in, and could not be resolved by reference to, the parties’ written submissions. Instead, the Western Parties take issue with the Commission’s characterization of certain shipping activities undertaken by Western Refining. *See* Br. 41-42. Such complaints do not concern the state of the record, but rather the Commission’s interpretation of that record. *See Lichoulas v. FERC*, No. 08-1373, 2010 U.S. App. LEXIS 10970, at *29-30 (D.C. Cir. May 28, 2010) (affirming the Commission’s decision not to hold an evidentiary hearing: “At bottom, [petitioner’s] complaint is with the legal conclusion FERC has drawn from the facts. An evidentiary hearing is not warranted simply because he

disagrees with that conclusion”).

Finally, the Western Parties claim that it is “fundamentally incorrect for an adjudicative body” to resolve disputed factual issues in the context of a motion to dismiss. Br. 40, 44. But it is well-established that factual issues relating to an adjudicative body’s subject matter jurisdiction may be resolved “before the adjudication of a case on its merits.” *Dillon v. Rogers*, 596 F.3d 260, 271 (5th Cir. 2010). Thus, “when subject matter jurisdiction over a case turns on disputed facts,” the Commission, like “judges [has] the power to resolve these disputes in assuring” itself of its “jurisdiction.” *Id.* (citing *Wetmore v. Rymer*, 169 U.S. 115, 120-21 (1898); *Chatham Condo Ass’ns v. Century Vill., Inc.*, 597 F.2d 1002, 1012 (5th Cir. 1979)).

Here, the Commission reviewed the extensive record assembled by the parties and resolved all factual issues relating to its jurisdiction to hear the Western Parties’ dispute. On the basis of that review, the Commission reasonably concluded that the parties’ dispute arose out of a contract regarding property rights, and not a common carrier/shipper relationship. As such, the Western Parties’ complaint concerned matters outside of the Commission’s jurisdiction under the Interstate Commerce Act, and outside its special regulatory expertise; accordingly, it was properly dismissed.

CONCLUSION

For the reasons stated, the petition should be dismissed for lack of jurisdiction. Alternatively, the petition should be denied on the merits and the challenged FERC orders upheld in all respects.

Respectfully submitted,

Christine A. Varney
Assistant Attorney General

Thomas R. Sheets
General Counsel

John J. Powers, III
Attorney

Robert H. Solomon
Solicitor

/s/ Robert J. Wiggers
Robert J. Wiggers
Attorney

/s/ Robert M. Kennedy
Robert M. Kennedy
Attorney

U.S. Department of Justice
Washington, DC 20530
Tel: (202) 514-2460
Email: Robert.wiggers@usdoj.gov

Federal Energy Regulatory Commission
Washington DC 20426
Tel: (202) 502-6600
Fax: (202) 273-0901
Email: Robert.kennedy@ferc.gov

June 7, 2010
CORRECTED BRIEF: July 8, 2010

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(c)(i) and Fifth Circuit Rule

32.3, I certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. 32(a)(7)(B) because it contains 10,820 words, excluding the cover page, statement regarding oral argument, table of contents and authorities, certificates of counsel, and the addenda.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Office Word, Version 2003 in 14 point, Times New Roman style.

/s/ Robert J. Wiggers

Robert J. Wiggers
Attorney of Record for Respondent
United States of America

/s/ Robert M. Kennedy

Robert M. Kennedy
Attorney of Record for Respondent
Federal Energy Regulatory
Commission

July 8, 2010

**CERTIFICATE REGARDING PRIVACY REDACTIONS
AND VIRUS SCANNING**

I certify that (1) any necessary privacy redactions have been made in this brief, (2) the electronic submission is an exact copy of the paper document, in compliance with 5th Cir. R. 25.2.1, and (3) the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free from viruses.

/s/ Robert J. Wiggers

Robert J. Wiggers
Attorney of Record for Respondent
United States of America

/s/ Robert M. Kennedy

Robert M. Kennedy
Attorney of Record for Respondent
Federal Energy Regulatory
Commission

July 8, 2010

APPENDIX A

STATUTES AND REGULATIONS

TABLE OF CONTENTS

FEDERAL POWER ACT

16 U.S.C. § 824b.....A1

INTERSTATE COMMERCE ACT

49 U.S.C. app. § 1(1)A3

49 U.S.C. app. § 1(5)A4

49 U.S.C. app. § 1(18)A5

49 U.S.C. app. § 1aA6

49 U.S.C. app. § 3(1)A8

49 U.S.C. app. § 4(1)A9

49 U.S.C. app. § 5A10

49 U.S.C. app. § 6A15

49 U.S.C. app. § 8A17

49 U.S.C. app. § 9A18

49 U.S.C. app. 13(1)A19

49 U.S.C. app. § 15(1)A20

49 U.S.C. app. § 20A21

NATURAL GAS ACT

15 U.S.C. §§ 717fA24

REGULATIONS

18 C.F.R. § 343.2A27

18 C.F.R. § 385.206A28

Section 203(a) of the Federal Power Act, 16 U.S.C. § 824b, provides:

Disposition of property; consolidations; purchase of securities

(a) Authorization

(1) No public utility shall, without first having secured an order of the Commission authorizing it to do so—

(A) sell, lease, or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission, or any part thereof of a value in excess of \$10,000,000;

(B) merge or consolidate, directly or indirectly, such facilities or any part thereof with those of any other person, by any means whatsoever;

(C) purchase, acquire, or take any security with a value in excess of \$10,000,000 of any other public utility; or

(D) purchase, lease, or otherwise acquire an existing generation facility—

(i) that has a value in excess of \$10,000,000; and (ii) that is used for interstate wholesale sales and over which the Commission has jurisdiction for ratemaking purposes.

(2) No holding company in a holding company system that includes a transmitting utility or an electric utility shall purchase, acquire, or take any security with a value in excess of \$10,000,000 of, or, by any means whatsoever, directly or indirectly, merge or consolidate with, a transmitting utility, an electric utility company, or a holding company in a holding company system that includes a transmitting utility, or an electric utility company, with a value in excess of \$10,000,000 without first having secured an order of the Commission authorizing it to do so.

(3) Upon receipt of an application for such approval the Commission shall give reasonable notice in writing to the Governor and State commission of each of the States in which the physical property affected, or any part thereof, is situated, and to such other persons as it may deem advisable.

(4) After notice and opportunity for hearing, the Commission shall approve the proposed disposition, consolidation, acquisition, or change in control, if it finds that the proposed transaction will be consistent with the public interest, and will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company, unless the Commission determines that the cross-subsidization, pledge, or encumbrance will be consistent with the public interest.

(5) The Commission shall, by rule, adopt procedures for the expeditious consideration of applications for the approval of dispositions, consolidations, or acquisitions, under this section. Such rules shall identify classes of transactions, or specify criteria for transactions, that normally meet the standards established in paragraph (4). The Commission shall provide expedited review for such transactions. The Commission shall grant or deny any other application for approval of a transaction not later than 180 days after the application is filed. If the Commission does not act within 180 days, such application shall be deemed granted unless the Commission finds, based on good cause, that further consideration is required to determine whether the proposed transaction meets the standards of paragraph (4) and issues an order tolling the time for acting on the application for not more than 180 days, at the end of which additional period the Commission shall grant or deny the application.

(6) For purposes of this subsection, the terms “associate company”, “holding company”, and “holding company system” have the meaning given those terms in the Public Utility Holding Company Act of 2005 [42 U.S.C. 16451 et seq.].

Section 1(1) of the Interstate Commerce Act, 49 U.S.C. app. § 1(1), provides:

§ 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.

Section 1(5) of the Interstate Commerce Act, 49 U.S.C. app. § 1(5), provides:

(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.

Section 1(18) of the Interstate Commerce Act, 49 U.S.C. app. § 1(18), provides:

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

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

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

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

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

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

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

and with such documentation as the Commission shall prescribe. The Commission may—

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

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

(iii) refuse to issue such a certificate.

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

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

(e) Any construction or operation which is contrary to any provision of this paragraph, of any regulations promulgated under this paragraph, or of any terms and conditions of an applicable certificate, may be enjoined by an appropriate district court of the United States in a civil action commenced and maintained by the United States, the Commission, or the attorney general or the transportation regulatory body of an affected State or area. Such a court may impose a civil penalty of not to exceed \$5,000 on each person who knowingly authorizes, consents to, or permits any violation of this paragraph or of the conditions of a certificate issued under this paragraph.

Section 1a of the Interstate Commerce Act, 49 U.S.C. app. § 1a, provides:

§ 1a. Abandonment and discontinuance of rail service

- (1) Authorization pursuant to certification by Commission; application and notice of intent required in accordance with rules and regulations; statutory provisions applicable; limitation on authority of Commission

No carrier by railroad subject to this chapter shall abandon all or any portion of any of its lines of railroad (hereafter in this section referred to as "abandonment") and no such carrier shall discontinue the operation of all rail service over all or any portion of any such line (hereinafter referred to as "discontinuance"), unless such abandonment or discontinuance is described in and covered by a certificate which is issued by the Commission and which declares that the present or future public convenience and necessity require or permit such abandonment or discontinuance. An application for such a certificate shall be submitted to the Commission, together with a notice of intent to abandon or discontinue, not less than 60 days prior to the proposed effective date of such abandonment or discontinuance, and shall be in accordance with such rules and regulations as to form, manner, content, and documentation as the Commission may from time to time prescribe. Abandonments and discontinuances shall be governed by the provisions of this section or by the provisions of any other applicable Federal statute, notwithstanding any inconsistent or contrary provision in any State law or constitution, or any decision, order, or procedure of any State administrative or judicial body. The authority granted to the Commission under this section shall not apply to (a) abandonment or discontinuance with respect to spur, industrial, team switching, or side tracks if such tracks are located entirely within one State, or (b) any street, suburban, or interurban electric railway which is not operated as part of a general system of rail transportation.

- (2) Affidavit accompanying notice of intent; contents of affidavit and notice of intent

(a) Whenever a carrier submits to the Commission a notice of intent to abandon or discontinue, pursuant to paragraph (1) of this section, such carrier shall attach thereto an affidavit certifying that a copy of such notice (i) has been sent by certified mail to the chief executive officer of each State that would be directly affected by such abandonment or discontinuance, (ii) has been posted in each terminal and station on any line of railroad proposed to be so abandoned or discontinued, (iii) has been published for 3 consecutive weeks in a newspaper of general circulation in each county in which all or any part of such line of railroad is located, and (iv) has been mailed, to the extent practicable, to all shippers who have made significant use (as determined by the Commission in its discretion) of such line of railroad during the 12 months preceding such submission.

(b) The notice required under subdivision (a) of this paragraph shall include (i) an accurate and understandable summary of the carrier's application for a certificate of abandonment or discontinuance, together with the reasons therefor, and (ii) a statement indicating that each interested person is entitled to recommend to the Commission that it approve, disapprove, or take any other specified action with respect to such application.

- (3) Investigation by Commission; prerequisites; effect; scope; procedures

During the 60-day period between the submission of a completed application for a certificate of abandonment or discontinuance pursuant to paragraph (1) of this section and the proposed effective date of an abandonment or discontinuance, the Commission shall, upon petition, or may, upon its own initiative, cause an investigation to be conducted to assist it in determining what disposition to make of such application. An order to the Commission to implement the preceding sentence must be issued and served upon any affected carrier not less than 5 days prior to the

end of such 60-day period. If no such investigation is ordered, the Commission shall issue such a certificate, in accordance with this section, at the end of such 60-day period. If such an investigation is ordered, the Commission shall order a postponement, in whole or in part, in the proposed effective date of the abandonment or discontinuance. Such postponement shall be for such reasonable period of time as is necessary to complete such investigation. Such an investigation may include, but need not be limited to, public hearings at any location reasonably adjacent to the line of railroad involved in the abandonment or discontinuance application, pursuant to rules and regulations of the Commission. Such a hearing may be held upon the request of any interested party or upon the Commission's own initiative. The burden of proof as to public convenience and necessity shall be upon the applicant for a certificate of abandonment or discontinuance.

- (4) Issuance of certificate; contents; taking effect of abandonment or discontinuance

The Commission shall, upon an order with respect to each application for a certificate of abandonment or discontinuance—

(a) issue such certificate in the form requested by the applicant if it finds that such abandonment or discontinuance is consistent with the public convenience and necessity. In determining whether the proposed abandonment is consistent with the public convenience and necessity, the Commission shall consider whether there will be a serious adverse impact on rural and community development by such abandonment or discontinuance;

(b) issue such certificate with modifications in such form and subject to such terms and conditions as are required, in the judgment of the Commission, by the public convenience and necessity; or

(c) refuse to issue such certificate.

Each such certificate which is issued by the Commission shall contain provisions for the protection of the interests of employees. Such provisions shall be at least as beneficial to such interests as provisions established pursuant to section 5(2)(f) of this Appendix and pursuant to section 565 of title 45. If such certificate is issued without an investigation pursuant to paragraph (3) of this section, actual abandonment or discontinuance may take effect, in accordance with such certificate, 30 days after the date of issuance thereof. If such a certificate is issued after an investigation pursuant to such paragraph (3), actual abandonment or discontinuance may take effect, in accordance with such certificate, 120 days after the date of issuance thereof.

- (5) Diagram of transportation system directly or indirectly operated by carrier by railroad subject to this chapter; preparation, submission to Commission, and publication; contents; amendments; opposition to issuance or denial of certificate limited by diagram or amended diagram

(a) Each carrier by railroad subject to this chapter shall, within 180 days after the date of promulgation of regulations by the Commission pursuant to this section, prepare, submit to the Commission, and publish, a full and complete diagram of the transportation system operated, directly or indirectly, by such carrier. Each such diagram which shall include a detailed description of each line of railroad which is "potentially subject to abandonment", as such term is defined by the Commission. Such term shall be defined by the Commission by rules and such rules may include standards which vary by region of the Nation and by railroad or group of railroads. Each such diagram shall also identify any line of railroad as to which such carrier plans to submit an application for a certificate of abandonment or discontinuance in accordance with this section. Each such carrier shall submit to the Commission and publish, in accordance with regulations of the Commission, such amendments to such diagram as are necessary to maintain the accuracy of such diagram.

(b) The Commission shall not issue a certificate of abandonment or discontinuance with respect to a line of railroad if such abandonment or discontinuance is opposed by—

(i) a shipper or any other person who has made significant use (as determined by the Commission in its discretion) of such line of railroad during the 12-month period preceding the submission of an applicable application under paragraph (1) of this section; or

(ii) a State, or any political subdivision of a State, if such line of railroad is located, in whole or in part, within such State or political subdivision; unless such line or railroad has been identified and described in a diagram or in an amended diagram which was submitted to the Commission under subdivision (a) of this paragraph at least 4 months prior to the date of submission of an application for such certificate.

(6) Findings by Commission of public convenience and necessity permitting abandonment or discontinuance; publication in Federal Register; further findings of offers of financial assistance postponing issuance of certificate of abandonment or discontinuance; duration of postponement

(a) Whenever the Commission makes a finding, in accordance with this section, that the public convenience and necessity permit the abandonment or discontinuance of a line or railroad, it shall cause such finding to be published in the Federal Register. If, within 30 days of such publication, the Commission further finds that—

(i) a financially responsible person (including a government entity) has offered financial assistance (in the form of a rail service continuation payment) to enable the rail service involved to be continued; and

(ii) it is likely that such proffered assistance would—

(A) cover the difference between the revenues which are attributable to such line of railroad and the avoidable cost of providing rail freight service on such line, together with a reasonable return on the value of such line; or

(B) cover the acquisition cost of all or any portion of such line of railroad;

the Commission shall postpone the issuance of a certificate of abandonment or discontinuance for such reasonable time, not to exceed 6 months, as is necessary to enable such person or entity to enter into a binding agreement, with the carrier seeking such abandonment or discontinuance, to provide such assistance or to purchase such line and to provide for the continued operation of rail services over such line. Upon notification to the Commission of the execution of such an assistance or acquisition and operating agreement, the Commission shall postpone the issuance of such a certificate for such period of time as such an agreement (including any extensions or modifications) is in effect.

(b) A carrier by railroad subject to this chapter shall promptly make available, to any party considering offering financial assistance in accordance with subdivision (a) of this paragraph, its most recent reports on the physical condition of any line of railroad with respect to which it seeks a certificate of abandonment or discontinuance, together with such traffic, revenue, and other data as is necessary to determine the amount of assistance that would be required to continue rail service.

(7) Determination by Commission subsequent to findings of offers of financial assistance of extent avoidable costs of rail service and reasonable return on rail properties exceed operating revenues

Whenever the Commission finds, under paragraph (6)(a) of this section, that an offer of financial assistance has been made, the Commission shall determine the extent to which the avoidable cost of providing rail service plus a reasonable return on the value of

the rail properties involved exceed the revenues attributable to the line of railroad or the rail service involved.

(8) Statutory provisions applicable to petitions filed and pending prior to February 5, 1976, or prior to promulgation of regulations by Commission

Petitions for abandonment or discontinuance which were filed and pending before the Commission as of February 5, 1976, or prior to the promulgation by the Commission of regulations required under this section shall be governed by the provisions of section 1 of this title which were in effect on February 5, 1976, except that paragraphs (6) and (7) of this section shall be applicable to such petitions.

(9) Injunctive relief; jurisdiction; parties; civil penalty

Any abandonment or discontinuance which is contrary to any provision of this section, or any regulation promulgated under this section, or of any terms and conditions of an applicable certificate, may be enjoined by an appropriate district court of the United States in a civil action commenced and maintained by the United States, the Commission, or the attorney general or the transportation regulatory body of an affected State or area. Such a court may impose a civil penalty of not to exceed \$5,000 on each person who knowingly authorizes, consents to, or permits any violation of this section or of any regulation under this section.

(10) Further findings by Commission of suitability of abandoned or discontinued properties for use for other public purposes; limitations on disposal subsequent to finding

In any instance in which the Commission finds that the present or future public convenience and necessity permit abandonment or discontinuance, the Commission shall make a further finding whether such properties are suitable for use for other public purposes, including roads or highways, other forms of mass transportation, conservation, energy production or transmission, or recreation. If the Commission finds that the properties proposed to be abandoned are suitable for other public purposes, it shall order that such rail properties not be sold, leased, exchanged, or otherwise disposed of except in accordance with such reasonable terms and conditions as are prescribed by the Commission, including, but not limited to, a prohibition on any such disposal, for a period not to exceed 180 days after the effective date of the order permitting abandonment unless such properties have first been offered, upon reasonable terms, for acquisition for public purposes.

(11) "Avoidable cost" and "reasonable return" defined

As used in this section:

(a) The term "avoidable cost" means all expenses which would be incurred by a carrier in providing a service which would not be incurred, in the case of discontinuance, if such service were discontinued or, in the case of abandonment, if the line over which such service was provided were abandoned. Such expenses shall include but are not limited to all cash inflows which are foregone and all cash outflows which are incurred by such carrier as a result of not discontinuing or not abandoning such service. Such foregone cash inflows and incurred outflows shall include (i) working capital and required capital expenditures, (ii) expenditures to eliminate deferred maintenance, (iii) the current cost of freight cars, locomotives and other equipment, and (iv) the foregone tax benefits from not retiring properties from rail service and other effects of applicable Federal and State income taxes.

(b) The term "reasonable return" shall, in the case of a railroad not in reorganization, be the cost of capital to such railroad (as determined by the Commission), and, in the case of a railroad in reorganization, shall be the mean cost of capital of railroads not in reorganization, as determined by the Commission.

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

Section 3(1) of the Interstate Commerce Act, 49 U.S.C. app. § 3(1), provides:

§ 3. Preferences; interchange of traffic; terminal facilities

(1) Undue preferences or prejudices prohibited

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

Section 4(1) of the Interstate Commerce Act, 49 U.S.C. app. § 4(1), provides:

§ 4. Long and short haul charges; competition with water routes

(1) Charges for long and short hauls and on through route; exemption

It shall be unlawful for any common carrier subject to this chapter or chapter 12 of this Appendix to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this chapter or chapter 12 of this Appendix, but this shall not be construed as authorizing any common carrier within the terms of this chapter or chapter 12 of this Appendix to charge or receive as great compensation for a shorter as for a longer distance: *Provided*, That upon application to the Commission and after investigation, such carrier, in special cases, may be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property, and the Commission may from time to time prescribe the extent to which such designated carriers may be relieved from the operation of the foregoing provisions of this section, but in exercising the authority conferred upon it in this proviso, the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and no such authorization shall be granted on account of merely potential water competition not actually in existence: *Provided further*, That any such carrier or carriers operating over a circuitous line or route may, subject only to the standards of lawfulness set forth in other provisions of this chapter or chapter 12 of this Appendix and without further authorization, meet the charges of such carrier or carriers of the same type operating over a more direct line or route, to or from the competitive points, provided that rates so established over circuitous routes shall not be evidence on the issue of the compensatory character of rates involved in other proceedings: *And provided further*, That tariffs proposing rates subject to the provision of this paragraph requiring Commission authorization may be filed when application is made to the Commission under the provisions hereof, and in the event such application is approved, the Commission shall permit such tariffs to become effective upon one day's notice: *And provided further*, That the provisions of this para-

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

Section 5 of the Interstate Commerce Act, 49 U.S.C. app. § 5, provides:

§ 5. Combinations and consolidations of carriers

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

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

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

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

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

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

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

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

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

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

this paragraph except upon a specific finding by the Commission that such guaranty or assumption is not inconsistent with the public interest. No transaction shall be approved under this paragraph which will result in an increase of total fixed charges, except upon a specific findings by the Commission that such increase would not be contrary to public interest.

(f) As a condition of its approval, under this paragraph or paragraph (3), of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Such arrangement shall contain provisions no less protective of the interests of employees than those imposed before February 5, 1976, pursuant to this subdivision and those established pursuant to section 565 of title 45. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may be entered into after September 18, 1940, by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

(g) In any case arising under this paragraph which involves a common carrier by railroad, the Commission shall—

(i) within 30 days after the date on which an application is filed with the Commission and after a certified copy of such application is furnished to the Secretary of Transportation, (A) publish notice thereof in the Federal Register, or (B) if such application is incomplete, reject such application by order, which order shall be deemed to be final under the provisions of section 17 of this Appendix;

(ii) provide that written comments on an application, as to which such notice is published, may be filed within 45 days after the publication of such notice in the Federal Register;

(iii) require that copies of any such comments shall be served upon the Secretary of Transportation and the Attorney General, each of whom shall be afforded 15 days following the date of receipt thereof to inform the Commission whether he will intervene as a party to the proceeding, and if so, to submit preliminary views on such application;

(iv) require that all other applications, which are inconsistent, in whole or in part, with such applications, and all petitions for inclusion in the transaction, shall be filed with the Commission and furnished to the Secretary of Transportation, within 90 days after the publication of notice of the application in the Federal Register;

(v) conclude any evidentiary proceedings within 240 days following the date of such publication of notice, except that in the case of an application involving the merger or control of two or more class I railroads, as defined by the Commission, the Commission shall conclude any evidentiary proceedings not more than 24 months following the date upon which notice of the application was published in the Federal Register; and

(vi) issue a final decision within 180 days following the date upon which the evidentiary proceeding is concluded.

If the Commission fails to issue a decision which is final within the meaning of section 17 of this Appendix within such 180-day period, it shall notify the Congress in writing of such failure and the reasons there-

for. If the Commission determines that the due and timely execution of its functions under this paragraph so requires, or that an application brought under this paragraph is of major transportation importance, it may order that the case be referred directly (without an initial decision by a division, individual Commissioner, board, or administrative law judge) to the full Commission for a decision which is final within the meaning of section 17 of this Appendix.

(h) The Secretary of Transportation may propose any modification of any transaction governed by this paragraph which involves a carrier by railroad. The Secretary shall have standing to appear before the Commission in support of any such proposed modification.

(3) Expedited merger, consolidation, etc., procedure; applicability; prerequisites

(a) If a merger, consolidation, unification or coordination project (as described in section 5(c) of the Department of Transportation Act [now 49 U.S.C. 333(c)], joint use of tracks or other facilities, or acquisition or sale of assets, which involves any common carrier by railroad subject to this chapter, is proposed by an eligible party in accordance with subdivision (b) of this paragraph during the period beginning on February 5, 1976, and ending on December 31, 1981, the party seeking authority for the execution or implementation of such transaction may utilize the procedure set forth in this paragraph or in paragraph (2) of this section.

(b) Any transaction described in subdivision (a) of this paragraph may be proposed to the Commission by—

(i) the Secretary of Transportation (hereafter in this paragraph referred to as the "Secretary"), with the consent of the common carriers by railroad subject to this chapter which are parties to such transaction; or

(ii) any such carrier which, not less than 6 months prior to such submission to the Commission, submitted such proposed transaction to the Secretary for evaluation pursuant to subdivision (f) of this paragraph.

(c) Whenever a transaction described in subdivision (a) of this paragraph is proposed under this paragraph, the proposing party shall submit an application for approval thereof to the Commission, in accordance with such requirements as to form, content, and documentation as the Commission may prescribe. Within 10 days after the date of receipt of such an application, the Commission shall send a notice of such proposed transaction to—

(i) the Governor of each State which may be affected, directly or indirectly, by such transaction if it is executed or implemented;

(ii) the Attorney General;

(iii) the Secretary of Labor; and

(iv) the Secretary (except where the Secretary is the proposing party).

The Commission shall accompany its notice to the Secretary with a request for the report of the Secretary pursuant to clause (v) of subdivision (f) of this paragraph. Each such notice shall include a copy of such application; a summary of the proposed transaction involved, and the proposing party's reasons and public interest justifications therefor.

(d) The Commission shall hold a public hearing on each application submitted to it pursuant to subdivision (c) of this paragraph, within 90 days after the date of receipt of such application. Such public hearing shall be held before a panel of the Commission duly designated for such purpose by the Commission. Such panel may utilize administrative law judges and the Rail Services Planning Office in such manner as it considers appropriate for the conduct of the hearing, the evaluation of such application and comments thereon, and the timely and reasonable determination of whether it is in the public interest to grant such ap-

plication and to approve such proposed transaction pursuant to subdivision (g) of this paragraph. Such panel shall complete such hearing within 180 days after the date of referral of such application to such panel, and it may, in order to meet such requirement, prescribe such rules and make such rulings as may tend to avoid unnecessary costs or delay. Such panel shall recommend a decision and certify the record to the full Commission for final decision, within 90 days after the termination of such hearing. The full Commission shall hear oral argument on the matter so certified, and it shall render a final decision within 120 days after receipt of the certified record and recommended decision of such panel. The Commission may, in its discretion, extend any time period set forth in this subdivision, except that the final decision of the Commission shall be rendered not later than the second anniversary of the date of receipt of such an application by the Commission.

(e) In making its recommended decision with respect to any transaction proposed under this paragraph, the duly designated panel of the Commission shall—

(i) request the views of the Secretary, with respect to the effect of such proposed transaction on the national transportation policy, as stated by the Secretary, and consider the matter submitted under subdivision (f) of this paragraph;

(ii) request the views of the Attorney General, with respect to any competitive or anticompetitive effects of such proposed transaction; and

(iii) request the views of the Secretary of Labor, with respect to the effect of such proposed transaction on railroad employees, particularly as to whether such proposal contains adequate employee protection provisions.

Such views shall be submitted in writing and shall be available to the public upon request.

(f) Whenever a proposed transaction is submitted to the Secretary by a common carrier by railroad pursuant to clause (ii) of subdivision (b) of this paragraph, and whenever the Secretary develops a proposed transaction for submission to the Commission pursuant to subdivision (c) of this paragraph, the Secretary shall—

(i) publish a summary and a detailed account of the contents of such proposed transaction in the Federal Register, in order to provide reasonable notice to interested parties and the public of such proposed transaction;

(ii) give notice of such proposed transaction to the Attorney General and to the Governor of each State in which any part of the properties of the common carriers by railroad involved in such proposed transaction are situated;

(iii) conduct an informal public hearing with respect to such proposed transaction and provide an opportunity for all interested parties to submit written comments;

(iv) study each such proposed transaction with respect to—

(A) the needs of rail transportation in the geographical area affected;

(B) the effect of such proposed transaction on the retention and promotion of competition in the provision of rail and other transportation services in the geographical area affected;

(C) the environmental impact of such proposed transaction and of alternative choices of action;

(D) the effect of such proposed transaction on employment;

(E) the cost of rehabilitation and modernization of track, equipment, and other facilities, with a comparison of the potential savings or losses from other possible choices of action;

(F) the rationalization of the rail system;

(G) the impact of such proposed transaction on shippers, consumers, and railroad employees;

(H) the effect of such proposed transaction on the communities in the geographical areas affected and on the geographical areas contiguous to such areas; and

(I) whether such proposed transaction will improve rail service; and

(v) submit a report to the Commission setting forth the results of each study conducted pursuant to clause (iv) of this subdivision, within 10 days after an application is submitted to the Commission pursuant to subdivision (c) of this paragraph, with respect to the proposed transaction which is the subject of such study. The Commission shall give due weight and consideration to such report in making its determinations under this paragraph.

(g) The Commission may—

(i) approve a transaction proposed under this paragraph, if the Commission determines that such proposed transaction is in the public interest; and

(ii) condition its approval of any such proposed transaction on any terms, conditions, and modifications which the Commission determines are in the public interest; or

(iii) disapprove any such proposed transaction, if the Commission determines that such proposed transaction is not in the public interest.

In each such case, the decision of the Commission shall be accompanied by a written opinion setting forth the reasons for its action.

(4) Noncarrier deemed carrier upon acquiring control

Whenever a person which is not a carrier is authorized, by an order entered under paragraph (2) of this section, to acquire control of any carrier or of two or more carriers, such person thereafter shall, to the extent provided by the Commission in such order, be considered as a carrier subject to such of the following provisions as are applicable to any carrier involved in such acquisition of control: Sections 20(1) to (10), 304(a)(1) and (2), 320 and 913 of this Appendix, (which relate to reports, accounts, and so forth, of carriers), and sections 20a(2) to (11), and 314 of this Appendix, (which relate to issues of securities and assumptions of liability of carriers), including in each case the penalties applicable in the case of violations of such provisions. In the application of such provisions of sections 20a and 314 of this Appendix, in the case of any such person, the Commission shall authorize the issue or assumption applied for only if it finds that such issue or assumption is consistent with the proper performance of its service to the public by each carrier which is under the control of such person, that it will not impair the ability of any such carrier to perform such service, and that it is otherwise consistent with the public interest.

(5) Control effected by other than prescribed methods

It shall be unlawful for any person, except as provided in paragraphs (2) and (3) of this section, to enter into any transaction within the scope of subdivision (a) of paragraph (2) of this section, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this paragraph and paragraph (6) of this section, the words "control or management" shall be construed to include the power to exercise control or management.

(6) Transactions deemed to effectuate control or management

For the purposes of this section, but not in anywise limiting the application of the provisions thereof, any transaction shall be deemed to accomplish or effectuate the control or management in a common interest of two carriers—

(a) if such transaction is by a carrier, and if the effect of such transaction is to place such carrier

and persons affiliated with it, taken together, in control of another carrier;

(b) if such transaction is by a person affiliated with a carrier, and if the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier;

(c) if such transaction is by two or more persons acting together, one of whom is a carrier or is affiliated with a carrier, and if the effect of such transaction is to place such persons and carriers and persons affiliated with any one of them and persons affiliated with any such affiliated carrier, taken together, in control of another carrier.

(7) Affiliation with a carrier defined

For the purposes of this section a person shall be held to be affiliated with a carrier if, by reason of the relationship of such person to such carrier (whether by reason of the method of, or circumstances surrounding organization or operation, or whether established through common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or any other direct or indirect means), it is reasonable to believe that the affairs of any carrier of which control may be acquired by such person will be managed in the interest of such other carrier.

(8) Investigation by Commission of effectuation of control by nonprescribed methods

The Commission is authorized, upon complaint or upon its own initiative without complaint, but after notice and hearing, to investigate and determine whether any person is violating the provisions of paragraph (5) of this section. If the Commission finds after such investigation that such person is violating the provisions of such paragraph, it shall by order require such person to take such action as may be necessary, in the opinion of the Commission, to prevent continuance of such violation. The provisions of this paragraph shall be in addition to, and not in substitution for, any other enforcement provisions contained in this chapter; and with respect to any violation of paragraphs (2) to (13) of this section, any penalty provision applying to such a violation by a common carrier subject to this chapter shall apply to such a violation by any other person.

(9) Jurisdiction of injunctions, etc., against violations of section or orders

The district courts of the United States shall have jurisdiction upon the complaint of the Commission, alleging a violation of any of the provisions of this section or disobedience of any order issued by the Commission thereunder by any person; to issue such writs of injunction or other proper process, mandatory or otherwise, as may be necessary to restrain such person from violation of such provision or to compel obedience to such order.

(10) Supplemental orders by Commission

The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1), (2) or (8) of this section, as it may deem necessary or appropriate.

(11) Unifications, consolidations, etc., of motor carriers only

Nothing in this section shall be construed to require the approval or authorization of the Commission in the case of a transaction within the scope of paragraph (2) of this section where the only parties to the transaction are motor carriers subject to chapter 8 of this Appendix (but not including a motor carrier controlled by or affiliated with a carrier as defined in section 1(3) of this Appendix), and where the aggregate gross operating revenues of such carriers have not exceeded \$300,000 for a period of twelve consecutive months ending not more than six months preceding the date of the agreement of the parties covering the transaction.

Nothing in this section shall be construed to require the approval or authorization of the Commission in

the case of a transaction within the scope of paragraph (2) of this section where the only parties to the transaction are street, suburban, or interurban electric railways none of which is controlled by or under common control with any carrier which is operated as part of a general steam railroad system of transportation.

(12) Plenary nature of authority under section

The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any powers granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State.

(13) Separability clause

If any provision of the foregoing paragraphs of this section, or the application thereof to any person or circumstances, is held invalid, the other provisions of such paragraphs, and the application of such provision to any other person or circumstances, shall not be affected thereby.

(14) "Carrier" defined

As used in paragraphs (2) to (13) of this section, inclusive, the term "carrier" means a carrier by railroad and an express company and a sleeping-car company, subject to this chapter; and a motor carrier subject to chapter 8 of this Appendix; and a water carrier subject to chapter 12 of this Appendix.

(15) Interest in competing water carrier; prohibition

Notwithstanding the provisions of paragraph (2) of this section, from and after the 1st day of July 1914, it shall be unlawful for any carrier, as defined in section 1(3) of this Appendix, or (after September 18, 1940) any person controlling, controlled by, or under common control with, such a carrier to own, lease, operate, control, or have any interest whatsoever (by stock ownership or otherwise, either directly, indirectly, through any holding company, or by stockholders or directors in common, or in any other manner) in any common carrier by water operated through the Panama Canal or elsewhere with which such carrier aforesaid does or may compete for traffic or any vessel carrying freight or passengers upon said water route or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic; and in case of the violation of this provision each day in which

such violation continues shall be deemed a separate offense.

(16) Determination of fact of competition

Jurisdiction is conferred on the Commission to determine questions of fact, arising under paragraph (15) of this section, as to the competition or possibility of competition, after full hearing, on the application of any railroad company or other carrier. Such application may be filed for the purpose of determining whether any existing service is in violation of such paragraph and may pray for an order permitting the continuance of any vessel or vessels already in operation, or may pray for an order under the provisions of paragraph (17) of this section. The Commission may on its own motion or the application of any shipper institute proceedings to inquire into the operation of any vessel in use by any railroad or other carrier which has not applied to the Commission and had the question of competition or the possibility of competition determined as herein provided. In all such cases the order of said Commission shall be final.

(17) Permission of interest in competing water carrier

Notwithstanding the provisions of paragraph (15) of this section, the Commission shall have authority, upon application of any carrier, as defined in section 1(3) of this Appendix, and after hearing, by order to authorize such carrier to own or acquire ownership of, to lease or operate, to have or acquire control of, or to have or acquire an interest in, a common carrier by water or vessel, not operated through the Panama Canal, with which the applicant does or may compete for traffic, if the Commission shall find that the continuance or acquisition of such ownership, lease, operation, control, or interest will not prevent such common carrier by water or vessel from being operated in the interest of the public and with advantage to the convenience and commerce of the people, and that it will not exclude, prevent, or reduce competition on the route by water under consideration: *Provided*, That if the transaction or interest sought to be entered into, continued, or acquired is within the scope of paragraph (2)(a) of this section, the provisions of paragraph (2) of this section shall be applicable thereto in addition to the provisions of this paragraph: *And provided further*, That no such authorization shall be necessary if the carrier having the ownership, lease, operation, control, or interest has, prior to September 18, 1940, obtained an order of extension under the provisions of paragraph (21) of this section, as in effect prior to such date, and such order is still in effect.

Section 6 of the Interstate Commerce Act, 49 U.S.C. app. § 6, provides:

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

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

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

(2) Schedule of rates through foreign country

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

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

No change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the Commission and

to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection: *Provided*, That the Commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified, or modify the requirements of this section in respect to publishing, posting, and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions: *Provided further*, That the Commission is authorized to make suitable rules and regulations for the simplification of schedules of rates, fares, charges, and classifications and to permit in such rules and regulations the filing of an amendment of or change in any rate, fare, charge, or classification without filing complete schedules covering rates, fares, charges, or classifications not changed if, in its judgment, not inconsistent with the public interest.

(4) Joint tariffs

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

(5) Copies of traffic contracts to be filed

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

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

The schedules required by this section to be filed shall be published, filed, and posted in such form and manner as the Commission by regulation shall prescribe. The Commission shall, beginning 2 years after February 5, 1976, require (a) that all rates shall be incorporated into the individual tariffs of each common carrier by railroad subject to this chapter or rail rate-making association within 2 years after the initial publication of the rate, or within 2 years after a change in any rate is approved by the Commission, whichever is later, and (b) that any rate shall be null and void with respect to any such carrier or association which does not so incorporate such rate into its individual tariff. The Commission may, upon good cause shown, extend such period of time. Notice of any such extension and a statement of the reasons therefor shall be promptly transmitted to the Congress. The Commission is authorized to reject any schedule filed with it which is not in accordance with this section and with such regulations. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

(7) Transportation without filing and publishing rates forbidden; rebates; privileges

No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter,

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

(8) Preference to shipments for United States

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

(9) Schedule lacking notice of effective date

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

(10) Penalty for failure to comply with regulations

In case of failure or refusal on the part of any carrier, receiver, or trustee to comply with the terms of any regulation adopted and promulgated or any order made by the Commission under the provisions of this section, such carrier, receiver, or trustee shall be liable to a penalty of \$500 for each such offense, and \$25 for each and every day of the continuance of such offense, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

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

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

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

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

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

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

Section 8 of the Interstate Commerce Act, 49 U.S.C. app. § 8, provides:

§ 8. Liability in damages to persons injured by violation of law

In case any common carrier subject to the provisions of this chapter shall do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

Section 9 of the Interstate Commerce Act, 49 U.S.C. app. § 9, provides:

§ 9. Remedies of persons damaged; election; witnesses

Any person or persons claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter in any district court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit.

Section 13(1) of the Interstate Commerce Act, 49 U.S.C. app. § 13(1), provides:

§ 13. Complaints to and investigations by Commission

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

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

Section 15(1) of the Interstate Commerce Act, 49 U.S.C. app. § 15(1), provides:

§ 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.

Section 20 of the Interstate Commerce Act, 49 U.S.C. app. § 20, provides:

§ 20. Reports, records, and accounts of carriers; mandamus; liability of initial carrier for loss, etc.

(1) Reports from carriers and lessors

The Commission is authorized to require annual, periodical, or special reports from carriers, lessors, and associations (as defined in this section), to prescribe the manner and form in which such reports shall be made, and to require from such carriers, lessors, and associations specific and full, true, and correct answers to all questions upon which the Commission may deem information to be necessary, classifying such carriers, lessors, and associations as it may deem proper for any of these purposes. Such annual reports shall give an account of the affairs of the carrier, lessor, or association in such form and detail as may be prescribed by the Commission.

(2) Period covered by and time for making reports; oaths for reports

Said annual reports shall contain all the required information for the period of twelve months ending on the 31st day of December in each year, unless the Commission shall specify a different date, and shall be made out under oath and filed with the Commission at its office in Washington within three months after the close of the year for which the report is made, unless additional time be granted in any case by the Commission. Such periodical or special reports as may be required by the Commission under paragraph (1) of this section, shall also be under oath whenever the Commission so requires.

(3) Uniform cost and revenue accounting and reporting system for all common carriers by railroad subject to this chapter; promulgation of regulations and procedures; effective date; criteria; review and revision of system; authorization of appropriations

(a) The Commission shall, not later than June 30, 1977, issue regulations and procedures prescribing a uniform cost and revenue accounting and reporting system for all common carriers by railroad subject to this chapter. Such regulations and procedures shall become effective not later than January 1, 1978. Before promulgating such regulations and procedures, the Commission shall consult with and solicit the views of other agencies and departments of the Federal Government, representatives of carriers, shippers, and their employees, and the general public.

(b) In order to assure that the most accurate cost and revenue data can be obtained with respect to light density lines, main line operations, factors relevant in establishing fair and reasonable rates, and other regulatory areas of responsibility, the Commission shall identify and define the following items as they pertain to each facet of rail operations:

- (i) operating and nonoperating revenue accounts;
- (ii) direct cost accounts for determining fixed and variable cost for materials, labor, and overhead components of operating expenses and the assignment of such costs to various functions, services, or activi-

ties, including maintenance-of-way, maintenance of equipment (locomotive and car), transportation (train, yard and station, and accessorial services), and general and administrative expenses; and

(iii) indirect cost accounts for determining fixed, common, joint, and constant costs, including the cost of capital, and the method for the assignment of such costs to various functions, services, or activities.

(c) The accounting system established pursuant to this paragraph shall be in accordance with generally accepted accounting principles uniformly applied to all common carriers by railroad subject to this chapter, and all reports shall include any disclosure considered appropriate under generally accepted accounting principles or the requirements of the Commission or of the Securities and Exchange Commission. The Commission shall, notwithstanding any other provision of this section, to the extent possible, devise the system of accounts to be cost effective, nonduplicative, and compatible with the present and desired managerial and responsibility accounting requirements of the carriers, and to give due consideration to appropriate economic principles. The Commission should attempt, to the extent possible, to require that such data be reported or otherwise disclosed only for essential regulatory purposes, including rate change requests, abandonment of facilities requests, responsibility for peaks in demand, cost of service, and issuance of securities.

(d) In order that the accounting system established pursuant to this paragraph continue to conform to generally accepted accounting principles, compatible with the managerial responsibility accounting requirements of carriers, and in compliance with other objectives set forth in this section, the Commission shall periodically, but not less than once every 5 years, review such accounting system and revise it as necessary.

(e) There are authorized to be appropriated to the Commission for purposes of carrying out the provisions of this paragraph such sums as may be necessary, not to exceed \$1,000,000, to be available for—

(i) procuring temporary and intermittent services as authorized by section 3109(b) of title 5, but at rates for individuals not to exceed \$250 per day plus expenses; and

(ii) entering into contracts or cooperative agreements with any public agency or instrumentality or with any person, firm, association, corporation, or institution, without regard to section 5 of title 41.

(4) Depreciation charges

The Commission shall, as soon as practicable, prescribe for carriers the classes of property for which depreciation charges may properly be included under operating expenses, and the rate or rates of depreciation which shall be charged with respect to each of such classes of property, classifying the carriers as it may deem proper for this purpose. The Commission may, when it deems necessary, modify the classes and rates so prescribed. When the Commission shall have exercised its authority under the foregoing provisions of this paragraph, carriers shall not charge to operating expenses any depreciation charges on classes of property other than those prescribed by the Commission, or charge with respect to any class of property a rate of depreciation other than that prescribed therefor by the Commission, and no such carrier shall include under operating expenses any depreciation charge in any form whatsoever other than as prescribed by the Commission.

(5) Forms of accounts, records, and memoranda; access to records, etc., by Commission or agents

The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers and their lessors, including the accounts, records, and memoranda of the movement of traffic, as well as of the receipts and expenditures of moneys, and it shall be unlawful for such carriers or lessors to keep any accounts, records, and memoranda contrary to any rules, regulations, or

orders of the Commission with respect thereto. The Commission or any duly authorized special agent, accountant, or examiner thereof shall at all times have authority to inspect and copy any and all accounts, books, records, memoranda, correspondence, and other documents, of such carriers, lessors, and associations, and such accounts, books, records, memoranda, correspondence, and other documents, of any person controlling, controlled by, or under common control with any such carrier, as the Commission deems relevant to such person's relation to or transactions with such carrier. The Commission or its duly authorized special agents, accountants, or examiners shall at all times have access to all lands, buildings, or equipment of such carriers or lessors, and shall have authority under its order to inspect and examine any and all such lands, buildings, and equipment. Such carriers, lessors, and other persons shall submit their accounts, books, records, memoranda, correspondence, and other documents for the inspection and copying authorized by this paragraph, and such carriers and lessors shall submit their lands, buildings, and equipment to inspection and examination, to any duly authorized special agent, accountant, or examiner of the Commission, upon demand and the display of proper credentials.

(6) Persons furnishing cars or protection against elements; access to and forms of records, etc.; reports

The Commission or any duly authorized special agent, accountant, or examiner thereof shall at all times have authority to inspect and copy any and all accounts, books, records, memoranda, correspondence, and other documents, of persons which furnish cars or protective service against heat or cold to or on behalf of any carrier by railroad or express company subject to this chapter: *Provided, however,* That such authority shall be limited to accounts, books, records, memoranda, correspondence, or other documents which pertain or relate to the cars or protective service so furnished. The Commission shall further have authority, in its discretion, to prescribe the forms of any or all accounts, records, and memoranda which it is authorized by this paragraph to inspect and copy, and to require the persons furnishing such cars or protective service, as aforesaid, to submit such reports and specific and full, true, and correct answers to such questions, relative to such cars or service, as the Commission may deem necessary. Persons furnishing such cars or protective service shall submit their accounts, books, records, memoranda, correspondence, or other documents, to the extent above provided, for inspection or copying to any duly authorized special agent, accountant, or examiner of the Commission upon demand and the display of proper credentials.

(7) Penalties and forfeitures in connection with accounts, records, reports, etc.

(a) In case of failure or refusal on the part of any carrier, lessor, or other person to keep any accounts, records, and memoranda in the form and manner prescribed, under authority of this section, by the Commission, or to submit any accounts, books, records, memoranda, correspondence, or other documents to the Commission or any of its authorized agents, accountants, or examiners for inspection or copying, as required under this section, such carrier, lessor, or person shall forfeit to the United States not to exceed \$500 for each such offense and for each day during which such failure or refusal continues.

(b) Any person who shall knowingly and willfully make, cause to be made, or participate in the making of, any false entry in any annual or other report required under this section to be filed, or in the accounts of any book of accounts or in any records or memoranda kept by a carrier, or required under this section to be kept by a lessor or other person, or who shall knowingly and willfully destroy, mutilate, alter, or by any other means or device falsify the record of any such accounts, records, or memoranda, or who shall knowingly and willfully neglect or fail to make full, true, and correct entries in such accounts, records, or

memoranda of all facts and transactions appertaining to the business of the carrier, lessor, or person, or shall knowingly and willfully keep any accounts, records, or memoranda contrary to the rules, regulations, or orders of the Commission with respect thereto, or shall knowingly or willfully file with the Commission any false report or other document, shall be deemed guilty of a misdemeanor and shall be subject, upon conviction in any court of the United States of competent jurisdiction to a fine of not more than five thousand dollars or imprisonment for not more than two years, or both such fine and imprisonment: *Provided,* That the Commission may in its discretion issue orders specifying such operating, accounting, or financial papers, records, books, blanks, tickets, stubs, correspondence, or documents of such carriers, lessors, or other persons as may, after a reasonable time, be destroyed, and prescribing the length of time the same shall be preserved.

(c) Any carrier or lessor, or person furnishing cars or protective service, or any officer, agent, employee, or representative thereof, who shall fail to make and file an annual or other report with the Commission within the time fixed by the Commission, or to make specific and full, true, and correct answer to any question within thirty days from the time it is lawfully required by the Commission so to do, shall forfeit to the United States the sum of one hundred dollars for each and every day it shall continue to be in default with respect thereto.

(d) In case of failure or refusal on the part of any carrier or lessor to accord to the Commission or its duly authorized special agents, accountants, or examiners, access to, and opportunity for the inspection and examination of, any lands, buildings, or equipment of said carrier or lessor, as provided in this section, such carrier or lessor shall forfeit to the United States the sum of one hundred dollars for each day during which such failure or refusal continues.

(e) All forfeitures authorized in this paragraph shall be recovered in the manner provided for the recovery of forfeitures under the provisions of this chapter.

(f) Any special agent, accountant, or examiner who knowingly and willfully divulges any fact or information which may come to his knowledge during the course of any examination or inspection made under authority of this section, except insofar as he may be directed by the Commission or by a court or judge thereof, shall be guilty of a misdemeanor and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not more than \$500 or imprisonment for not exceeding six months, or both.

(8) "Keep" and "kept" defined

As used in this section, the words "keep" and "kept" shall be construed to mean made, prepared, or compiled, as well as retained; the term "carrier" means a common carrier subject to this chapter, and includes a receiver or trustee of such carrier; the term "lessor" means a person owning a railroad, a water line, or a pipe line, leased to and operated by a common carrier subject to this chapter, and includes a receiver or trustee of such lessor; and the term "association" means an association or organization maintained by or in the interest of any group of carriers subject to this chapter which performs any service, or engages in any activities, in connection with any traffic, transportation, or facilities subject to this Act.

(9) Jurisdiction to compel compliance by mandamus

The district courts of the United States shall have jurisdiction, upon the application of the Attorney General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of said Act to regulate commerce or of any Act supplementary thereto or amendatory thereof by any common carrier, to issue a writ or writs of mandamus commanding such common

carrier to comply with the provisions of said Acts, or any of them.

(10) Special agents or examiners

And to carry out and give effect to the provisions of said Acts, or any of them, the Commission is authorized to employ special agents or examiners who shall have power to administer oaths, examine witnesses, and receive evidence.

(11) Liability of initial and delivering carrier for loss; limitation of liability; notice and filing of claim

Any common carrier, railroad, or transportation company subject to the provisions of this chapter receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory, or any common carrier, railroad, or transportation company delivering said property so received and transported shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made, is declared to be unlawful and void: *Provided*, That if the loss, damage, or injury occurs while the property is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water and by and under the laws and regulations applicable to transportation by water, and the liability of the initial or delivering carrier shall be the same as that of such carrier by water: *Provided, however*, That the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first, to baggage carried on passenger trains or boats, or trains or boats carrying passengers; second, to property, except ordinary livestock, received for transportation concerning which the carrier shall have been or shall be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recov-

ery to an amount not exceeding the value so declared or released, and shall not, so far as relates to values, be held to be a violation of section 10 of this Appendix; and any tariff schedule which may be filed with the Commission pursuant to such order shall contain specific reference thereto and may establish rates varying with the value so declared and agreed upon; and the Commission is empowered to make such order in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation. The term "ordinary livestock" shall include all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses: *Provided further*, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law: *Provided further*, That all actions brought under and by virtue of this paragraph against the delivering carrier shall be brought, and may be maintained, if in a district court of the United States, only in a district, and if in a State court, only in a State through or into which the defendant carrier operates a line of railroad: *Provided further*, That it shall be unlawful for any such receiving or delivering common carrier to provide by rule, contract, regulation, or otherwise a shorter period for the filing of claims than nine months, and for the institution of suits than two years, such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice: *And provided further*, That for the purposes of this paragraph and of paragraph (12) of this section the delivering carrier shall be construed to be the carrier performing the line-haul service nearest to the point of destination and not a carrier performing merely a switching service at the point of destination: *And provided further*, That the liability imposed by this paragraph shall also apply in the case of property reconsigned or diverted in accordance with the applicable tariffs filed as in this chapter provided.

(12) Recovery by initial or delivering carrier from connecting carrier

The common carrier, railroad, or transportation company issuing such receipt or bill of lading, or delivering such property so received and transported, shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained, the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof, and the amount of any expense reasonably incurred by it in defending any action at law brought by the owners of such property.

Section 7 of the Natural Gas Act, 15 U.S.C. § 717f, provides:

Construction, extension, or abandonment of facilities

(a) Extension or improvement of facilities on order of court; notice and hearing

Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: Provided, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) Abandonment of facilities or services; approval of Commission

No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) Certificate of public convenience and necessity

(1) (A) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: Provided, however, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

(B) In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: Provided, however, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application

for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(2) The Commission may issue a certificate of public convenience and necessity to a natural-gas company for the transportation in interstate commerce of natural gas used by any person for one or more high-priority uses, as defined, by rule, by the Commission, in the case of—

(A) natural gas sold by the producer to such person; and

(B) natural gas produced by such person.

(d) Application for certificate of public convenience and necessity

Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require.

(e) Granting of certificate of public convenience and necessity

Except in the cases governed by the provisos contained in subsection (c)(1) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

(f) Determination of service area; jurisdiction of transportation to ultimate consumers

(1) The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization; and

(2) If the Commission has determined a service area pursuant to this subsection, transportation to ultimate consumers in such service area by the holder of such service area determination, even if across State lines, shall be subject to the exclusive jurisdiction of the State commission in the State in which the gas is consumed. This section shall not apply to the transportation of natural gas to another natural gas company.

(g) Certificate of public convenience and necessity for service of area already being served Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company.

(h) Right of eminent domain for construction of pipelines, etc.

When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way,

for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: Provided, That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds \$3,000.

18 C.F.R. § 343.2 provides:

PART 343 – PROCEDURAL RULES APPLICABLE TO OIL PIPELINE PROCEEDINGS

343.2 - Requirements for filing interventions, protests and complaints.

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

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

(c) Other requirements for filing protests or complaints

(1) Rates established under 342.3 of this chapter. A protest or complaint filed against a rate proposed or established pursuant to 342.3 of this chapter must allege reasonable grounds for asserting that the rate violates the applicable ceiling level, or that the rate increase is so substantially in excess of the actual cost increases incurred by the carrier that the rate is unjust and unreasonable, or that the rate decrease is so substantially less than the actual cost decrease incurred by the carrier that the rate is unjust and unreasonable. In addition to meeting the requirements of the section, a complaint must also comply with all the requirements of 385.206, except 385.206(b)(1) and (2).

(2) Rates established under 342.4(c) of this chapter. A protest or complaint filed against a rate proposed or established under 342.4(c) of this chapter must allege reasonable grounds for asserting that the rate is so substantially in excess of the actual cost increases incurred by the carrier that the rate is unjust and unreasonable. In addition to meeting the requirements of the section, a complaint must also comply with all the requirements of 385.206, except 385.206(b)(1) and (2).

(3) Non-rate matters. A protest or complaint filed against a carrier's operations or practices, other than rates, must allege reasonable grounds for asserting that the operations or practices violate a provision of the Interstate Commerce Act, or of the Commission's regulations. In addition to meeting the requirements of this section, a complaint must also comply with the requirements of 385.206.

(4) A protest or complaint that does not meet the requirements of paragraphs (c)(1), (c)(2), or (c)(3) of this section, whichever is applicable, will be dismissed.

18 C.F.R. § 385.206 provides:

PART 385 – RULES OF PRACTICE AND PROCEDURE

385.206 - Complaints (Rule 206)

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

(b) Contents. A complaint must:

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

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

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

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

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

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

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

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

(9) State (i) Whether the Enforcement Hotline, Dispute Resolution Service, tariff-based dispute resolution mechanisms, or other informal dispute resolution procedures were used, or why these procedures were not used; (ii) Whether the complainant believes that alternative dispute resolution (ADR) under the Commission's supervision could successfully resolve the complaint; (iii) What types of ADR procedures could be used; and (iv) Any process that has been agreed on for resolving the complaint.

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

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

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

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

(e) Privileged treatment.

(1) If a complainant seeks privileged treatment for any documents submitted with the complaint, the complainant must submit, with its complaint, a request for privileged treatment of documents and information under section 388.112 of this chapter and a proposed form of protective agreement. In the event the complainant requests privileged treatment under section 388.112 of this chapter, it must file the original and three copies of its complaint with the information for which privileged treatment is sought and 11 copies of the pleading without the information for which privileged treatment is sought. The original and three copies must be clearly identified as containing information for which privileged treatment is sought.

(2) A complainant must provide a copy of its complaint without the privileged information and its proposed form of protective agreement to each entity that is to be served pursuant to section 385.206(c).

(3) The respondent and any interested person who has filed a motion to intervene in the complaint proceeding may make a written request to the complainant for a copy of the complete complaint. The request must include an executed copy of the protective agreement and, for persons other than the respondent, a copy of the motion to intervene. Any person may file an objection to the proposed form of protective agreement.

(4) A complainant must provide a copy of the complete complaint to the requesting person within 5 days after receipt of the written request that is accompanied by an executed copy of the protective agreement.

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

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

(1) The Commission may assign a case to be resolved through alternative dispute resolution procedures in accordance with 385.604385.606, in cases where the affected parties consent, or the Commission may order the appointment of a settlement judge in accordance with 385.603;

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

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

(h) Fast Track processing.

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

(2) A complainant may request Fast Track processing of a complaint by including such a request in its complaint, captioning the complaint in bold type face COMPLAINT REQUESTING FAST TRACK PROCESSING, and explaining why expedition is necessary as required by section 385.206(b)(11).

(3) Based on an assessment of the need for expedition, the period for filing answers, interventions and comments to a complaint requesting Fast Track processing may be shortened by the Commission from the time provided in section 385.206(f).

(4) After the answer is filed, the Commission will issue promptly an order specifying the procedure and any schedule to be followed.

(i) Simplified procedure for small controversies. A simplified procedure for complaints involving small controversies is found in section 385.218 of this subpart.

(j) Satisfaction.

(1) If the respondent to a complaint satisfies such complaint, in whole or in part, either before or after an answer is filed, the complainant and the respondent must sign and file: (i) A statement setting forth when and how the complaint was satisfied; and (ii) A motion for dismissal of, or an amendment to, the complaint based on the satisfaction.

(2) The decisional authority may order the submission of additional information before acting on a motion for dismissal or an amendment under paragraph (c)(1)(ii) of this section.

APPENDIX B

COMPLAINT IN

TEPPCO Crude Pipeline LLC, et al.

v.

Western Refining Pipeline, Co.

NO. CV46987

FILED
2009 JUL -8 AM 10:44
VICTOR H. GIBSON, DISTRICT CLERK
MIDLAND COUNTY, TEXAS
BY _____ DEPUTY

TEPPCO CRUDE PIPELINE, LLC
and TEPPCO CRUDE OIL, LLC

IN THE DISTRICT COURT OF

Vs.

MIDLAND COUNTY, TEXAS

WESTERN REFINING PIPELINE
COMPANY and WESTERN
REFINING SOUTHWEST, INC.

385 JUDICIAL DISTRICT

PLAINTIFFS' ORIGINAL PETITION

This petition is filed by TEPPCO Crude Pipeline, LLC ("TEPPCO") and TEPPCO Crude Oil, LLC ("TEPPCO Crude"), as plaintiffs, against Western Refining Pipeline Company ("Western") and Western Refining Southwest, Inc. ("Western Refining"), as defendants.

DISCOVERY LEVEL

1. TEPPCO requests that this case be treated as a Level 3 case for discovery purposes, pursuant to the Texas Rules of Civil Procedure.

NATURE OF DISPUTE

2. Western has breached its contract with TEPPCO. The contract is a Lease Agreement, in which TEPPCO, as Lessor, agreed to lease pipeline capacity to Western, as Lessee, over a 10 year term. The Lease Agreement requires Western to pay TEPPCO base rentals over the entire term, whether Western uses the capacity or not. This requirement was intended to reimburse TEPPCO for the

initial capital outlays made by TEPPCO to accomplish the purpose of the Lease Agreement. Western wrongfully terminated the Lease Agreement, causing damages to TEPPCO.

3. Western Refining, an affiliate of Western, has breached its contract with TEPPCO Crude. That contract is a crude oil purchase agreement that runs concurrent with the Lease Agreement. Western Refining failed to purchase the required minimum quantities.

PARTIES AND VENUE

4. TEPPCO and TEPPCO Crude are Texas limited liability companies, with their principal place of business in Houston, Harris County, Texas.

5. Western and Western Refining are foreign corporations, with their principal place of business in El Paso, El Paso County, Texas. They may be served with process by serving their registered agent for service of process, CT Corporation, 350 N. St. Paul Street, Dallas, Texas 75201.

6. Venue is proper in this district because the pipeline at issue is located in part in this district and because a substantial part of the events or omissions giving rise to the claim occurred in this county.

BACKGROUND FACTS

7. TEPPCO is in the business of gathering, storing, and transporting crude oil. It owns, among other assets, two 8-inch pipelines running between

Midland, Texas and Hobbs, New Mexico, and other facilities that carry crude oil. TEPPCO Crude is the marketing affiliate of TEPPCO.

8. Western is the successor in interest to Giant Pipeline Company. Western is affiliated with Western Refining, a successor in interest to Giant Industries Arizona, Inc., which owns two oil refineries in New Mexico. For ease of reference, we will refer throughout this petition to Western, even though the underlying contract was entered before Western's parent bought Giant.

9. Western desired a reliable way to bring crude oil to Western Refining's refineries in New Mexico. To accomplish this goal, Western entered into the Lease Agreement with TEPPCO on August 25, 2006. This Lease Agreement has several pertinent provisions:

- TEPPCO agreed to lease capacity to Western to ship crude oil from Midland to Hobbs on one of TEPPCO's 8-inch pipelines.
- In addition, TEPPCO agreed to construct and lease capacity to Western in another pipeline segment from Hobbs to Lynch, New Mexico. That segment would connect to a Western-owned pipeline carrying crude to Western Refining's refineries.
- The lease was for a term of 10 years, to begin upon completion of the construction of the new pipeline segment.

- Western agreed to a base monthly rental of the capacity in the TEPPCO pipelines. This base rental was due whether Western used the capacity or not, because it was intended to reimburse TEPPCO for the over \$12 million capital cost of constructing the new pipeline segment.
- Western was obligated to provide sufficient crude oil to fill the two pipelines in order to move its crude oil (commonly called “line fill”).

10. On the same day that Western entered the Lease Agreement with TEPPCO, Western Refining entered into a crude oil purchase agreement with TEPPCO Crude. This related agreement obligated Western’s affiliate to purchase crude oil, in quantities declining over the 10-year term that ran concurrent with the Lease Agreement.

11. TEPPCO’s new pipeline segment from Hobbs to Lynch was completed in June 2007, triggering the beginning of Western’s right to use the capacity of the TEPPCO lines and its obligation to pay the base rentals. Western (which, by June of 2007, had acquired Giant) contributed the required line fill, consisting of 26,000 barrels of crude oil for the Midland to Hobbs segment, 9,275 barrels to fill the tank bottom in Hobbs, and 13,600 barrels to fill the new line from Hobbs to Lynch.

12. From the beginning of the operational term of the two related agreements, Western did not support the arrangement that had been negotiated by

its predecessor in interest. Western did not use the full capacity it had leased, and Western Refining did not purchase the required minimum volumes of crude oil. The use of the pipelines and the purchase of crude oil continued to dwindle over time. By February 2008, TEPPCO approached Western to determine if there was interest in Western buying out the remaining term of the contracts. By the end of May 2008, Western stopped using the pipeline capacity and its Western Refining stopped purchasing crude oil altogether, and they have not resumed since.

13. Rather than permit its Midland to Hobbs segment to remain inactive, TEPPCO pumped Western's line fill to a storage tank in Midland, and re-directed shipments of other crude oil from Hobbs to Midland, using the pipe in the opposite direction. The line, however, remained available to Western. Had Western given the requisite five day notice to TEPPCO of its intent to use the leased capacity, TEPPCO could have easily re-filled the line with Western's line fill and begun shipments to Western. Western never gave notice of any intent or desire to use the line.

14. Western paid the base rental through December 2008. Since then, however, it has refused to do so.

15. In September 2008, Western demanded immediate return of its line fill. TEPPCO refused, as the Lease Agreement was still in effect and it required Western to make this line fill available for the entire 10-year term. TEPPCO still

safely maintains Western's line fill crude oil. Moreover, Western has possession and control of an approximately equivalent volume of TEPPCO's line fill that TEPPCO had delivered to Western. This TEPPCO crude oil had filled a Western pipeline segment from Lynch, New Mexico to another pipeline going to Midland.

16. On February 9, 2009, without notice to TEPPCO, Western terminated the Lease Agreement, Western Refining terminated the crude oil purchase agreement, and together they filed a proceeding before the Federal Energy Regulatory Commission, seeking damages against TEPPCO. Western claimed that the mere filing of the FERC complaint triggered a right to terminate the Lease Agreement. FERC dismissed the complaint on June 22, 2009 for lack of jurisdiction.

BREACHES OF CONTRACTS

17. Western has breached the Lease Agreement by wrongfully terminating the contract, by holding TEPPCO's line fill crude oil, and by failing to pay the remaining required base rentals.

18. Western's breach has caused TEPPCO to suffer damages in excess of \$10 million.

19. Western Refining has breached the crude oil purchase agreement by failing to purchase the required minimum quantities of crude oil, causing damages to TEPPCO Crude.

20. TEPPCO and TEPPCO Crude are entitled to recover their reasonable attorneys' fees for the necessary services of their attorneys in bringing this action.

DECLARATORY RELIEF

21. TEPPCO seeks a declaration that it did not breach the Lease Agreement by refusing to return Western's line fill in September 2008, when Western demanded return of the line fill. TEPPCO remains ready, willing, and able to return the line fill, when the rights and liabilities of the parties under the Lease Agreement are determined by the Court.

22. TEPPCO further seeks a declaration that Western is not entitled under the terms of the Lease Agreement to a refund of any of the base rentals already paid.

23. TEPPCO further seeks a declaration that the FERC complaint filed by Western and Western Refining, which was dismissed for lack of jurisdiction, did not entitle Western to terminate the Lease Agreement and did not entitle Western Refining to terminate the crude oil purchase agreement.

24. TEPPCO further seeks a declaration that its decision to re-direct the flow of its pipeline from Hobbs to Midland did not constitute a breach of the Lease Agreement.

25. TEPPCO seeks to recover its reasonable attorneys' fees incurred for the necessary services of its attorneys in obtaining these declarations.

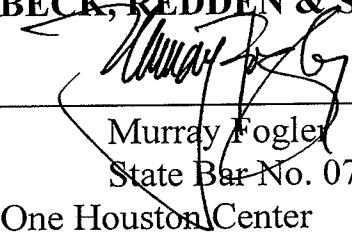
JURY DEMAND

Plaintiffs demand a trial by jury.

Therefore, TEPPCO and TEPPCO Crude request that Western and Western Refining be cited to appear and answer. Upon final hearing, TEPPCO and TEPPCO Crude request that they recover judgment against Western and Western Refining for all actual damages, for the requested declaratory relief, for reasonable attorneys' fees, for prejudgment and post-judgment interest, for costs of court, and for such other relief, general and special, legal and equitable, to which they may be justly entitled.

Respectfully submitted,

BECK, REDDEN & SECREST, L.L.P.



Murray Fogler

State Bar No. 07207300

One Houston Center
1221 McKinney, Suite 4500
Houston, Texas 77010
713.951.3700
713.951.3720 (Fax)

**ATTORNEYS FOR PLAINTIFFS
TEPPCO CRUDE PIPELINE, LLC and
TEPPCO CRUDE OIL, LLC**

DATE: July 8, 2009.

APPENDIX C

ANSWER IN

TEPPCO Crude Pipeline LLC, et al.

v.

Western Refining Pipeline, Co.

D229231
1071.012

No. CV-46987

TEPPCO CRUDE PIPELINE, LLC
and TEPPCO CRUDE OIL, LLC

Plaintiffs

VS.

WESTERN REFINING PIPELINE
COMPANY and WESTERN
REFINING SOUTHWEST, INC.

Defendants

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FILED
2009 AUG 20 PM 2:06
IN THE DISTRICT COURT OF
MIDLAND COUNTY, TEXAS
DISTRICT CLERK
BY _____

MIDLAND COUNTY, TEXAS DEPUTY

385TH JUDICIAL DISTRICT

**DEFENDANTS' MOTION TO TRANSFER VENUE
AND, SUBJECT THERETO, ORIGINAL ANSWER**

1

TO THE HONORABLE JUDGE OF SAID COURT:

Come now Defendants Western Refining Pipeline Company ("Western Pipeline") and Western Refining Southwest, Inc. ("Western Refining"), and file this Motion to Transfer Venue, requesting transfer of this case to El Paso County, Texas. El Paso County, unlike Midland County, is a county of proper venue for this action

Background

This is a breach of contract lawsuit. Plaintiffs claim that Western Pipeline has wrongfully terminated a Lease Agreement under which Western Pipeline agreed to lease certain pipeline capacity from TEPPCO Crude Pipeline, LLC ("TEPPCO Pipeline"). Plaintiffs also claim that Western Refining has breached a crude oil purchase agreement by failing to purchase certain quantities of crude oil from TEPPCO Crude Oil, LLC ("TEPPCO Crude").

Argument

The general venue rule, which applies in this case¹, provides that a lawsuit against a corporate defendant may be brought either “in the county in which all or a substantial part of the events or omissions giving rise to the claim occurred” or “in the county of the defendant’s principal office in this state.” CIV. P. REM. CODE § 15.002(a)(1) & (3). Plaintiffs bear the burden to prove that venue is maintainable in Midland County under one of those provisions. TEX. R. CIV. P. 87(2)(a) (“A party who seeks to maintain venue of the action in a particular county in reliance upon Section 15.001 (General Rule)...has the burden to make proof, as provided in paragraph 3 of this rule, that venue is maintainable in the county of suit.”). Plaintiffs cannot meet that burden because El Paso County, not Midland County, is the proper venue for this proceeding under §15.002.

Plaintiffs plead two bases for venue in Midland County: (1) “the pipeline at issue is located in part in this district” and (2) “a substantial part of the events or omissions giving rise to the claim occurred in this county.” Petition at ¶ 6.

Plaintiffs’ first allegation – that a portion of Plaintiffs’ pipeline is located in this district – is irrelevant, and is not a proper basis for venue in this case. Plaintiffs own a pipeline that runs from Midland to Lynch, New Mexico. Western Pipeline contracted to lease capacity on that pipeline so that Western Refining could transport crude oil on that pipeline in order to obtain additional supplies of crude in New Mexico, and Plaintiffs claim that Western Pipeline wrongfully terminated that contract. The pipeline itself, however, is not at issue in this case. The fact that part of the pipeline on which crude was shipped is located in Midland County does not make this county a place where a

¹The venue rules divide venue into three categories: “general” (Civ. P. Rem. Code § 15.002), “mandatory” (Civ. P. Rem. Code § 15.011-020), and “permissive” (Civ. P. Rem. Code § 15.031-039). None of the “mandatory” or “permissive” venue provisions apply to this dispute, so it is governed by the “general rule.”

substantial portion of the events that gives rise to Plaintiffs' claims occurred, as required by the venue rules. Otherwise, venue would be proper in each and every county between Midland and Hobbs, New Mexico that the TEPPCO pipeline touched. That is not the law.

Plaintiffs' second allegation, that "a substantial part of the events or omissions giving rise to the claim occurred in this county," is legally and factually wrong. Defendants specifically deny that a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in Midland County.

Under Texas law, to determine whether a "substantial" part of the facts giving rise to a claim occurred in a particular county, the Court must examine the essential elements of the asserted claim. *Chiriboga v. State Farm Mutual Automobile, Ins. Co.*, 96 S.W.3d 673, 680 (Tex. App. – Austin 2003, no pet.) ("[Plaintiff] presented evidence that an event did occur in Milam County, but the question is whether that event amounted to a 'substantial part' of the events giving rise to the lawsuit."). Plaintiffs' claims in this case are for breach of contract, involving two contracts between plaintiffs and defendants. The contracts were not negotiated or executed, by either side, in Midland County.

Under the first contract – a pipeline lease agreement – Western Pipeline paid money to TEPPCO in Dallas, in return for pipeline capacity to allow Western Refining to transport crude oil from Midland to Lynch, New Mexico. Plaintiffs claim that Western Pipeline breached that contract in three ways: "by wrongfully terminating the contract, by holding TEPPCO's line fill crude oil, and by failing to pay the remaining required base rentals." Petition at ¶ 17. None of those alleged breaches occurred in Midland County. Western Pipeline sent its termination letter from its offices in El Paso to plaintiffs'

offices in Oklahoma City. Western Pipeline is alleged to hold the TEPPCO line fill crude oil in New Mexico. Western Pipeline sent payment for the base rentals under the lease agreement from Tempe, AZ to Dallas, TX. Also, Plaintiffs' petition alleges that those base rentals were intended to cover costs that plaintiffs incurred to build a new pipeline segment in New Mexico (not Midland County). Petition at ¶ 9 ("TEPPCO agreed to construct and lease capacity to Western in another pipeline segment from Hobbs to Lynch, New Mexico...Western agreed to a base monthly rental of the capacity in the TEPPCO pipelines. This base rental was due whether Western used the capacity or not, because it was intended to reimburse TEPPCO for the over \$12 million capital cost of constructing the new pipeline segment."). Therefore, neither Western Pipeline's performance of its obligations under the lease agreement (payment of money), nor any of the alleged breaches of the lease agreement, occurred in Midland County. It cannot be said that a "substantial part" of the events giving rise to Plaintiffs' claims concerning that agreement occurred in Midland County.

Under the second contract at issue in this case – a crude oil purchase agreement –Western Refining purchased crude oil from Plaintiffs. Plaintiffs claim that Western Refining breached that contract by "failing to purchase the required minimum quantities of crude oil." Petition at ¶ 19. That alleged breach did not occur in Midland County. Western Refining performed its obligations under that contract by sending payment for its crude oil purchases by wire from Tempe, AZ to TEPPCO's account in San Francisco. Western Refining ultimately terminated that contract by sending a letter from El Paso to Oklahoma City. The events that give rise to plaintiffs' breach of contract claim relating to the crude oil purchase agreement, therefore, also did not occur in Midland County.

Plaintiffs may argue that venue is proper in Midland County because the terms of the crude oil purchase agreement required Western Refining to take delivery of crude oil purchases in Midland. But Plaintiffs do not claim (and cannot claim) that Western Refining failed to take delivery of any oil it purchased under the agreement. Furthermore, under Texas law, the fact that a contract provides for delivery of oil or gas from a seller to a buyer in a particular county does *not* make that a county of proper venue for a lawsuit against the buyer for failing to honor its contractual obligations. See *Rorschach v. Pitts*, 248 S.W.2d 120 (Tex. 1952) (holding that county where the buyer was to take delivery of gas was not proper venue for lawsuit by the seller against the buyer because “the essential obligation in suit for venue purposes is that of payment, and since no place of performance of that obligation is stated in the contract, no exception to the general rule of venue at the domicile is involved.”); *Brazos Electric Power Cooperative, Inv. V. Southwestern Gas Pipeline, Inc.*, 555 S.W.2d 168, 171 (Tex. App. — Eastland 1977, now writ) (“The fact that defendant has received gas in Palo Pinto County is not controlling... We hold that plaintiff has failed to prove that venue is proper in Palo Pinto County.”).

Both contracts at issue in this case were formed outside of Midland County. Defendants’ obligations under both contracts, namely the payment of money, were performed outside of Midland County. All of Defendants’ alleged breaches of both contracts occurred outside of Midland County. Under the venue rules, that makes Midland County an improper venue for this action.

To the extent that Plaintiffs have any cause of action at all against Defendants (which Defendants deny), El Paso County is the proper venue for this proceeding.

Western Refining is an Arizona corporation and Western Pipeline is a New Mexico corporation, but their principal office in this state is located in El Paso, Texas. Thus, under Civil Practice & Remedies Code § 15.002(a)(3), venue is maintainable in El Paso County. See CIV. P. REM. CODE § 15.002(a)(3) (“all lawsuits shall be brought...in the county of the defendant’s principal office in this state, if the defendant is not a natural person.”).

This case should also be transferred to El Paso County for the convenience of the parties and witnesses and in the interest of justice. CIV. P. REM. CODE §15.002(b). Maintenance of this action in Midland County would cause Defendants economic and personal hardship because almost all of Defendants’ operations, documents, and witnesses relevant to this dispute are located in El Paso and New Mexico, not Midland County. At the same time, transfer to El Paso County would impose no hardship on Plaintiffs because Plaintiffs’ operations, documents, and witnesses relevant to this dispute are located almost entirely in Oklahoma City and Houston, not Midland County. Plaintiffs filed suit in Midland County simply because they wanted to *avoid* El Paso County. That is not a proper basis for venue. See, e.g., *Chiriboga*, 96 S.W.2d at 681 (“The legislature’s purpose in using the term “substantial part” in section 15.002(a)(1) was to curtail forum-shopping. No longer is any fact connected to a lawsuit sufficient to establish venue, as it was under the old venue scheme.”). Because El Paso is a proper county, and because the balance of interests support this lawsuit proceeding in El Paso, Defendants also request transfer of this case to El Paso based on the convenience of the parties and witnesses.

ORIGINAL ANSWER

Subject to and without waiver of their Motion to Transfer Venue, and pursuant to the laws of the State of Texas and Rule 92 of the Texas Rules of Civil Procedure, Defendants also file a general denial and request that Plaintiffs be required to prove their charges, assertions and allegations by the preponderance of the credible evidence.

Defendants expressly reserve their rights to assert such other and additional defenses, counterclaims, cross-claims and/or third party claims as may be warranted by discovery.

WHEREFORE, PREMISES CONSIDERED, Defendants pray that this lawsuit be transferred to El Paso County, Texas. In the alternative, Defendants pray that Plaintiffs take nothing by its suit, that Defendants be dismissed, that all costs of court be assessed against Plaintiffs, and that Defendants be granted all other and further relief to which they may show themselves justly entitled.

Dated: August 20, 2009.

Respectfully submitted,

GIBBS & BRUNS, L.L.P.

By: *Jeremy Doyle* *by permission*
Chris Reynolds *Trudg*
Texas Bar No. 16801900
Jeremy L. Doyle
Texas Bar No. 24012553
Angus J. Dodson
Texas Bar No. 24034418
1100 Louisiana, Suite 5300
Houston, Texas 77002
Telephone: 713/650-8805
Telecopier: 713/750-0903

Max E. Wright
Hinkle, Hensley, Shanor & Martin
P. O. Box 3580
Midland, TX 79702
432/683-4691
432/683-6518 - fax

By: *Max E. Wright*
Max E. Wright
State Bar No. 22049400

**ATTORNEYS FOR
DEFENDANTS**

CERTIFICATE OF SERVICE

I hereby certify that I have, this 8th day of July, 2010, caused the foregoing to be filed with the clerk of the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. All participants in this case are registered CM/ECF users and will be served via the Court's CM/ECF system.

/s/ Robert M. Kennedy

Robert M. Kennedy

Attorney of Record for Respondent

Federal Energy Regulatory Commission