ORAL ARGUMENT IS NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 09-1236 and 09-1251
[formerly Nos. 08-1192, 09-1236 and 09-1251]

FLINT HILLS RESOURCES ALASKA, LLC, *et al.*,
[formerly PETRO STAR INC., *et al.*]
PETITIONERS,

v.

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

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

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

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MAY 11, 2010
FINAL BRIEF: JULY 6, 2010

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and Amici

The parties before this Court are listed in the brief of Petitioners.

B. Rulings Under Review

1. Order Accepting Compliance Filing, *BP Pipelines (Alaska), Inc., et al.*, FERC Docket No. OR06-10, *et al.*, 125 FERC ¶ 61,254 (December 2, 2008) ("Compliance Order"), R. 189, JA 146; and

2. Order Denying Rehearing, *BP Pipelines (Alaska), Inc., et al.*, FERC Docket No. OR06-10, *et al.*, 128 FERC ¶ 61,169 (August 18, 2009) ("Rehearing Order"), R. 200, JA 153.

C. Related Cases

The consolidated cases in this appeal challenge orders accepting a filing made in compliance with *BP Pipelines, Inc.*, 122 FERC ¶ 61,236 (2008) ("Opinion No. 500"). A petition for review of Opinion No. 500 was filed in *Petro Star Inc. v. FERC*, D.C. Cir. No. 08-1192. On April 7, 2010, the Court granted Petro Star's unopposed motion for voluntary dismissal of that petition for review.

Consolidated appeals are pending before this Court in *Flint Hills Resources Alaska, LLC, et al.*, D.C. Cir. Nos. 06-1361, *et. al.*, relating to the inflation adjustment method for valuing certain crude oil cuts shipped on the Trans Alaska Pipeline System ("TAPS"). Those consolidated appeals are scheduled for oral argument on September 13, 2010. In addition, *Flint Hills Resources Alaska, LLC v. FERC*, D.C. Cir. Case Nos. 08-1270, *et al.*, a consolidated appeal of FERC

orders that established rates and ordered refunds for interstate service in 2005 and 2006 on TAPS, is scheduled for oral argument on October 7, 2010.

s/ Kathrine Henry
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July 6, 2010

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GLOSSARY

Administrator	TAPS Quality Bank Administrator
Br.	Initial Brief of Petitioners/Refiners
Compliance Order	Order Accepting Compliance Filing, *BP Pipelines (Alaska), Inc., et al.*, Docket No. OR06-10, *et al.*, 125 FERC ¶ 61,254 (December 2, 2008), R. 189, JA 146
FERC or Commission	Federal Energy Regulatory Commission
Hearing Order	Order Accepting Replacement Price and Setting Processing Cost Adjustment for Hearing, *BP Pipelines (Alaska), Inc.*, Docket No. OR06-10, *et al.*, 116 FERC ¶ 61,291 (September 26, 2006), R. 14, JA 142
JA	Joint Appendix
R.	Record
Refiners	Petitioners Flint Hills Resources Alaska, LLC and Petro Star, Inc.
Rehearing Order	Order Denying Rehearing, *BP Pipelines (Alaska), Inc., et al.*, Docket No. OR06-10, *et al.*, 128 FERC ¶ 61,169 (August 18, 2009), R. 200, JA 153
Section 4412	Section 4412 of the Motor Carrier Safety Reauthorization Act of 2005
TAPS	Trans Alaska Pipeline System

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

STATEMENT OF THE ISSUE

Whether the Federal Energy Regulatory Commission ("Commission" or "FERC") reasonably interpreted § 4412(b)(2) of the Motor Carrier Safety Reauthorization Act of 2005, when it determined the effective date of Quality Bank processing cost adjustments for Heavy Distillate crude oil shipped on the Trans Alaska Pipeline System ("TAPS").

STATUTORY PROVISIONS

The pertinent statutes are contained in the Addendum to this brief. In particular, § 4412 of the Motor Carrier Safety Reauthorization Act of 2005, Pub. L. No. 109-59 § 4412, 119 Stat. 1714, 1778-79 (2005), at issue here, provides:

Section 4412. Quality Bank Adjustments

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

(b) PROCEEDINGS. –

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

(2) PROCEEDINGS COMMENCED AFTER THE DATE OF ENACTMENT. – In a proceeding commenced after the date of enactment of this Act, the Commission may not order retroactive changes in TAPS quality bank adjustments for any period that exceeds the 15-month period immediately preceding the earliest date of the first order of the Federal Energy Regulatory Commission imposing quality bank adjustments in the proceeding.

(c) DEADLINE FOR CLAIMS. –

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

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

INTRODUCTION

The sole issue in this case is the reasonableness of the Commission's determination of the effective date for certain TAPS quality bank adjustments under § 4412(b)(2) of the Motor Carrier Safety Reauthorization Act of 2005 ("Motor Carrier Act"). This case follows five other appeals already decided by or pending before this Court involving significantly more complex issues concerning the valuation of various cuts of crude oil shipped on TAPS, which provides the only means for shipping oil pumped from Alaska's North Slope oil fields to Valdez, Alaska. *See OXY USA, Inc. v. FERC*, 64 F.3d 679 (D.C. Cir. 1995); *Exxon Co. v. FERC*, 182 F.3d 30 (D.C. Cir. 1999); *Tesoro Alaska Petroleum Co. v. FERC*, 234 F.3d 1286 (D.C. Cir. 2000); *Petro Star Inc. v. FERC*, Nos. 06-1166 *et al.*, 2008 U.S. App. LEXIS 5328 (D.C. Cir. Mar. 6, 2008), *cert. denied sub nom. Exxon Mobil Corp. v. FERC*, 129 S. Ct. 898 (2009); *Flint Hills Resources Alaska, LLC v. FERC*, D.C. Cir. Nos. 06-1361 *et al.* (decision pending).

Because there are multiple shippers and only one pipeline, the shippers' oil, which is of varying quality, is necessarily commingled during shipping, and each shipper takes delivery of a share of the common stream at Valdez. *See OXY*, 64 F.3d at 684. "The TAPS 'Quality Bank' is an accounting arrangement approved by [FERC] that makes monetary adjustments between shippers in an attempt to place each in the same economic position it would enjoy if it received the same

petroleum at Valdez that it delivered to TAPS on the North Slope." *Id.* Thus, "the Quality Bank charges shippers of relatively low-quality petroleum who benefit from commingling and distributes the proceeds to shippers of higher quality petroleum whose product is degraded by commingling." *Id.*

Because the oil at issue is not sold until after it is commingled and shipped to Valdez, there is no independent market upon which to base the relative price of the various streams shipped on TAPS. *See Exxon*, 182 F.3d at 35. The Quality Bank determines the relative value of the oil using a "distillation" method. *Id.* "Under that methodology, the crude stream is separated into its component parts, or 'cuts,' market values are assigned to each cut, and the value of a crude stream is determined by the relative weighting of the cuts." *Trans Alaska Pipeline Sys.*, 113 FERC ¶ 61,062 at P 4 (2005).

The nine TAPS cuts, from lightest to heaviest, are: (1) Propane; (2) Isobutane; (3) Normal Butane; (4) Light Straight Run; (5) Naphtha; (6) Light Distillate; (7) Heavy Distillate; (8) Vacuum Gas Oil; and (9) Resid. Of the nine cuts, only one – Heavy Distillate – is at issue in this consolidated appeal.

Some cuts are products with market prices, while others, like Heavy Distillate, for which there is no market, are assigned a proxy market product, and require further processing to meet that proxy's specifications. Rehearing Order P 3, JA 154. Where processing is necessary, the valuation method deducts these

processing costs from the market price of the refined, finished product, reducing the value of that particular cut. *Id.*

An independent neutral expert, the Quality Bank Administrator, administers the Quality Bank. The TAPS tariff requires the Administrator to give notice of any proposed or needed modification to the existing valuations. Rehearing Order P 4, JA 154.

In this consolidated appeal, two refiners, Flint Hills Resources Alaska, LLC and Petro Star Inc. ("Refiners") challenge orders in which the Commission accepted compliance tariff filings by the TAPS Carriers, the owners of the pipeline,[1] to be effective June 1, 2006, to establish the processing cost adjustment for Heavy Distillate. *BP Pipelines (Alaska), Inc., et al.*, 125 FERC ¶ 61,254 (2008) ("Compliance Order"), R. 189, JA 146, *reh'g denied*, 128 FERC ¶ 61,169 (2009) ("Rehearing Order"), R. 200, JA 153. Refiners argue that the Commission erred in its interpretation of § 4412 of the Motor Carrier Act, and insist that the statute compels the Commission, when determining the effective date for retroactive changes in quality bank adjustments, to select the December 2, 2008 Compliance Order as the "first order" of the Commission "imposing quality bank adjustments," instead of the September 26, 2006 Hearing Order.

[1] The current TAPS Carriers are BP Pipelines (Alaska) Inc., ConocoPhillips Transportation Alaska Inc., ExxonMobil Pipeline Company, Koch Alaska Pipeline Company, LLC and Unocal Pipeline Company.

STATEMENT OF THE FACTS

I. Statutory Background

In 1906, Congress extended the definition of common carrier under the Interstate Commerce Act to oil pipelines and required that their rates be just and reasonable. *See* 49 U.S.C. app. § 1(5) (1988). *See also, e.g., Ass'n of Oil Pipelines v. FERC*, 83 F.3d 1424, 1428 n. 6 (D.C. Cir. 1996) (explaining statute's background and unusual citation format). In 1977, in conjunction with the formation of the Department of Energy, regulatory authority over oil pipelines under the Interstate Commerce Act was transferred from the Interstate Commerce Commission to the newly-created FERC. *Id.*

The Interstate Commerce Act sets forth procedures for parties to challenge pipelines' rates. Section 15(7) authorizes the Commission to hold a hearing concerning the lawfulness of filed tariffs and, at its discretion, to suspend the tariff pending such hearing. *See* 49 U.S.C. app. § 15(7). In addition, the Commission may order refunds of any increased rates or charges later found to be unjustified. *Id. See also, e.g., id.* §§ 1(5)(a) (all rates for oil pipeline transportation must be just and reasonable), 13 (providing for complaints by shippers), and 15(1) (authorizing the Commission to prescribe just and reasonable rates after hearing).

Congress enacted § 4412 of the Motor Carrier Safety Reauthorization Act of 2005 in August 2005. Pub. L. No. 109-59 § 4412, 119 Stat. 1714, 1778-79 (2005)

("§ 4412"). Section 4412(b)(1) provides that, in proceedings commenced before its enactment, no retroactive changes in adjustments in the TAPS Quality Bank are allowed for periods before February 1, 2000. For proceedings (like this one) commenced after its enactment, § 4412(b)(2) limits the period for any retroactive changes in Quality Bank adjustments to the "15-month period immediately preceding the earliest date of the first order of the Federal Energy Regulatory Commission imposing quality bank adjustments in the proceeding." *Id.*

II. The Proceedings Before The Commission

A. Events Leading to the Challenged Orders

In 2005, the Commission issued Opinion No. 481, which established as the proxy reference price to value the West Coast Heavy Distillate cut the published Los Angeles spot quote for Low Sulfur Diesel, which has a sulfur content of 500 parts per million (ppm). *Trans Alaska Pipeline Sys.*, 113 FERC ¶ 61,062 at PP 50-78 (2005), *order on reh'g*, 114 FERC ¶ 61,323 (2006), *order on reh'g*, 115 FERC ¶ 61,287 (2006), *aff'd sub nom. Petro Star Inc. v. FERC*, No. 06-1166, 2008 U.S. App. LEXIS 5328 (D.C. Cir. Mar. 6, 2008). Since Alaska North Slope crude oil has a significantly higher sulfur content of 5,000 ppm, the Quality Bank Administrator made a downward adjustment of 6.4302 cents per gallon from the reference price to account for the cost of removing sulfur to meet the 500 ppm sulfur standard of the proxy. Compliance Order P 6, JA 147; Rehearing Order P 5,

JA 154.

On July 28, 2006, the TAPS Carriers filed the Administrator's notice with the Commission that, as of June 1, 2006, the published Low Sulfur Diesel reference price had been replaced by the price of Ultra Low Sulfur Diesel, with a sulfur content of only 8 ppm. Thus, a new proxy for the West Coast Heavy Distillate Cut was required. *Id.*

The Administrator's notice advised that because more expensive processing would be required to meet the lower 8 ppm sulfur specification, he recommended using as a reference proxy the published Los Angeles spot quote for Ultra Low Sulfur Diesel minus a proposed processing cost adjustment of 10.4549 cents per gallon for the West Coast Heavy Distillate cut. Compliance Order P 7, JA 148; Rehearing Order P 6, JA 154.

All parties agreed to the proposed new reference proxy; however, some objected to the proposed processing cost adjustment. Compliance Order P 8, JA 148; Rehearing Order P 7, JA 155. Accordingly, the Commission issued an order on September 26, 2006, which accepted the Administrator's recommendation of the new proxy and the proposed processing cost adjustment "effective June 1, 2006, subject to refund," and established a hearing to determine the amount of the processing cost adjustment. *BP Pipelines (Alaska) Inc., et al.*, 116 FERC ¶ 61,291 (2006) ("Hearing Order"), R. 14, JA 142. The order stated that the value of the cut

"will be subject to refund when the Commission issues the final order." *Id.* P 11, JA 145.

On September 7, 2007, following a hearing, the Administrative Law Judge ("ALJ") issued an Initial Decision. *BP Pipelines (Alaska) Inc., et al.*, 120 FERC ¶ 63,018 (2007), R. 159, JA 261. The Initial Decision determined the factors the Administrator should use to calculate the processing cost. On March 20, 2008, the Commission affirmed the ALJ's Initial Decision in Opinion No. 500, *BP Pipelines (Alaska) Inc.*, 122 FERC ¶ 61,236 (2008), R. 178, JA 343, and directed the TAPS Carriers "to make a compliance filing establishing the processing cost adjustment for the West Coast Heavy Distillate cut." *Id.* Ordering Par. B.[2]

The compliance filing on April 2, 2008, calculated an 8.1340 cents per gallon processing cost adjustment as of June 1, 2006, the effective date under the Commission's Hearing Order, about 2 cents less than the Administrator's proposed adjustment. R. 179, JA 403. In the compliance filing, the TAPS Carriers stated that after Commission action, revised monthly invoices would be issued for the period starting June 2006, since the Commission had accepted the Administrator's originally proposed adjustment subject to refund. *Id.* at pp. 2-3 and fn. 3, JA 405-406.

[2] Petro Star Inc. filed a petition for review of Opinion No. 500 in D.C. Cir. No. 08-1192. On April 7, 2010, following the filing of Petitioners' opening brief here, the Court granted Petro Star's unopposed motion for voluntary dismissal of its petition for review.

Flint Hills protested the compliance filing, claiming that the proposed June 1, 2006 effective date was a retroactive TAPS Quality Bank adjustment that exceeded the 15-month period permitted by section 4412(b)(2) of the Motor Carrier Act. R. 180, JA 408. Flint Hills argued that the first order imposing a quality bank adjustment in this proceeding would issue only when the processing cost adjustment was fixed in numerical form in the compliance filing. *Id.* at 5-6, JA 412-413. Thus, if the Commission accepted the compliance filing, for example, on May 1, 2008, the effective date of that order could not precede February 1, 2007. *Id.* at 8, JA 415.

B. The Challenged Orders

1. The Compliance Order

On December 2, 2008, the Commission issued an order accepting the compliance filing, effective June 1, 2006. Compliance Order, R. 189, JA 146. The Commission concluded that the Hearing Order, issued on September 26, 2006, was the first order, under the meaning of § 4412(b)(2), which imposed a quality bank adjustment in the proceeding. *Id.* P 14, JA 150. The Commission found that the June 1, 2006 effective date was within the permissible 15-month period for retroactive quality bank adjustments. *Id.*

The Commission explained that the Hearing Order met all the requirements of § 4412(b)(2), since it was the "first order" issued in the proceeding and it

"imposed" a quality bank "adjustment" by changing the valuation of the Heavy Distillate cut. *Id.* P 17, JA 150. In addition, the Commission stated that § 4412(b)(2) did not require that the adjustment in the first order be final and not subject to change; the fact that the statute references "the earliest date of the first order" demonstrates that Congress contemplated that the Commission might issue subsequent orders which could change the initially established quality bank adjustment. *Id.* P 19, JA 151. By contrast, Flint Hills' position, that the term "imposing" in § 4412(b)(2) must refer to the later compliance order in a proceeding, improperly would read the word "first" out of the provision. *Id.*

The Commission further explained that § 15(7) of the Interstate Commerce Act authorizes the agency to impose retroactive adjustments back to the effective date set in the Hearing Order; § 4412(b)(2) of the Motor Carrier Act merely limits the number of months preceding the effective date set in the Hearing Order that can be included in the refund period. *Id.* P 20, JA 151. The Commission explained that, although the first order in response to a pipeline filing is usually issued before the 15-month period would elapse, the entire 15-month period could apply in the case of an "unlawful order" on judicial remand, which was the situation that motivated Congress to adopt the 15-month limitation. *Id.* In addition to taking remedial action affecting a particular pending case through § 4412(b)(1), Congress also included the 15-month limitation in § 4412(b)(2) in order "to

prevent a recurrence of the prospect of a lengthy refund period caused by extended litigation over an unlawful order." *Id.* n. 11, JA 151.

Flint Hills and Petro Star separately filed for rehearing of the Compliance Order, claiming that the June 1, 2006 effective date violated the 15-month limitation in § 4412(b)(2). R. 190, 191, JA 437, 459.

2. The Rehearing Order

On August 18, 2009, the Commission denied rehearing. Rehearing Order, R. 200, JA 153. The Commission first found that § 4412 is ambiguous because it does not define terms such as "claim" and "imposing," nor is it clear whether the "adjustment" defined in § 4412(a) and referenced in § 4412(b)(2) refers to a change in an existing amount or refers to a new monetary charge. *Id.* P 34, JA 161. The Commission concluded that its interpretation of § 4412(b)(2) was reasonable and consistent with what Congress sought to address. *Id.*

The Commission then described the circumstances that led to Congress's enactment of § 4412. In 1993, the Commission determined that the existing Quality Bank valuation method was no longer just and reasonable and accepted a contested settlement that incorporated the current distillation method. *Id.* P 35, JA 162. Following this Court's decisions in *OXY* and *Exxon*, and the subsequent remand proceedings, the Commission set for hearing certain valuation issues, including the effective date of the new valuations under the distillation method. *Id.*

In August 2004, the ALJ issued an Initial Decision, which held that the Administrator must recalculate the Quality Bank from December 1993 forward and make appropriate refunds. *Id.*

In August 2005, before the Commission acted on the objections to the ALJ's Initial Decision, Congress enacted § 4412. The limited legislative history cited in the requests for rehearing showed that Congress intended to address the extended refund period, possibly 12 years, which certain TAPS shippers would incur if refunds were provided back to 1993. *Id.* P 36, JA 162. Section 4412(b)(1) provided that in proceedings commenced before its enactment, retroactive quality bank adjustments were limited back to February 1, 2000. Thereafter, in October 2005, the Commission issued Opinion No. 481, which affirmed the Initial Decision in most respects, but limited the refunds back to February 1, 2000, in accordance with the statute. *Id.* P 37, JA 163.

For proceedings commenced after its enactment, like this one, § 4412(b)(2) limited the period for retroactive adjustments to the "15-month period immediately preceding the earliest date of the first order of the Federal Energy Regulatory Commission imposing quality bank adjustments in the proceeding." *Id.* The Commission found that the September 26, 2006 Hearing Order, setting a June 1, 2006 refund effective date, satisfied the statutory criteria, since it was the "first order" and "imposed" a quality bank "adjustment." *Id.*

The Commission found unpersuasive the rehearing argument that the Hearing Order could not be the "first order" because it did not definitively establish the precise amount of the processing cost adjustment for Heavy Distillate. *Id.* P 38, JA 163. The Commission also found inapposite the cases cited by Flint Hills and Petro Star in support of their claim that an order accepting a rate subject to refund does not "impose" a rate. *Id.* PP 39-41, JA 163-164.

The Commission further discussed the potential practical consequences if the arguments in favor of rehearing, regarding the effective date of the compliance filing, were accepted. *Id.* PP 42-43, JA 165. The Commission pointed out that, unlike the situation Congress intended to address in § 4412, all parties understood that the new amount of the processing cost adjustment for Heavy Distillate would become effective June 1, 2006. *Id.* P 44, JA 165.

These consolidated appeals followed.

SUMMARY OF ARGUMENT

Unlike other TAPS appeals raising difficult, technical questions of Alaska oil valuation, here the only question is one of timing. That question is resolved by reference to § 4412 of the Motor Carrier Act of 2005, which entrusts to the Commission the task of setting an effective date and determining when refunds may start. Under the statute, refunds cannot extend farther back than 15 months before the "first order" of the Commission "imposing quality bank adjustments."

In the orders on appeal, the Commission, employing traditional tools of statutory construction, reasonably determined that its September 26, 2006 Hearing Order was the "first order of the Federal Energy Regulatory Commission imposing quality bank adjustments" in this proceeding. Accordingly, the effective date of June 1, 2006, providing for only 4 months of retroactive relief, was well within the 15-month statutory limitation for retroactive changes in quality bank adjustments. The Commission's interpretation of this ambiguous statutory language entrusted to its administration was entirely reasonable and, thus, is entitled to *Chevron* deference from the reviewing Court.

The Commission based its determination on the statute's context and the circumstances existing at the time § 4412(b)(2) was enacted. The agency reasonably concluded that its selection of a June 1, 2006 effective date for retroactive changes in quality bank adjustments fit the statutory terms and addressed the concerns of Congress.

Refiners fail to demonstrate that the Commission's interpretation is unreasonable. Neither the plain language of § 4412(b)(2) nor its context supports Refiners' interpretation that: (1) the "first order" imposing quality bank adjustments must be an order issued after a full hearing that "prescribes" or "fixes" final, judicially reviewable adjustments; and (2) retroactive changes in quality bank adjustments are only permissible for the 15-month period immediately preceding

such a final order. As the Commission explained, the September 26, 2006 Hearing Order adjusted the price for Heavy Distillate when it accepted the new reference proxy for that crude oil cut and set for hearing only the processing cost adjustment. While the precise numerical price would not be known until after the hearing, the parties knew at the time of the Hearing Order that the price change would become effective June 1, 2006. As the September 26, 2006 Hearing Order established the refund effective date of June 1, 2006, that is the "first order," within the meaning of § 4412(b)(2), that "imposed" an "adjustment" in the price. With notice, any change in the price after September 26, 2006 is prospective in nature, so refunds for the almost 4-month period between June 1, 2006 and September 26, 2006 are well within the 15-month period for retroactive changes allowed by § 4412(b)(2).

ARGUMENT

I. STANDARD OF REVIEW

Where a court is called upon to review an agency's construction of the statute it administers, well-settled principles apply. If Congress has directly spoken to the precise question at issue, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984). *See also, e.g., Oklahoma Natural Gas Co. v. FERC*, 28 F.3d 1281, 1283-84 (D.C. Cir. 1994) (FERC interpretation of its own jurisdiction entitled to

C*hevron* deference) (citing application of *Chevron* principles to interpretation of the Interstate Commerce Act in *Railway Labor Executives' Ass'n v. United States*, 987 F.2d 806, 813 (D.C. Cir. 1993)). "[I]f the statute is silent or ambiguous with respect to the specific issue," however, the Court must "proceed to step two and defer to 'any permissible construction of the statute' offered by the agency." *HolRail, LLC v. STB*, 515 F.3d 1313, 1316 (D.C. Cir. 2008) (quoting *Chevron*, 467 U.S. at 843).

In deciding whether statutory text is plain or ambiguous, courts consider "the particular statutory language at issue, as well as the language and design of the statute as a whole." *City of Tacoma v. FERC*, 331 F.3d 106, 114-15 (D.C. Cir. 2003) (quoting *Halverson v. Slater*, 129 F.3d 180, 184 (D.C. Cir. 1997)). *See also, e.g., Piedmont Envt'l. Council v. FERC*, 558 F.3d 304, 312-13 (4th Cir. 2009), *cert. denied sub nom. Edison Elec. Inst. v. Piedmont Envt'l. Council*, 2010 U.S. LEXIS 635 (U.S. Jan. 19, 2010) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (in determining "[t]he plainness or ambiguity of statutory language," courts refer "to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole")). When presented with statutory ambiguity, the question on review is not whether petitioner's interpretation is reasonable, but whether the agency's interpretation is reasonable. *See, e.g., American Forest and Paper Ass'n v. FERC*, 550 F.3d 1179, 1182-83 (D.C. Cir.

2008) ("Step two of *Chevron* does not require the best interpretation, only a reasonable one.").

In light of this precedent, the Commission's reasonable interpretation should be accorded *Chevron* respect on appeal.

II. THE COMMISSION'S INTERPRETATION OF § 4412(b)(2) WAS REASONABLE AND IS ENTITLED TO DEFERENCE

The Commission's interpretation of § 4412 of the Motor Carrier Act was straightforward and reasonable. The Commission first found that § 4412 is ambiguous, because it does not define or clarify all the terms it uses, such as "claim," "imposing," and "adjustment." Rehearing Order P 34, JA 161. While the statute, in § 4412(a), defines some of the terms used in § 4412(b)(2), it does not define others. In particular, the statute does not define, and it is not clear, in the broader context of TAPS quality bank regulation under the Interstate Commerce Act, whether the "adjustment" made in the Commission's "first order," referred to in § 4412(b)(2), refers to a change in an existing amount or refers to a new specific monetary charge. *Id.*

The Commission next considered the circumstances existing in 2005, when § 4412 was enacted, to determine Congress's intent. *Id.* PP 35-37, JA 162-163. Based on that examination, the Commission reasonably could conclude that, in § 4412(b)(1), Congress intended to address the then-pending review by the Commission of an ALJ's Initial Decision issued in 2004, which would have

imposed refunds back more than 10 years to 1993. *Id.* P 35-36, JA 162; Compliance Order P 20, fn. 11, JA 151. That Initial Decision was issued following remands by this Court of certain quality bank valuation determinations by the agency. *Id.* The Commission reasonably could conclude further that, after taking remedial action affecting the then-pending administrative proceeding, it followed that Congress designed § 4412(b)(2) "to prevent a recurrence of the prospect of a lengthy refund period caused by extended litigation over an unlawful order." Compliance Order P 20, JA 151. *See also* Rehearing Order P 36 & n. 20, JA 162 (very limited legislative history reveals only that Congress was concerned with "risk and uncertainty" of an extended ("possibly 12 years;" "nearly unlimited") refund period).

In the particular circumstances presented here, the Commission reasonably concluded that the Hearing Order, which established an effective date of June 1, 2006, was the "first order" in the proceeding that "imposed" a quality bank adjustment by changing the proxy for valuing Heavy Distillate and establishing a processing adjustment to the proxy, subject to refund. Compliance Order P 14, 17, JA 150. That adjustment was imposed on a going forward basis from the date of the Hearing Order and was applied retroactively to June 1, 2006. Rehearing Order P 38, JA 163. The effective date of June 1, 2006, set in the September 26, 2006 Hearing Order, was within the 15-month limitation period established in

§ 4412(b)(2). Compliance Order P 18, JA 150.

The Commission reasonably concluded that it had little choice other than to accept the compliance filing, effective June 1, 2006. Rehearing Order PP 42-43, JA 165. The compliance filing, which was made in April 2008, reflected the processing cost adjustments as of June 1, 2006, the date when the Ultra Low Sulfur reference price, based on a particularly low sulfur content, became the new proxy. *Id.* P 42, JA 165. In addition, the Hearing Order had accepted the Administrator's July 2006 recommendation of the new proxy and the proposed processing cost adjustment, subject to refund, effective June 1, 2006. Thus, all parties understood from the outset of the proceeding that, when the amount of the processing cost adjustment was determined after hearing and affirmed by the Commission, the new amount would become effective June 1, 2006. *Id.* P 44, JA 165.

As the Commission found, the prior processing cost adjustment could not apply to the period after June 1, 2006, because it was based on the previous Low Sulfur Diesel reference price, based on a higher sulfur content, which was no longer reported. *Id.* P 43, JA 165. Alternatively, the Commission could not allow the processing cost adjustment proposed by the Administrator to stay in effect for the period after June 1, 2006, since it was determined not to be just and reasonable. *Id.* As the Commission explained: "Such an outcome could not have been the intent of Congress in enacting section 4412 and is completely without any logical

or legal basis, and contrary to all Quality Bank precedent involving changes in reference prices." *Id.*

The Commission considered the language of § 4412(b)(2) in the context of the circumstances leading to its enactment and reasonably determined that the September 26, 2006 Hearing Order was the first order in the proceeding that imposed a quality bank adjustment to the valuation of the Heavy Distillate cut. *See Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 696 **(**D.C. Cir. 2000) ("[a]s *Chevron* counsels . . . FERC's interpretation of undefined and ambiguous statutory terms is entitled to deference"), *aff'd, New York v. FERC*, 535 U.S. 1 (2002). Thus, the Commission reasonably concluded that the effective date of June 1, 2006, for the processing cost adjustment for Heavy Distillate was within the permissible 15-month period in § 4412(b)(2) for retroactive changes to quality bank adjustments.

III. REFINERS FAIL TO DEMONSTRATE THAT § 4412(b)(2) IS PLAIN IN THEIR FAVOR OR THAT THE COMMISSION'S INTERPRETATION IS UNREASONABLE.

Refiners argue that the plain language of § 4412(b)(2) supports their interpretation that the first Commission order imposing quality bank adjustments in the underlying proceeding was the December 2, 2008 Compliance Order. Br. at 24-33. Thus, Refiners claim that the only permissible retroactive period for adjustments was the 15-month period immediately preceding the

Compliance Order (*i.e.*, September 2007 through December 2008). *Id.* at 26, 50-56. In the alternative, Refiners assert, even if § 4412(b)(2) were ambiguous, the statute's structure and history support Refiners' interpretation. *Id.* at 35-40. As demonstrated below, Refiners' interpretation is not supported by the language or history of the statute, or by the caselaw cited in their brief.

A. The Language Of § 4412(b)(2) Does Not Indicate That Congress Intended To Change Established Principles Concerning Retroactive Adjustments.

Refiners assert that the December 2, 2008 Compliance Order allowed retroactive quality bank adjustments for the 30-month period between June 1, 2006, when the new proxy price for Heavy Distillate was published, and December 2, 2008, in violation of the 15-month statutory limit in § 4412(b)(2). *Id.* at 25. Refiners further argue that retroactive adjustments could only be allowed for the period from September 3, 2007 through December 2, 2008, the 15-month period preceding the December 2, 2008 Compliance Order. *Id.* at 26, 54.

According to Refiners, no adjustments could be invoiced for the 15-month period from June 1, 2006 through September 3, 2007, and the interim price approved in the September 26, 2006 Hearing Order should remain as the permanent price for that period, despite the fact that the interim price ultimately was found not to be just and reasonable. *Id.* Moreover, Refiners contend, even if the first order imposing quality bank adjustments were the September 26, 2006

Hearing Order, as the Commission determined, refunds could only be ordered between June 1, 2006, when the proxy reference price changed, and September 26, 2006. *Id.* at 25-26. The Commission would then have to reinstate the interim price temporarily from September 27, 2006 through December 2, 2008, after which period the adjustments accepted in the Compliance Order would again go into effect. *Id.* at 26, fn. 26.

Refiners' argument, if accepted, would result in an anomalous situation that Congress could not have intended. Refiners ignore well-settled law that, when the Commission accepts a proposed rate filing subject to refund and later orders refunds back to the effective date, there is no violation of the prohibition against retroactive ratemaking. *See, e.g., Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1075 (D.C. Cir. 1992) ("[I]t is not that notice relieves the Commission of the bar on retroactive ratemaking, but that it 'changes what would be purely retroactive ratemaking into a functionally prospective process by placing the relevant audience on notice at the outset that the rates being promulgated are provisional only and subject to later revision.'") (quoting *Columbia Gas Transmission Corp. v. FERC*, 895 F.2d 791, 797 (D.C. Cir. 1990) (discussing suspension and refund authority under section 4(e) of the Natural Gas Act, 15 U.S.C. § 717c(e)); *NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 801 (D.C. Cir. 2007) (same under section 205 of the Federal Power Act, 16 U.S.C. § 824d). This same principle has been applied

by this Court in other TAPS Quality Bank cases arising under the Interstate Commerce Act. *See, e.g., Exxon*, 182 F.3d at 54 ("[T]he rule against retroactive ratemaking 'does not extend to cases in which [customers] are on adequate notice that resolution of some specific issue may cause a later adjustment to the rate being collected at the time of service.' The goals of equity and predictability are not undermined when the Commission warns all parties involved that a change in rates is only tentative and might be disallowed.") (quoting *OXY*, 64 F.3d at 699) (internal citations omitted).

In the underlying proceedings, Refiners were on notice from the outset that the refund effective date was June 1, 2006. The Hearing Order, which established the refund effective date of June 1, 2006, was issued on September 26, 2006. Thus, the only retroactive adjustments were between June 1, 2006, and September 26, 2006. As the Commission found, this 4-month period of retroactivity was well within the 15-month limit for retroactive quality bank adjustments in § 4412(b)(2). Compliance Order P 18, JA 150; Rehearing Order P 46, JA 166. Refiners erroneously argue that, even assuming September 26, 2006 were the date of the first order imposing quality bank adjustments, § 4412(b)(2) barred the Commission from directing quality bank adjustments between September 26, 2006 and December 2, 2008, when the Compliance Order was issued, since this period exceeds the 15-month period immediately preceding September 26, 2006.

Consistent with this Court's precedent, however, adjustments during the period between issuance of the Hearing Order, when the Commission placed the parties on notice of possible price corrections, and the Compliance Order were not retroactive adjustments, but were (as explained in *Natural Gas Clearinghouse*) "functionally prospective."

There is no indication in either the language of § 4412(b)(2) or the legislative history that Congress intended to impose a definitive end date (in addition to a definitive beginning date) to rate corrections. In contrast, for example, Congress allowed refunds in the context of § 206(b) of the Federal Power Act, 16 U.S.C. §824e(b), for a specific circumscribed period beginning no later than five months after the filing of a complaint and ending fifteen months later. *See also Exxon Mobil Corp. v. FERC*, 571 F.3d 1208, 1211-12 (D.C. Cir. 2009) (same). Courts "generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts." *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185 (1988) (citing *Dir. OWCP v. Perini N. River Assoc.*, 459 U.S. 297, 319-320 (1983)). Congress should be presumed to have been aware that existing pertinent law allowed refunds in other circumstances for a specific circumscribed period.

Refiners further argue that the challenged orders do not reflect reasoned decisionmaking, since the Rehearing Order failed to explain "how a 30-month

retroactive adjustment period could be justified in light of the plain language of § 4412(b)(2)." Br. at 40-41. But there was no extra-statutory 30-month period of retroactivity to justify. There was only a 4-month period of retroactivity, as the September 26, 2006 Hearing Order, placing all parties on notice of possible future rate corrections, made all future corrections prospective in nature. The Commission fully explained its reasons for determining that (1) § 4412 (b)(2) was ambiguous, (2) the first order in the proceeding to which the 15-month limitation applied was the September 26, 2006 Hearing Order, and (3) the effective date of June 1, 2006 was within the 15-month period immediately preceding the Hearing Order. Rehearing Order PP 14, 18, JA 150. The Commission further explained that § 4412(b)(2) merely limits the number of months preceding the Hearing Order that can be included in the refund period. Compliance Order P 20, JA 151; Rehearing Order P 46, JA 166. Section 4412(b)(2) does not limit the number of months following the Hearing Order (*i.e.*, following notice to the parties) that can be subject to a functionally prospective rate correction.

B. The Language Of § 4412(b)(2) Does Not Support Refiners' Assertion That The First Order Imposing Quality Bank Adjustments Was The December 2, 2008 Compliance Order.

Next, Refiners argue that, under the plain language of § 4412(b)(2), the first order "imposing quality bank adjustments" in this proceeding must be the December 2, 2008 Compliance Order that established "actual" quality bank

adjustments. Br. at 27-33. Refiners' argument is wholly unsupported.

As the Commission found in the challenged orders, Refiners' claim that the first order imposing quality bank adjustments was the December 2, 2008 Compliance Order would read the word "first" out of the language of § 4412(b)(2). Compliance Order P 19, JA 151. Section 4412(b)(2) refers to the "earliest date of the first order," not an "order subject to review." Rehearing Order P 38, JA 163. In contrast, § 4412(c)(2) requires that the Commission issue a "final order" in a proceeding within 15 months of the filing of a claim relating to a quality bank. The use of "first order" in one subsection and "final order" in the next section strongly indicates that Congress consciously drew a distinction between two kinds of orders in quality bank proceedings. *See American Forest and Paper Ass'n*, 550 F.3d at 1181 ("[W]here Congress includes particular language in one section of a statute but omits if from another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

On appeal, Refiners assert that no quality bank adjustments were "imposed" in the underlying proceeding until the Commission, after the hearing, "established" in the Compliance Order the "actual" processing cost adjustments that would determine the monetary obligations to be paid by quality bank participants. Br. at 28-29. Refiners further contend that the September 26, 2006 Hearing Order did

not "impose" any adjustments, because the Hearing Order merely "allowed" changes to take effect for an interim period. *Id.* at 29-33. These assertions are based on nothing more than Refiners' own self-serving definition of "impose."

For example, Refiners assert that "impose" must mean "prescribe," a term used in Interstate Commerce Act § 15(1), 49 U.S.C. app. § 15(1), or "fix," as used for electric and natural gas rates under the Federal Power Act, *see* 16 U.S.C. § 824e(a), and the Natural Gas Act, *see* 15 U.S.C. § 717d(a). There is no support for this assertion. Nowhere in the Interstate Commerce Act is the term "impose" used, and there is no indication in § 4412(b)(2) that Congress meant to equate "impose" with "prescribe" (or "fix"). To the contrary, the fact that Congress did not use "prescribe" (or "fix") in § 4412(b)(2) indicates that it intended that the first order imposing a quality bank adjustment would not be the final order in a proceeding that definitively prescribed (or fixed) the adjustment after a hearing. Congress should be presumed to have made the conscious decision not to reference an order "prescribing" (or "fixing") precise quality bank adjustments in § 4412(b)(2). *See Shays v. FEC*, 528 F.3d 914, 934 (D.C. Cir. 2008) ("[W]hen Congress uses different language in different sections of a statute, it does so intentionally.").

In addition, the fact that the September 26, 2006 Hearing Order was an interim order does not mean that it did not "impose" a quality bank adjustment.

An adjustment was made to the new reference proxy proposed by the Quality Bank Administrator, which the Commission in its Hearing Order found was acceptable to all parties (and thus was not set for hearing). Moreover, contrary to Refiners' claim, the Hearing Order did not merely "accept" the proposed processing cost adjustment. The Hearing Order directed the Administrator to assess a new processing cost adjustment, and the Administrator complied with this order by invoicing quality bank participants back to June 1, 2006, and going forward until the December 2, 2008 Compliance Order. Rehearing Order P 38, JA 163. The Hearing Order ordered that the value of Heavy Distillate "will be" the new proxy price minus a processing adjustment of 10.4549 cents per gallon, effective June 1, 2006. Hearing Order P 11 and Ordering Paragraph (B), JA 144-145. Thus, the Commission reasonably determined that the Hearing Order, which was undeniably the first order in the proceeding, "imposed" a quality bank adjustment.

The Commission's interpretation of "imposed" is consistent with the dictionary definitions provided by Refiners, Br. at 28. The Hearing Order "established or applied by authority" interim processing adjustments that were "compulsory" and had to be "obeyed" by the Administrator in invoicing the participants immediately and by the participants in paying the invoices. The Commission's interpretation is also consistent with common usage of "impose" in the context of rate proceedings under the Natural Gas Act and Federal Power Act.

For example, the term is commonly used when describing the length of the suspension period or potential refund obligations "imposed" by the Commission after initial review of a rate filing. *See, e.g., Westar Energy, Inc. v. FERC*, 568 F.3d 985, 989 (D.C. Cir. 2009) (discussing FERC's decision to "impose" refund liability); *El Paso Natural Gas Co.*, 129 FERC ¶ 61,170 at P 31 (2009) (discussing exercise of FERC's authority under the NGA to "impose" suspension and refund provisions); *Southern Cal. Edison Co.*, 128 FERC ¶ 61,287 at P 18 (2009) (discussing policy of "imposing" maximum suspension period). Thus, the notion that non-final hearing and suspension orders cannot "impose," but can merely "accept," rates is contrary to established practice.

C. The Cases Cited By Refiners Are Not Applicable.

The cases cited by Refiners in support of their argument that Congress intended that the 15-month limitation would apply from the date of a final order issued after a hearing, not an earlier order accepting adjustments subject to refund, are not applicable. Br. at 29-30. First, neither case uses the word "impose" (or the phrase "first order"). Second, the cases address different issues.

As the Commission found, *Electrical District No. 1 v. FERC*, 774 F.2d 490 (D.C. Cir. 1985), involved whether the Commission had "fixed" a just and reasonable rate under § 206 of the Federal Power Act, and *ExxonMobil v. FERC*, 487 F.3d 945 (D.C. Cir. 2007), involved whether the Commission had "approved

or prescribed" a just and reasonable rate and, therefore, whether reparations could be ordered under § 16(3) of the Interstate Commerce Act. Rehearing Order P 39, JA 163. In contrast to those cases, this case involves the question of what was the "first order" issued by the Commission "imposing quality bank adjustments in the proceeding" under § 4412(b)(2). *Id.*

The Commission further found, in the alternative, that even if those cases involved the same statutory language at issue in § 4412(b)(2), the circumstances in those cases were not analogous to the circumstances here. Rehearing Order PP 40-41, JA 164-165. In *Electrical District No. 1 v. FERC*, an electric utility filed for a rate increase under § 206 of the Federal Power Act,[3] which at the time did not allow refunds for periods prior to the date the Commission determined the just and reasonable rate. The Commission found the proposed rate excessive and directed the utility to file a revised rate schedule to reflect the findings in its decision. The Commission later approved the second filing and granted the utility's request to make the rate effective as of the date of its earlier order directing the utility to file the revised rate schedule. This Court reversed, stating that the earlier order, which established "no more than the basic principles pursuant to which the new rates are calculated," did not "fix" the rates under the Federal Power Act. *Id.*, 774 F.2d at

[3] The utility's contract with its customers provided that all new rates be fixed by the Commission under § 206 of the Federal Power Act, instead of § 205, the usual statutory vehicle for seeking rate increases. 774 F.2d at 491.

493. Therefore, the old rate remained in effect until the revised rate schedule was filed and accepted, and could not be changed retroactively. Rehearing Order P 40, JA 164.

In contrast, the September 26, 2006 Hearing Order accepted the July 2006 filing to establish a new proxy for Heavy Distillate effective June 1, 2006; only the amount of the processing cost adjustment to the new proxy was left to be determined after hearing. *Id.* Under the Hearing Order, the old proxy was no longer operative, and the new proxy applied as of June 1, 2006. Thus, the Hearing Order was the first order imposing the quality bank adjustment for Heavy Distillate as of June 1, 2006. *Id.*

In *ExxonMobil Oil Corp. v. FERC*, an oil pipeline filed for increased rates under § 15(7) of the Interstate Commerce Act. Following complaints challenging the rates, the Commission's order accepting and suspending the rates subject to refund acknowledged that the agency was uncertain of the methodology it would use to determine the just and reasonable rate. The Commission subsequently issued an order reducing the rates, but denied the challenging shippers reparations. In doing so, the Commission relied on the doctrine in *Arizona Grocery Co. v. Atchison, Topeka and Santa Fe Ry. Co.*, 284 U.S. 370, 390 (1932), that where the Commission has "prescribed" a reasonable rate, reparations are precluded. This Court reversed and held reparations were available to the complainants, finding

that the Commission in the first order had not approved or prescribed a reasonable rate, because it did not establish the methodology for determining the final rate. 487 F.3d at 968.

In contrast, here Refiners have not argued that there was no methodology to value the Heavy Distillate cut. Nor could they, as all parties agreed with the Quality Bank Administrator's choice of a new reference proxy (Ultra Low Sulfur Diesel). Only the processing cost adjustment for the new proxy, set for hearing, was left to be determined. Rehearing Order P 41, JA 164-165. That the processing cost may be a necessary part of the valuation of a quality bank cut, as Refiners assert, *see* Br. at 49, does not mean that only a final order calculating that adjustment can be the Commission's "first order . . . imposing quality bank adjustments" under the terms of § 4412(b)(2).

CONCLUSION

For the reasons stated, the Commission's orders should be affirmed in all respects.

Respectfully submitted,

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July 6, 2010

Flint Hills Resources, Alaska, LLC, et al. v. FERC **Docket No. OR06-10**
D.C. Cir. Nos. 09-1236 and 09-1251

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. 32(a)(7)(C)(i), I certify that the Final Brief of Respondent Federal Energy Regulatory Commission contains 7,813 words, not including the tables of contents and authorities, the certificates of counsel and the addendum.

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July 6, 2010

ADDENDUM
STATUTES

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Section 205 of the Federal Power Act, 16 U.S.C. § 824d, provides as follows:

(a) Just and reasonable rates
All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful. (b) Preference or advantage unlawful No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service. (c) Schedules Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services. (d) Notice required for rate changes Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published. (e) Suspension of new rates; hearings; five-month period

Section 205 of the Federal Power Act, 16 U.S.C. § 824d, provides as follows:

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. (f) Review of automatic adjustment clauses and public utility practices; action by Commission; “automatic adjustment clause” defined (1) Not later than 2 years after November 9, 1978, and not less often than every 4 years thereafter, the Commission shall make a thorough review of automatic adjustment clauses in public utility rate schedules to examine— (A) whether or not each such clause effectively provides incentives for efficient use of resources (including economical purchase and use of fuel and electric energy), and

Section 205 of the Federal Power Act, 16 U.S.C. § 824d, provides as follows:

(B) whether any such clause reflects any costs other than costs which are—
(i) subject to periodic fluctuations and
(ii) not susceptible to precise determinations in rate cases prior to the time such costs are incurred.
Such review may take place in individual rate proceedings or in generic or other separate proceedings applicable to one or more utilities.
(2) Not less frequently than every 2 years, in rate proceedings or in generic or other separate proceedings, the Commission shall review, with respect to each public utility, practices under any automatic adjustment clauses of such utility to insure efficient use of resources (including economical purchase and use of fuel and electric energy) under such clauses.
(3) The Commission may, on its own motion or upon complaint, after an opportunity for an evidentiary hearing, order a public utility to—
(A) modify the terms and provisions of any automatic adjustment clause, or
(B) cease any practice in connection with the clause,
if such clause or practice does not result in the economical purchase and use of fuel, electric energy, or other items, the cost of which is included in any rate schedule under an automatic adjustment clause.
(4) As used in this subsection, the term “automatic adjustment clause” means a provision of a rate schedule which provides for increases or decreases (or both), without prior hearing, in rates reflecting increases or decreases (or both) in costs incurred by an electric utility. Such term does not include any rate which takes effect subject to refund and subject to a later determination of the appropriate amount of such rate.

Section 206 of the Federal Power Act, 16 U.S.C. § 824e, provides as follows:

(a) Unjust or preferential rates, etc.; statement of reasons for changes; hearing; specification of issues
Whenever the Commission, after a hearing held upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.

Section 206(b) of the Federal Power Act, 16 U.S.C. § 824e(b), provides as follows:

(b) Refund effective date; preferential proceedings; statement of reasons for delay; burden of proof; scope of refund order; refund orders in cases of dilatory behavior; interest

Whenever the Commission institutes a proceeding under this section, the Commission shall establish a refund effective date. In the case of a proceeding instituted on complaint, the refund effective date shall not be earlier than the date of the filing of such complaint nor later than 5 months after the filing of such complaint. In the case of a proceeding instituted by the Commission on its own motion, the refund effective date shall not be earlier than the date of the publication by the Commission of notice of its intention to initiate such proceeding nor later than 5 months after the publication date. Upon institution of a proceeding under this section, the Commission shall give to the decision of such proceeding the same preference as provided under section 824d of this title and otherwise act as speedily as possible. If no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. In any proceeding under this section, the burden of proof to show that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential shall be upon the Commission or the complainant. At the conclusion of any proceeding under this section, the Commission may order refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, practice, or contract which the Commission orders to be thereafter observed and in force: Provided, That if the proceeding is not concluded within fifteen months after the refund effective date and if the Commission determines at the conclusion of the proceeding that the proceeding was not resolved within the fifteen-month period primarily because of dilatory behavior by the public utility, the Commission may order refunds of any or all amounts paid for the period subsequent to the refund effective date and prior to the conclusion of the proceeding. The refunds shall be made, with interest, to those persons who have paid those rates or charges which are the subject of the proceeding.

Interstate Commerce Act, 49 U.S.C. app. §§ 1-16, provides as follows:

TITLE 49, APPENDIX—TRANSPORTATION

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

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

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

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

Prior to repeal, section read as follows:

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

(1) Carriers subject to regulation

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

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

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

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

Interstate Commerce Act, 49 U.S.C. app. §§ 1-16, provides as follows:

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

(2) Transportation subject to regulation

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

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

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

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

(3) Definitions

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

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

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

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

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

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

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

Interstate Commerce Act, 49 U.S.C. app. §§ 1-16, provides as follows:

by the Commission, and would serve a useful public purpose.

(2) Attendance of witnesses and production of documents

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the Commission, or any party to a proceeding before the commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section.

(3) Compelling attendance and testimony of witnesses, etc.

And any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any common carrier subject to the provisions of this chapter, or other person, issue an order requiring such common carrier or other person to appear before said Commission (and produce books and papers if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(4) Depositions

The testimony of any witness may be taken, at the instance of a party, in any proceeding or investigation depending [pending] before the Commission, by deposition, at any time after a cause or proceeding is at issue on petition and answer. The Commission may also order testimony to be taken by deposition in any proceeding or investigation pending before it, at any stage of such proceeding or investigation. Such depositions may be taken before any judge of any court of the United States, or any United States commissioner, or any clerk of a district court, or any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court, or court of common please of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, nor interested in the event of the proceeding or investigation. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition. Any person may be compelled to appear and depose, and to produce documentary evidence, in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the Commission as hereinbefore provided.

(5) Oath; subscription of testimony on deposition

Every person deposing as herein provided shall be cautioned and sworn (or affirm, if he so request) to testify the whole truth, and shall be carefully examined. His testimony shall be reduced to writing by the magistrate taking the deposition, or under his direction, and shall, after it has been reduced to writing, be subscribed by the deponent.

(6) Deposition in foreign country; filing of depositions

If a witness whose testimony may be desired to be taken by deposition be in a foreign country, the deposition may be taken before an officer or person designated by the Commission, or agreed upon by the parties by stipulation in writing to be filed with the Commission. All depositions must be promptly filed with the Commission.

(7) Fees for depositions

Witnesses whose depositions are taken pursuant to this chapter, and the magistrate or other officer taking the same, shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

(Feb. 4, 1887, ch. 104, pt. I, § 12, 24 Stat. 383; Mar. 2, 1889, ch. 382, § 3, 25 Stat. 858; Feb. 10, 1891, ch. 128, 26 Stat. 743; May 28, 1896, ch. 252, § 19, 29 Stat. 184; Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167; Feb. 28, 1920, ch. 91, § 415, 41 Stat. 484; Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543; Sept. 18, 1940, ch. 722, title I, § 9(a), 54 Stat. 910; June 25, 1948, ch. 646, § 1, 62 Stat. 909; Feb. 5, 1976, Pub. L. 94-210, title II, § 207, 90 Stat. 42.)

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

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

Prior to repeal, section read as follows:

§ 13. Complaints to and investigations by Commission

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

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

(2) Complaints by State commissions; inquiry on Commission's own motion; expenses of State commissions

Said Commission shall, in like manner and with the same authority and powers, investigate any complaint forwarded by the railroad commissioner or railroad commission or any State or Territory at the request of such commissioner or commission, and the Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said Commission by any provision of this chapter, or concerning which any question may arise under any of the provisions of this chapter, or relating to the enforcement of any of the provisions of this chapter. And the said Commission shall have the same powers and authority to proceed with any inquiry instituted on its motion as though it had been appealed to by complaint or petition under any of the provisions of this chapter, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had excepting orders for the payment of money. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant. Representatives of State commissions sitting with the Commission, under the provisions of this section, in cases pending before the Commission, shall receive such allowances for travel and subsistence expense as the Commission shall provide.

Interstate Commerce Act, 49 U.S.C. app. §§ 1-16, provides as follows:

(3) Investigation involving State regulations; conference of State and interstate commissions

Whenever in any investigation under the provisions of this chapter, or in any investigation instituted upon petition of the carrier concerned, which petition is authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this chapter or chapter 12 of this title with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this chapter or chapter 12 of this Appendix.

(4) Duty of Commission where State regulations result in discrimination

Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against, or undue burden on, interstate or foreign commerce (which the Commission may find without a separation of interstate and intrastate property, revenues, and expenses, and without considering in totality the operations or results thereof of any carrier, or group or groups of carriers wholly within any State), which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, discrimination, or burden. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

(5) Exclusive authority to determine and prescribe intrastate rates; prerequisites; procedures

The Commission shall have exclusive authority, upon application to it, to determine and prescribe intrastate rates if,—

(a) a carrier by railroad has filed with an appropriate administrative or regulatory body of a State, a change in an intrastate rate, fare, or charge, or a change in a classification, regulation, or practice that has the effect of changing such a rate, fare, or charge, for the purpose of adjusting such rate, fare, or charge to the rate charged on similar traffic moving in interstate or foreign commerce; and

(b) the State administrative or regulatory body has not, within 120 days after the date of such filing, acted finally on such change.

Notice of the application to the Commission shall be served on the appropriate State administrative or regulatory body. Upon the filing of such an application, the Commission shall determine and prescribe, according to the standards set forth in paragraph (4) of this section, the rate thereafter to be charged. The provisions of this paragraph shall apply notwithstanding the laws or constitution of any State, or the pendency of any proceeding before any State court or other State authority. Nothing in this paragraph shall affect the authority of the Commission to institue [institute] an investigation or to act in such investigation as provided in paragraphs (3) and (4) of this section.

(6) Petition for commencement of proceeding for issuance, amendment, or repeal of order, etc., relating to common carriers by railroads; grant or denial; judicial review; limitations; definition

(a) Whenever, pursuant to section 553(e) of title 5, an interested person (including a government entity) petitions the Commission for the commencement of a proceeding for the issuance, amendment, or repeal of an order, rule, or regulation relating to common carriers by railroads under this Act, the Commission shall grant or deny such petition within 120 days after the date of receipt of such petition. If the Commission grants such a petition, it shall commence an appropriate proceeding as soon thereafter as practicable. If the Commission denies such a petition, it shall set forth, and publish in the Federal Register, its reasons for such denial.

(b) If the Commission denies a petition under subdivision (a) (or if it fails to act thereon within the 120-day period established by such subdivision), the petitioner may commence a civil action in an appropriate court of appeals of the United States for an order directing the Commission to initiate a proceeding to take the action requested in such petition. Such an action shall be commenced within 60 days after the date of such denial or, where appropriate, within 60 days after the date of expiration of such 120-day period.

(c) If the petitioner, in an action commenced under subdivision (b), demonstrates to the satisfaction of the court, by a preponderance of the evidence in the record before the Commission or, in an action based on a petition on which the Commission failed to act, in a new proceeding before such court, that the action requested in such petition to the Commission is necessary and that the failure of the Commission to take such action will result in the continuation of practices which are not consistent with the public interest or in accordance with this Act, such court shall order the Commission to initiate such action.

(d) In any action under this paragraph, a court shall have no authority to compel the Commission to take any action other than the initiation of a proceeding for the issuance, amendment, or repeal of an order, rule, or regulation under this Act.

(e) As used in this paragraph, the term "Commission" includes any division, individual Commissioner, administrative law judge, employee board, or any other person authorized to act on behalf of the Commission in any part of the proceeding for the issuance, amendment, or repeal of any order, rule, or regulation under this Act relating to common carriers by railroad.

(Feb. 4, 1887, ch. 104, pt. I, § 13, 24 Stat. 383; June 18, 1910, ch. 309, § 11, 36 Stat. 550; Feb. 28, 1920, ch. 91, § 416, 41 Stat. 484; Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543; Sept. 18, 1940, ch. 722, title I, § 9(b), (c), 54 Stat. 910; Aug. 12, 1958, Pub. L. 85-625, § 4, 72 Stat. 570; Feb. 5, 1976, Pub. L. 94-210, title II, § 210, title III, § 304(b), 90 Stat. 46, 52; Oct. 19, 1976, Pub. L. 94-555, title II, § 220(*l*), 90 Stat. 2630.)

§ 13a. Repealed. Pub. L. 95-473, § 4(b), (c), Oct. 17, 1978, 92 Stat. 1466, 1470

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

Prior to repeal, section read as follows:

Interstate Commerce Act, 49 U.S.C. app. §§ 1-16, provides as follows:

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

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

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

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

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

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

Prior to repeal, section read as follows:

§ 14. Reports and decisions of Commission

(1) Reports of investigations by Commission

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

(2) Record of reports; copies

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

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

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

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

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

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

Prior to repeal, section read as follows:

Interstate Commerce Act, 49 U.S.C. app. §§ 1-16, provides as follows:

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

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

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

(2) Orders of Commission

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

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

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

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

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

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

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

Interstate Commerce Act, 49 U.S.C. app. §§ 1-16, provides as follows:

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

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

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

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

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

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

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

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

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

Interstate Commerce Act, 49 U.S.C. app. §§ 1-16, provides as follows:

in expenses theretofore experienced or demonstrably certain to occur commencing on or before the effective date of the increased rates, as a result of any increases in taxes under the Railroad Retirement Tax Act, as amended [26 U.S.C. 3201 et seq.], occurring on or before January 1, 1975, or as a result of the enactment of the Railroad Retirement Amendments of 1973. Such increases in rates may be made effective on not more than thirty nor less than ten days' notice to the public, notwithstanding any outstanding orders of the Commission. To the extent necessary to effectuate their establishment, rates so increased shall be relieved from the provisions of section 4 of this Appendix and may be published in tariff supplements of the kind ordinarily authorized in general increase proceedings.

(c) Final rate determination; hearings, burden of proof; general ratemaking criteria; refunds, interest rate

The Commission shall within sixty days from the date of establishment of interim rates under subparagraph (b) of this paragraph commence hearings for the purpose of making the final rate determination. The Commission shall then proceed to make such final rate determination with the carrier having the burden of proof. In making such determination, the Commission may take into account all factors appropriate to ratemaking generally under this chapter and shall determine such final rates under the standards and limitations applicable to ratemaking generally under this chapter. If the increases in rates finally authorized by the Commission are less than the increases in rates initially made effective, the carrier or carriers shall, subject to such tariff provisions as the Commission shall deem sufficient, make such refunds (in the amount by which the initially increased rate collected exceeds the finally authorized increased rate) as may be ordered by the Commission, plus a reasonable rate of interest as determined by the Commission. Nothing contained in this paragraph shall limit or otherwise affect the authority of the Commission to authorize or permit to become effective any increase in rates other than the increases herein specified.

(d) Adjustment of intrastate rates

(A) Duty of State authority; petitions; interim rates; refunds, interest

The State authority having jurisdiction over petitions for intrastate rate increases by any carrier or group of carriers subject to this chapter shall, within 60 days of the filing of a verified petition for such increases based upon increases in expenses of such carriers as a result of any increases in taxes under the Railroad Retirement Tax Act, as amended [26 U.S.C. 3201 et seq.], occurring on or before January 1, 1975, or as a result of the enactment of the Railroad Retirement Amendments of 1973, act upon said petition. Such State authority may grant an interim rate increase or a final rate increase. If such State authority grants any interim rate increases, it shall thereafter investigate and determine the reasonableness of such increases and modify them to the extent required by applicable law. To the extent that any such interim increases are reduced as a result of the action of a State authority, the carrier or carriers shall make such refunds (in the amount by which the initially increased rate collected exceeds the finally authorized increased rate) as may be ordered by such State authority, plus a reasonable rate of interest as determined by the State authority.

(B) Action by Commission where complete denial or absence of timely action by State authority; grant of interim rates by Commission; final rate determination by State authority, refunds

If a State authority denies in toto such a petition filed with it by such carrier or group of carriers seeking relief regarding such intrastate rate increases or does not act finally on such petition within 60 days from the presentation thereof, the Commission shall, within 30 days of the filing of a verified petition by such carrier or group of carriers relating to such intrastate rates, act upon such petition by applying the ratemaking criteria of subparagraph (c) of this paragraph. If the Commission grants, in whole or in part, such petition by any carrier or group of carriers, the increase authorized shall be considered as an interim rate increase as provided in subparagraph (A) above and shall be subject to final determination by the State authority in accordance with the procedures prescribed for interim intrastate rate increases as provided above, including the ordering of refunds by such State authority.

(C) Action by Commission where partial denial by State authority results in discrimination

If a State authority denies in part such a petition filed with it by such carrier or group of carriers, within 60 days from the presentation thereof, the Commission shall, within 30 days of the filing of a verified petition by such carrier or group of carriers relating to the intrastate rates involved, act upon such petition by applying the criteria of section 13(4) of this Appendix.

(D) Stay of refund pending final order under section 13(4)

Nothing in subparagraph (A) or (B) shall be construed to abrogate the authority of the Commission under section 13(4) of this Appendix and in the event a carrier or group of carriers subject to a refund requirement under subparagraph (A) or (B) files a petition under section 13(3) of this Appendix, the refund requirement shall be stayed pending final order of the Commission under section 13(4) of this Appendix.

(E) Reasonable level for increased freight rates; preservation of market patterns and relationships and port relationships

Any increased freight rates authorized shall not exceed a reasonable level by types of traffic, commodities, or commodity groups and shall preserve existing market patterns and relationships and present port relationships by increase [increased] limitations within and between the major districts to the extent possible without authorizing unreasonable increases in any district.

(Feb. 4, 1887, ch. 104, pt. I, § 15a, as added Feb. 28, 1920, ch. 91, § 422, 41 Stat. 488, and amended June 16, 1933, ch. 91, title II, § 205, 48 Stat. 220; Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543; Sept. 18, 1940, ch. 722, title I, § 10(e), 54 Stat. 912; Aug. 12, 1958, Pub. L. 85-625, § 6, 72 Stat. 572; July 10, 1973, Pub. L. 93-69, title II, § 201, 87 Stat. 166; Feb. 5, 1976, Pub. L. 94-210, title II, §§ 203(b), 205, 90 Stat. 39, 41.)

§ 15b. Repealed. Pub. L. 95-473, § 4(b), Oct. 17, 1978, 92 Stat. 1466

Section, acts June 16, 1933, ch. 91, title II, § 206, 48 Stat. 220; Oct. 21, 1942, ch. 619, title V, § 504(c), 56 Stat. 957; Dec. 30, 1969, Pub. L. 91-172, title IX, § 951, Dec. 30, 1969, 83 Stat. 730, related to discontinuance of collection of excess income, liquidation of general railroad contingent fund, distribution of moneys, and computation of tax liabilities. For disposition of this section in revised Title 49, Transportation, see Table at beginning of Title 49. See, also, notes following Table.

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

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

Prior to repeal, section read as follows:

Interstate Commerce Act, 49 U.S.C. app. §§ 1-16, provides as follows:

§ 16. Orders of Commission and enforcement thereof

(1) Award of damages

If, after hearing on a complaint made as provided in section 13 of this Appendix, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this chapter for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

(2) Proceedings in courts to enforce orders; costs; attorney's fee

If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the district court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any State court of general jurisdiction having jurisdiction of the parties, a complaint setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated, and except that the plaintiff shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the plaintiff shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit.

(3) Limitation of actions

(a) All actions at law by carriers subject to this chapter for recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action accrues, and not after.

(b) All complaints against carriers subject to this chapter for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after, subject to subdivision (d) of this paragraph.

(c) For recovery of overcharges action at law shall be begun or complaint filed with the Commission against carriers subject to this chapter within three years from the time the cause of action accrues, and not after, subject to subdivision (d) of this paragraph, except that if claim for the overcharge has been presented in writing to the carrier within the three-year period of limitation said period shall be extended to include six months from the time notice in writing is given by the carrier to the claimant of disallowance of the claim, or any part or parts thereof, specified in the notice.

(d) If on or before expiration of the two-year period of limitation in subdivision (b) of this paragraph or of the three-year period of limitation in subdivision (c) of this paragraph a carrier subject to this chapter begins action under subdivision (a) of this paragraph for recovery of charges in respect of the same transportation service, or, without beginning action, collects charges in respect of that service, said period of limitation shall be extended to include ninety days from the time such action is begun or such charges are collected by the carrier.

(e) The cause of action in respect of a shipment of property shall, for the purposes of this section, be deemed to accrue upon delivery or tender of delivery thereof by the carrier, and not after.

(f) A complaint for the enforcement of an order of the Commission for the payment of money shall be filed in the district court or the State court within one year from the date of the order, and not after.

(g) The term "overcharges" as used in this section shall be deemed to mean charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the Commission.

(h) The provisions of this paragraph shall extend to and embrace cases in which the cause of action accrued prior to June 7, 1924, as well as cases in which the cause of action accrues thereafter, except that actions at law begun or complaints filed with the Commission against carriers subject to this chapter for the recovery of overcharges where the cause of action accrued on or after March 1, 1920, shall not be deemed to be barred under subdivision (c) of this paragraph if such actions shall have been begun or complaints filed prior to June 7, 1924, or within six months thereafter.

(i) The provisions of this paragraph (3) shall extend to and embrace all transportation of property or passengers for or on behalf of the United States in connection with any action brought before the Commission or any court by or against carriers subject to this chapter: *Provided, however,* That with respect to such transportation of property or passengers for or on behalf of the United States, the periods of limitation herein provided shall be extended to include three years from the date of (A) payment of charges for the transportation involved, or (B) subsequent refund for overpayment of such charges, or (C) deduction made under section 66 of this Appendix, whichever is later.

(4) Joinder of parties; process; judgment

In such suits all parties in whose favor the Commission may have made an award for damages by a single order may be joined as plaintiffs, and all of the carriers parties to such order awarding such damages may be joined as defendants, and such suit may be maintained by such joint plaintiffs and against such joint defendants in any district where any one of such joint plaintiffs could maintain such suit against any one of such joint defendants; and service of process against any one of such defendants as may not be found in the district where the suit is brought may be made in any district where such defendant carrier has its principal operating office. In case of such joint suit the recovery, if any, may be by judgment in favor of any one of such plaintiffs, against the defendant found to be liable to such plaintiff.

(5) Service of order of Commission and notices of proceedings

Every order of the Commission shall be forthwith served upon the designated agent of the carrier in the city of Washington or in such other manner as may be provided by law. In proceedings before the Commission involving the lawfulness of rates, fares, charges, classifications, or practices, service of notice upon an attorney in fact of a carrier who has filed a tariff or schedule in behalf of such carrier shall be deemed to be due and sufficient service upon the carrier, except where the carrier has designated an agent in the city of Washington, District of Columbia, upon whom service of notices and processes may be made, as provided in section 50 of this title: *Provided,* That in such proceedings service of notice of the suspension of a tariff or schedule upon an attorney in fact of a carrier who has filed said tariff or schedule in behalf of such carrier shall be deemed to be due and sufficient service upon the carrier, and service of notice of the suspension of a joint tariff or schedule upon a carrier which has filed said joint tariff or schedule to which another carrier is a party shall be deemed to be due and sufficient notice upon the several carriers parties thereto. Such service of notice may be made by mail to such attorney in fact or carrier at the address shown in the tariff or schedule.

(6) Suspension or modification of orders

The Commission shall be authorized to suspend or modify its orders upon such notice and in such manner as it shall deem proper.

Motor Carrier Safety Reauthorization Act of 2005, Public Law 109-59, 119 Stat. 1778-79 (Aug. 10, 2005), provides as follows:

SEC. 4412. QUALITY BANK ADJUSTMENTS.

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

(b) PROCEEDINGS.—
(1) IN GENERAL.—In a proceeding commenced before the date of enactment of this Act, the Federal Energy Regulatory Commission may not order retroactive changes in TAPS quality bank adjustments for any period before February 1, 2000.
(2) PROCEEDINGS COMMENCED AFTER THE DATE OF ENACTMENT.—In a proceeding commenced after the date of enactment of this Act, the Commission may not order retroactive changes in TAPS quality bank adjustments for any period that exceeds the 15-month period immediately preceding the earliest date of the first order of the Federal Energy Regulatory Commission imposing quality bank adjustments in the proceeding.

(c) DEADLINE FOR CLAIMS.—
(1) IN GENERAL.—A claim relating to a quality bank under this section shall be filed with the Federal Energy Regulatory Commission not later than 2 years after the date on which the claim arose.
(2) FINAL ORDER.—Not later than 15 months after the date on which a claim is filed under paragraph (1), the Federal Energy Regulatory Commission shall issue a final order with respect to the claim.

Section 4(e) of the Natural Gas Act, 15 U.S.C. § 717c(e) provides as follows:

(e) Authority of Commission to hold hearings concerning new schedule of rates
Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

Section 5(a), of the Natural Gas Act, 15 U.S.C. § 717d(a) provides as follows:

(a) Decreases in rates
Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: Provided, however, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

Flint Hills Resources Alaska, LLC v. FERC **Docket No. OR06-10**
D.C. Cir. Nos. 09-1236 and 09-1251

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 6th day of July 2010, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system or via U.S. Mail, as indicated below:

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