

144 FERC ¶ 61,025
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony Clark.

BP Pipelines (Alaska) Inc.	Docket Nos.	IS09-348-007
BP Pipelines (Alaska) Inc.		IS09-348-000
BP Pipelines (Alaska) Inc.		IS09-395-000
BP Pipelines (Alaska) Inc.		IS09-395-007
BP Pipelines (Alaska) Inc.		IS10-204-000
BP Pipelines (Alaska) Inc.		IS10-204-005
BP Pipelines (Alaska) Inc.		IS10-491-000
BP Pipelines (Alaska) Inc.		IS11-335-000
BP Pipelines (Alaska) Inc.		OR11-10-000

ConocoPhillips Transportation Alaska, Inc.	IS09-384-000
ConocoPhillips Transportation Alaska, Inc.	IS09-384-007
ConocoPhillips Transportation Alaska, Inc.	IS10-205-000
ConocoPhillips Transportation Alaska, Inc.	IS10-205-001
ConocoPhillips Transportation Alaska, Inc.	IS10-205-006
ConocoPhillips Transportation Alaska, Inc.	IS10-476-000
ConocoPhillips Transportation Alaska, Inc.	IS11-306-000

ExxonMobil Pipeline Company	IS09-391-000
ExxonMobil Pipeline Company	IS09-391-007
ExxonMobil Pipeline Company	IS09-177-000
ExxonMobil Pipeline Company	IS09-177-008
ExxonMobil Pipeline Company	IS10-200-000
ExxonMobil Pipeline Company	IS10-200-005
ExxonMobil Pipeline Company	IS10-547-000
ExxonMobil Pipeline Company	IS11-336-000

Unocal Pipeline Company	IS09-176-000
Unocal Pipeline Company	IS09-176-007
Unocal Pipeline Company	IS10-52-000
Unocal Pipeline Company	IS10-52-004
Unocal Pipeline Company	IS10-490-000
Unocal Pipeline Company	IS11-3-000
Unocal Pipeline Company	IS11-546-000
Unocal Pipeline Company	OR10-3-000

Unocal Pipeline Company	OR10-3-005
Koch Alaska Pipeline Company, L.L.C.	IS10-54-000
Koch Alaska Pipeline Company, L.L.C.	IS10-54-004
Koch Alaska Pipeline Company, L.L.C.	IS10-496-000
Koch Alaska Pipeline Company, L.L.C.	IS11-328-000
	(Consolidated)

ORDER ON CONTESTED SETTLEMENT

(Issued July 16, 2013)

1. On September 25, 2012, in accordance with Rule 602,¹ BP Pipelines (Alaska) Inc., ConocoPhillips Transportation Alaska, Inc., and ExxonMobil Pipeline Company (collectively, Remaining Carriers)² filed an Offer of Settlement

¹ 18 C.F.R. § 385.602 (2012).

² For purposes of this order, the owners of the Trans Alaska Pipeline System (TAPS) are divided into two groups. BP Pipelines (Alaska) Inc. (BP), Conoco Phillips Transportation Alaska Inc. (ConocoPhillips), and ExxonMobil Pipeline Company (ExxonMobil) are referred to as the Remaining Carriers. Koch Alaska Pipeline Company, LLC (Koch) and Unocal Pipeline Company (Unocal) are referred to as the Exiting Carriers. Where applicable in this order, the current TAPS owners or previous owners may be referred to collectively as the TAPS Carriers.

The Remaining Carriers continued as owners of TAPS after August 1, 2012. The Exiting Carriers provided notice to the Commission of their withdrawal from TAPS (effective August 1, 2012), and transfer of their TAPS interests to the Remaining Carriers. The Exiting Carriers also cancelled their Commission tariffs effective August 1, 2012. The Regulatory Commission of Alaska (RCA) approved Koch's transfer of its TAPS ownership interest. *In the Matter of the Joint Application Filed by Koch Alaska Pipeline Company, LLC*, 2012 WL 6628059 (Regulatory Commission of Alaska) December 14, 2012.

However, as of the date of this order, it does not appear that Unocal's transfer of its ownership shares is complete. On February 4, 2013, the RCA issued an Order Extending Deadline for Filing of Application for Transfer of Operating Authority directing Unocal to file by April 25, 2013, an application to transfer its operating authority in TAPS or to file an explanation of the reasons why the transfer application had not been filed. *In the Matter of the Request by Unocal*

(continued...)

and Application for Approval of Voluntary Pooling Agreement and Request for Expedited Consideration (Settlement). They state that the Settlement relates to the Commission's previous orders directing them to establish a cost pooling methodology among the owners of the Trans Alaska Pipeline System (TAPS).

2. The Settlement as filed consists of two agreements: (a) a retrospective Settlement Agreement (Settlement Agreement) and (b) a prospective Agreement Establishing Cost Pooling Mechanism (Pooling Agreement). The Settlement Agreement addresses past pooling issues on TAPS, and the Pooling Agreement establishes a new pooling mechanism for the Remaining Carriers to be effective as of August 1, 2012. On November 13, 2012, Unocal and BP filed a supplemental agreement that resolved all outstanding retrospective issues between Unocal and the Remaining Carriers (Unocal-BP Settlement).³

3. On January 8, 2013, the Settlement Judge appointed in this proceeding filed his Report of Contested Settlement (Settlement Judge Report).⁴ As discussed below, the Commission approves the Settlement and the Unocal-BP Settlement.

Pipeline Company, Docket No. P-12-013 (Regulatory Commission of Alaska) (February 4, 2013). On April 25, 2013, Unocal filed a compliance filing in that docket asserting that it was not in a position to file an application to transfer its operating authority at that time. Unocal stated that it and the other TAPS Carriers continued to dispute several transfer-related matters and that, by July 25, 2013, it would file its application or an explanation as to why the application could not be made.

In addition, on February 1, 2013, Unocal filed a petition for a declaratory order in the Harris County, Texas district court. Unocal asks the court to determine the rights and duties of the TAPS owners and exiting owners when an owner chooses to discontinue operations. *Unocal Pipeline Company v. BP Pipelines (Alaska), Inc.*, Case No. 201306244-7, District Court Harris County, TX, 165 Judicial District.

³ For purposes of this order, the term "Settlement" generally includes the Unocal-BP Settlement as well.

⁴ *BP Pipelines (Alaska) Inc.*, 142 FERC ¶ 63,006 (2013).

I. BACKGROUND

4. The extensive background of these consolidated proceedings is described in the Initial Decision (ID) issued on March 10, 2011,⁵ as well as in the Settlement Judge Report.⁶ It is abbreviated considerably in this order.

5. In 1985, the State of Alaska (Alaska) and the TAPS owners entered into a settlement agreement (1985 TAPS Settlement) establishing the TAPS Settlement Methodology (TSM), which governed the annual calculation of the maximum TAPS rates commencing on January 1, 1986.⁷ The 1985 TAPS Settlement provided that it would remain in effect through 2011; however, it permitted termination of the agreement as early as 2008 if a party requested renegotiation of its terms and the parties failed to adopt a new agreement. Alaska invoked the early termination provision in 2008 after the parties were unable to implement a replacement agreement, and the 1985 TAPS Settlement expired at the end of 2008.

6. For many years, the TAPS Carriers' annual rate filings submitted in accordance with the TSM drew no opposition. However, prior to 2005, the RCA, which has jurisdiction over the TAPS intrastate rates, determined that application of the TSM no longer produced just and reasonable intrastate rates. The RCA ordered the TAPS Carriers to employ a different ratemaking methodology that would reduce intrastate rates substantially.⁸

7. As a result of that decision, several parties filed protests and complaints alleging that the TAPS Carriers' 2005 and 2006 interstate rates calculated pursuant to the TSM also were unjust and unreasonable. In 2007, a Presiding

⁵ *BP Pipelines (Alaska) Inc.*, 134 FERC ¶ 63,020, at PP 1-41 (2011).

⁶ *BP Pipelines (Alaska) Inc.*, 142 FERC ¶ 63,006, at PP 6-20 (2013).

⁷ Certain parties challenged the 1985 TAPS Settlement. The Commission severed those parties and accepted the 1985 TAPS Settlement as uncontested and subject to the fair and reasonable standard. *Trans Alaska Pipeline System*, 33 FERC ¶ 61,064 (1985), *reh'g denied*, 33 FERC ¶ 61,392. The court affirmed the Commission's orders in *Arctic Slope Regional Corp. v. FERC*, 832 F.2d 158 (D.C. Cir. 1987).

⁸ *Amerada Hess Pipeline Corp.*, Order No. 34, 2004 WL 1896911 (Regulatory Commission of Alaska) June 10, 2004.

Administrative Law Judge issued an initial decision finding that application of the TSM no longer resulted in just and reasonable interstate rates and rejecting the TAPS Carriers' 2005 and 2006 rates.⁹ The Presiding Administrative Law Judge held that, rather than applying the TSM, the TAPS Carriers should calculate their interstate rates in accordance with the Commission's Opinion No. 154-B methodology.¹⁰

8. Until the Commission issued Opinion No. 502 affirming that initial decision,¹¹ each TAPS Carrier was permitted to charge individual and sometimes significantly different rates for interstate transportation on TAPS. In the initial decision in that proceeding, the Presiding Administrative Law Judge found that the variations in rates did not result from differences in the cost of service because all of the TAPS Carriers had essentially the same cost of service, so she ruled that the TAPS Carriers should begin charging a uniform rate as of January 1, 2005. In Opinion No. 502, the Commission affirmed that the TAPS Carriers should charge a uniform rate. However, the Commission also recognized that costs were allocated according to ownership percentages, while revenues were allocated on the basis of throughput, which would cause some TAPS Carriers to under-recover their costs with a uniform rate and others to over-recover such costs. The Commission determined that a pooling mechanism, such as that established in section II-2(f)(ii) of the TSM, would resolve this problem.¹² The Commission affirmed Opinion No. 502 in the First Opinion No. 502 Rehearing Order and the Second Opinion No. 502 Rehearing Order, and the Court of Appeals for the District of Columbia Circuit affirmed the Commission's orders, although it

⁹ *BP Pipelines (Alaska) Inc.*, 119 FERC ¶ 63,007 (2007).

¹⁰ *Williams Pipe Line Co.*, 31 FERC ¶ 61,377, *order on reh'g*, *Williams Pipe Line Co.*, Opinion No. 154-C, 33 FERC ¶ 61,327 (1985).

¹¹ *BP Pipelines (Alaska) Inc.*, Opinion No. 502, 123 FERC ¶ 61,287, *order on reh'g*, 125 FERC ¶ 61,215 (2008) (First Opinion No. 502 Rehearing Order), *order on reh'g*, 127 FERC ¶ 61,317 (2009) (Second Opinion No. 502 Rehearing Order), *aff'd*, *Flint Hills Resources Alaska, LLC v. FERC*, 627 F.3d 881, (D.C. Cir. 2010).

¹² *BP Pipelines (Alaska) Inc.*, Opinion No. 502, 123 FERC ¶ 61,287, at PP 237-251 (2008).

declined to rule on the issues of the uniform rate and a new pooling mechanism because “the ultimate form of pooling (if any) is completely unknown.”¹³

9. In an order in the instant proceeding issued June 30, 2009, the Commission accepted and suspended, subject to refund, certain TAPS Carriers’ tariffs for 2009, established hearing and settlement judge procedures, and consolidated the filings with related pending tariff filings for prior years.¹⁴ Following unsuccessful settlement efforts in the consolidated proceedings, the Chief Administrative Law Judge bifurcated the hearing. On March 10, 2011, the Presiding Administrative Law Judge (ALJ) issued the ID in this proceeding, which relates to non-strategic reconfiguration (Non-SR) issues, primarily the issue of pooling on the TAPS system.¹⁵ The three related agreements addressed in this order would settle the pooling issues. The remaining issues, which currently are pending before another Presiding Administrative Law Judge, relate to the strategic reconfiguration (SR) issues.¹⁶

10. On February 17, 2012, the Remaining Carriers filed a motion seeking appointment of a Settlement Judge to assist the parties in resolving their differences with respect to the pooling issues. On February 21, 2012, Koch filed a motion opposing the appointment of a Settlement Judge, but it stated that the

¹³ *Flint Hills Resources Alaska, LLC v. FERC*, 627 F.3d 881, 890 (D.C. Cir. 2010).

¹⁴ *BP Pipelines (Alaska) Inc.*, 127 FERC ¶ 61,316 (2009).

¹⁵ *BP Pipelines (Alaska) Inc.*, 134 FERC ¶ 63,020 (2011). The ALJ pointed out that TAPS is exempt from establishing its rates pursuant to the Commission’s indexing methodology and that, because the 1985 TAPS Settlement no longer applies, the TAPS Carriers currently have no method for establishing their rates from year-to-year other than by submitting rate filings to the Commission. The ALJ also observed that the Commission stated that it would be much more efficient for the TAPS Carriers to enter into a settlement establishing the manner in which their rates will increase from year-to-year. *BP Pipelines (Alaska) Inc.*, 134 FERC ¶ 63,020, at PP 34-35 (2011).

¹⁶ On December 28, 2012, the Commission issued an order approving a partial settlement in the proceeding involving the SR issues. *BP Pipelines (Alaska) Inc.*, 141 FERC ¶ 61,263 (2012). The settlement addressed in that order resolved depreciation and thereby the life of line issues.

Commission should suspend consideration of pooling issues for a reasonable period of time to allow the TAPS Carriers to attempt to negotiate a resolution of those issues. On April 23, 2012, the Commission directed the Chief Administrative Law Judge (Chief ALJ) to appoint a Settlement Judge.¹⁷ On May 2, 2012, the Chief ALJ issued an order appointing the Settlement Judge.

II. Comments, Reply Comments, and Answers

11. The State of Alaska (Alaska), Anadarko Petroleum Corporation (Anadarko), Tesoro Alaska Company (Tesoro), Koch, Unocal, and Trial Staff filed initial comments addressing the Settlement. The Remaining Carriers, Anadarko, Tesoro, Koch, Unocal, and Trial Staff filed reply comments.

12. In addition to their initial and reply comments, Anadarko filed an answer to the Remaining Carriers' reply comments, and the Remaining Carriers filed a response to that answer. While the Commission's regulations¹⁸ generally prohibit answers to answers, in this instance, these pleadings have provided additional information that assists the Commission in its decision-making process, and the Commission will accept them.

13. Anadarko and Trial Staff filed initial comments addressing the Unocal-BP Settlement, and Unocal filed reply comments in response to the initial comments of Anadarko and Trial Staff.

III. The Settlement Agreement¹⁹

A. Key Provisions

14. The Remaining Carriers are the only parties to this agreement. They state that they intend the Settlement Agreement to resolve all previously outstanding pooling issues, including whether, when, and how they will implement the cost pooling mechanism ordered by the Commission in the Opinion No. 502 rehearing

¹⁷ *BP Pipelines (Alaska) Inc.*, 139 FERC ¶ 61,065 (2012).

¹⁸ 18 C.F.R. § 385.213(a)(2) (2012).

¹⁹ Offer of Settlement and Application for Approval of Voluntary Pooling Agreement and Request for Expedited Consideration, Ex. B (September 25, 2012).

orders.²⁰ They further state that they intend the Settlement Agreement to resolve the issues pending on exceptions to the ID in this proceeding, including the uniform rate and return on equity issues. The Remaining Carriers emphasize that approval of the Settlement Agreement must be in connection with approval of the Pooling Agreement (without modification) pursuant to section 5(1) of the Interstate Commerce Act (ICA).²¹ The Remaining Carriers state that, upon such approval, their obligations will include the following:

- a. ConocoPhillips will pay BP \$263.534 million, plus interest, for the period of time between August 1, 2012, and the date such amount is paid.
 - b. ConocoPhillips will pay ExxonMobil \$8.891 million, plus interest, for the period of time between August 1, 2012, and the date such amount is paid.
 - c. BP will pay ExxonMobil \$1.822 million, plus interest, for the period of time between August 1, 2013, and the date such amount is paid.
 - d. None of the Remaining Carriers will be required to make or entitled to receive any other payments for the periods of time prior to August 1, 2012. No Exiting Carrier will be required to make any payment for all periods prior to August 1, 2012, as the result of Commission approval of the Settlement Agreement and the Pooling Agreement.
15. If the Commission approves the Settlement Agreement and the Pooling Agreement, subject to any modifications that a Remaining Carrier considers unacceptable, that Remaining Carrier may terminate the Settlement Agreement by written notice to the other Remaining Carriers and may request that the Commission resume the instant proceeding in its former litigation status. In that event, all of the Remaining Carriers' rights and obligations will continue as though the Settlement Agreement had not existed.

²⁰ *BP Pipelines (Alaska) Inc.*, 125 FERC ¶ 61,215 (2008); *order on reh'g*, 127 FERC ¶ 61,317 (2009).

²¹ 49 U.S.C. app. § 5(1) (1988).

16. The Remaining Carriers agree that all rate of return issues in the affected proceedings should be resolved consistent with the Joint Stipulation Regarding the Weighted Average Cost of Capital and Components Thereof, dated October 18, 2010. Subject to any superseding settlement agreement incorporating a specific uniform rate methodology, the Remaining Carriers agree to support and defend the following resolution of the uniform rate issue addressed in the ID and, if necessary, on judicial review. The Settlement Agreement provides as follows:

The TAPS Carriers' (1) calculation of uniform rates based on total system-wide cost of service and throughput, and (2) filing of such rates on each TAPS Carrier's own initiative, and without consultation or collaboration with any other TAPS Carrier, complies with the uniform rate requirement of Opinion No. 502; provided, however, that rates calculated and filed in this manner will be subject to complaint and/or protest and further Commission procedures to determine a just and reasonable maximum uniform rate for TAPS.²²

B. Positions of the Parties

17. The Remaining Carriers emphasize that the specified pooling payments among them are not considered in the calculation of the maximum rates that they may charge. Thus, they contend that approval of the Settlement Agreement will not cause a shipper to pay a rate that is higher than a just and reasonable rate. They also maintain that approval of both the Settlement Agreement and the Pooling Agreement will allow them to resolve their differences on a basis acceptable to themselves. They point out that no participants other than the Remaining Carriers will be required to pay any amounts into the cost pool or receive any payments from the cost pool.

18. Trial Staff states that the Settlement Agreement appears to be a reasonable resolution of the pre-August 1, 2012 pooling issues by providing for a series of voluntary negotiated payments among the Remaining Carriers and that it will provide financial certainty for the parties and avoid the necessity of further litigation. Trial Staff also points out that the payments will not have any impact on the TAPS interstate rates.

²² Offer of Settlement and Application for Approval of Voluntary Pooling Agreement and Request for Expedited Consideration, Ex. B at 7 (September 25, 2012).

19. Anadarko and Tesoro do not oppose the Settlement Agreement to the extent that it does not include prior payments of intrastate costs. They further condition their non-opposition to the Settlement Agreement to the extent that it does not prejudice their position on the Pooling Agreement, which they do oppose. Both argue that, if the Commission approves any pooling, it should limit that approval to a period of five years. Trial Staff supports the request of Anadarko and Tesoro to limit the Settlement Agreement to a five-year term.

20. Anadarko maintains that the Settlement represents the agreement of only three of nine interested participants and only three of the five TAPS Carriers. Tesoro observes that there were no initial comments filed in support of the Settlement, and Tesoro also states that the Commission has two options: (a) reject pooling outright or, (b) if any pooling is approved, it should not include intrastate revenues and costs.

21. Unocal initially opposed the Settlement Agreement. However, as discussed below, it subsequently entered into the Unocal-BP Settlement with the Remaining Carriers and withdrew its opposition to the Settlement Agreement, subject to the Commission's approval without modification of the Unocal-BP Settlement, the Settlement Agreement, and the Pooling Agreement. Koch originally withheld its support of the Settlement Agreement, but now withdraws its objections, provided that the Commission approves both the Settlement Agreement and the Pooling Agreement without modification. Alaska states that it does not oppose the Settlement Agreement insofar as it relates to the interstate tariff rate for the transportation of petroleum on the TAPS system.

C. Commission Analysis

22. Pursuant to Rule 602(g) of the Commission's Rules and Regulations governing approval of uncontested offers of settlement,²³ the Commission approves the Settlement Agreement without modification and as uncontested. Although Anadarko and Tesoro express conditional opposition to the Settlement Agreement, their concerns actually reflect their opposition to the forward-looking Pooling Agreement, and their speculative arguments do not provide a sufficient basis for the Commission to reject or modify the retrospective Settlement Agreement. The Settlement Agreement provides for payment only among the Remaining Carriers, and because it applies only to past periods, it will not affect future competition or future interstate transportation rates on the TAPS System.

²³ 18 C.F.R. § 385.602(g) (2012).

Approval of the Settlement Agreement also will allow the Remaining Carriers, Exiting Carriers, and shippers to avoid continued litigation addressing rates charged and collected for such past periods. For these reasons, the Commission finds that the Settlement Agreement appears to be fair and reasonable and in the public interest.

IV. The Unocal-BP Settlement

A. Key Provisions

23. Initially, Unocal claimed that it was entitled to cost pooling payments applicable to the period from January 1, 2009 through July 31, 2012, and that the Settlement Agreement did not provide for it to receive payments for that period. However, Unocal and BP now state that the Unocal-BP Settlement resolves Unocal's claims for cost pooling payments and its objections to the retrospective Settlement Agreement. Further, they state that the Unocal-BP Settlement resolves all other outstanding issues applicable to Unocal in the Commission proceedings listed in Appendix A to the Unocal-BP Settlement.²⁴ Unocal and BP emphasize that their support of this agreement is contingent on Commission approval of the Settlement Agreement and the Pooling Agreement without modification or condition.

24. The Unocal-BP Settlement includes, *inter alia*, the following obligations: (a) BP will pay Unocal \$5 million, plus interest from August 1, 2012, through the date the payment is made; and (b) except for this payment, Unocal is not required to make or entitled to receive any payment for the period at issue. The parties to this agreement agree not to challenge or support any challenge to any of the three agreements that are the subject of this order.

B. Positions of the Parties

25. Anadarko's comments generally are not specific to the provisions of the Unocal-BP Settlement. Anadarko continues to emphasize its conditional non-opposition to the Settlement Agreement. It also reiterates some of its previous arguments, in particular, its contention that the ICA does not grant the

²⁴ Explanatory Statement Regarding Offer of Settlement to Resolve Cost Pooling Issues Raised by Unocal Pipeline Company, Motion for Shortened Comment Period, and Request for Expedited Consideration, Ex. A, Attachment A, (November 13, 2012).

Commission authority over intrastate pooling. Further, Anadarko points out that it and Tesoro are the only shippers participating in this proceeding, but that they were excluded from the negotiations leading to these agreements. Anadarko contends that the Remaining Carriers were able to buy the non-opposition of Koch and Unocal, but that this fact does not diminish the importance and legal significance of the arguments advanced by Anadarko and Tesoro.

26. Trial Staff states that the Unocal-BP Settlement appears to be a reasonable resolution of the pre-August 1, 2012 pooling issues. Trial Staff emphasizes that the payment to Unocal will not impact TAPS rates and that this settlement will obviate the need for further expensive and time-consuming litigation on this long-standing and complex issue.

27. In their reply comments, Unocal and BP challenge Anadarko's arguments, contending that they are not relevant to the Commission's action on the Unocal-BP Settlement. Unocal and BP emphasize that their agreement applies only to barrels already moved on TAPS and does not implicate intrastate rates in any manner.

C. Commission Analysis

28. Pursuant to Rule 602(g) of the Commission's Rules and Regulations governing uncontested offers of settlement,²⁵ the Commission approves the Unocal-BP Settlement without modification. Although Anadarko expresses conditional opposition to the Unocal-BP Settlement, its concerns actually reflect its opposition to the forward-looking Pooling Agreement, and its speculative arguments do not provide a sufficient basis for the Commission to reject or modify the Unocal-BP Settlement. The Unocal-BP Settlement provides for payment to Unocal to settle issues relating to periods before August 1, 2012, and because it applies only to past periods, it will not affect future competition or future interstate transportation rates. Commission approval of the Unocal-BP Settlement also will allow the Remaining Carriers and Unocal to avoid continued litigation addressing rates charged and collected for past periods. For these reasons, the Commission finds that the Unocal-BP Settlement appears to be fair and reasonable and in the public interest.

²⁵ 18 C.F.R. § 385.602(g) (2012).

V. The Pooling Agreement

A. Key Provisions

29. Section 1(A) (Cost Pooling Mechanism) establishes the four types of costs that will be pooled: (a) non-variable operating expenses incurred, (b) *ad valorem* taxes, (c) depreciation, and (d) interest. Sections 1(A) through 1(C) explain that the pooling calculation will compare the TAPS Carriers' (i.e., the Remaining Carriers) composite ownership interests in TAPS (both the pipeline and the terminal tankage) with their respective throughput shares. The Remaining Carriers whose throughput shares exceed their composite ownership interests will pay into the pool, and the Remaining Carriers whose composite ownership interests exceeds their throughput shares will receive payments from the pool. Sections 1(D) and 1(E) explain the calculations of the Remaining Carriers' throughput shares and ownership interests in TAPS.

30. Section 3 (Implementation Date; Term) provides for the Pooling Agreement to be implemented beginning as of August 1, 2012, and to continue in effect as to all Remaining Carriers while they are carriers under the Agreement for the Design and Construction of the Trans Alaska Pipeline System dated August 27, 1970, as amended from time to time (System Agreement). Section 1(I) describes the determination of cost pooling for the partial year period from August 1, 2012, through December 31, 2012.

31. Section 4 (Settlement of Issues) provides that the Pooling Agreement and the Settlement Agreement resolve all issues relating to pooling, and it prohibits the parties from challenging the obligation of the Remaining Carriers to calculate their rates on a uniform basis, the pooling mechanism in the Pooling Agreement, or any other provision of the Pooling Agreement.

32. Section 5 (Non-Pooling Issues) allows a Remaining Carrier to terminate the Pooling Agreement and Settlement Agreement if the Commission does not approve both agreements or conditions its approval on modifications to the agreements that the Remaining Carrier considers unacceptable.

B. Commission Authority

1. Positions of the Parties

33. The Remaining Carriers contend that the Pooling Agreement meets the ICA section 5(1) requirements that a pooling must be found to be in the interest of better service to the public or of economy in operation and that it will not unduly restrain competition. They assert that section 5(1) also affords the Commission

the authority to approve pooling agreements if such agreements are assented to by all the carriers involved.

34. The Remaining Carriers argue that Koch and Unocal are not “carriers involved” because they are not parties to the Pooling Agreement and have withdrawn as TAPS Carriers. Additionally, continue the Remaining Carriers, both Interstate Commerce Commission (ICC) precedent and judicial precedent make it clear that the meaning of “all the carriers involved” is “confined to the parties to the pool.”²⁶ The Remaining Carriers emphasize that the Exiting Carriers no longer have FERC tariffs governing transportation on the TAPS system and have had no costs to pool since July 31, 2012. Further, although the Remaining Carriers state that ICA section 5(12) provides that the Commission’s power under ICA section 5 is plenary,²⁷ they also maintain that ICA section 5(1) itself confers exclusive and plenary authority on the Commission to approve pooling agreements and imposes no restriction on the Commission’s authority to approve the pooling of any type of cost, including intrastate costs.²⁸

35. The Remaining Carriers point out that the Commission ordered the TAPS Carriers to adopt a cost pool among themselves to remedy the cost over- and under-recoveries that they would experience as a result of the uniform rate requirement. They state that when the Commission approved the section II-2(f) pooling mechanism, it determined that exclusion of certain elements would ensure

²⁶ Remaining Carriers cite *Escanaba & Lake Superior Railroad Co. v. U.S.*, 303 U.S. 315, 322 (1938) (rejecting connecting carrier’s claim that it was a carrier “involved for purposes of section 5(1)) (*Escanaba*); *Proposed Pooling of Railroad Earnings and Service Involved in Operation of the Pullman Co. Under Railroad Ownership*, 268 ICC 473, 475 (1947); *Application of Atlantic Coast Line Railroad Co. for Approval of the Pooling of Less than Carload Freight Service from New York, NY, and Philadelphia, PA, to Macon, GA*, 283 ICC 158 (1951) (approval of pooling arrangement over the protest of a carrier that competed with the pooling carriers).

²⁷ 49 app. U.S.C. § 5(12) (1988).

²⁸ According to the Remaining Carriers, this interpretation is consistent with *Twin Cities and Head of Lakes Joint Passenger-Train Service (Twin Cities)*, 107 ICC 493, 494 (1926) (ICC found that it had authority to approve the pooling of intrastate costs and that its orders took precedence over a contrary state law).

that the pooling would not unduly restrain competition.²⁹ The Remaining Carriers contend that the partial cost pooling that was in effect through 2008 did not diminish competition among them.

36. The Remaining Carriers cite extensively to the ID, emphasizing that the Pooling Agreement at issue here excludes from the cost pool more costs than the ALJ would exclude, and they add that excluding the additional costs will preserve their incentive to compete for additional throughput. For example, continue the Remaining Carriers, the Pooling Agreement excludes Carrier Direct Costs from the cost pool, although the ALJ did not exclude those costs. However, the Remaining Carriers argue that exclusion of Carrier Direct Costs from the pool will give them an incentive to minimize those costs.³⁰

37. The Remaining Carriers assert that section II-2(a) of the Intrastate Settlement Agreement dated April 7, 1986 (Intrastate Settlement Agreement), establishes that the methodology used to calculate maximum intrastate rates is the same as the methodology used to calculate maximum interstate rates under the 1985 TAPS Settlement.³¹ Thus, explain the Remaining Carriers, only those portions of the 1985 TAPS Settlement that relate to the calculation of maximum interstate rates are relevant to the Intrastate Settlement Agreement, and the pooling adjustments established in section II-2(f) of the 1985 TAPS Settlement do not enter into the calculation of maximum intrastate rates under the Intrastate Settlement Agreement.

²⁹ The Remaining Carriers cite *BP Pipelines Inc.*, 33 FERC ¶ 61,064, at 61,140 (1985).

³⁰ Remaining Carriers' Offer of Settlement and Application for Approval of Voluntary Pooling Agreement and Request for Expedited Consideration at 25-26 (September 25, 2012). *BP Pipelines (Alaska) Inc.*, 134 FERC ¶ 63,020, at PP 896-915 (2011).

³¹ Response to Answer of Anadarko Petroleum Corporation to the Remaining Carriers' Reply Comments on Offer of Settlement and Application for Approval of Voluntary Pooling Agreement (November 27, 2012). Exhibit A is a copy of the Intrastate Settlement Agreement dated April 7, 1986. Section II-2(a) of that agreement provides in part that "[T]he intrastate TSM shall be the same as the TSM set forth in the [1985 TAPS Settlement.]" Intrastate Settlement Agreement at 14.

38. The Remaining Carriers point to the ALJ's recognition that inclusion of intrastate costs in a cost pool does not involve the setting of intrastate rates and does not usurp Alaska's authority.³² The Remaining Carriers also cite two orders issued by the RCA's predecessor, the Alaska Public Service Commission (APUC).³³ The Remaining Carriers argue that neither of those orders addressed pooling or section II-2(f) of the 1985 TAPS Settlement, and there is no evidence that the APUC intended to approve or thought it was approving a pooling of intrastate costs. Additionally, the Remaining Carriers state that, because the Commission orders approving the 1985 TAPS Settlement expressly addressed the validity of section II-2(f) as a pooling, the APUC could have addressed whether such a provision was lawful, reasonable, and in the public interest had the APUC believed that the TAPS Carriers were seeking its approval of the pooling. The Remaining Carriers also submit that Anadarko and Tesoro fail to acknowledge the many years that the 1985 TAPS Settlement remained in effect without controversy or threat to the RCA's (or the APUC's) power to set intrastate rates.

39. The Remaining Carriers challenge Anadarko's interpretation of the RCA's Order No. 34, in which the RCA concluded that pooling adjustments do not affect the calculation of maximum intrastate rates. The Remaining Carriers contend that the discussion in that order fully supports their position that pooling was not part of the intrastate agreement and that the Pooling Agreement at issue in this proceeding likewise will not affect the calculation of maximum intrastate rates. They add that Order No. 34 demonstrates exactly what the ALJ in this proceeding recognized, which is that inclusion of intrastate costs in the pooling mechanism does not usurp the RCA's authority.³⁴

40. The Remaining Carriers also point out that the ALJ rejected arguments that the Commission lacks jurisdiction to order pooling of intrastate costs. They explain that he determined that excluding those costs from the pooling would

³² *BP Pipelines (Alaska) Inc.*, 134 FERC ¶ 63,020, at PP 892-895 (2011).

³³ Remaining Carriers cite *In re Amerada Hess Pipeline Corp.*, Order No. P-86-2, 8 APUC 168 (May 30, 1987); *In re Amerada Hess Pipeline Corp.*, Order No. P-86-2, 13 APUC 448 (October 29, 1993). Copies of the orders are available on the RCA's website at the following location: <http://rca.alaska.gov/RCAWeb/home.aspx/>.

³⁴ Remaining Carriers cite *BP Pipelines (Alaska) Inc.*, 134 FERC ¶ 63,020, at P 892 (2011).

cause skewed results under the uniform rate requirement. Further, state the Remaining Carriers, the ALJ found it appropriate to include intrastate costs in the pooling mechanism because intrastate costs represent an increasing percentage of the TAPS cost of service and because inclusion of these costs in the pooling mechanism will promote efficiency and ease of administration. The Remaining Carriers add that the cost pool in the Pooling Agreement does not distinguish between interstate and intrastate costs, instead treating them as system-wide costs, just as the uniform tariff rate for TAPS is based on system-wide costs.³⁵

41. Trial Staff clarifies that, although intrastate costs were pooled under the 1985 TAPS Settlement, the Pooling Agreement here provides that only the intrastate costs associated with operating expenses, depreciation, and *ad valorem* taxes will be pooled. Therefore, explains Trial Staff, the intrastate costs relating to return on equity, deferred return, the income tax allowance, cost of debt, and AFUDC are excluded from the pool, as are the corresponding interstate costs.

42. Trial Staff acknowledges that it initially opposed the pooling of certain costs at the hearing stage of this proceeding, but Trial Staff emphasizes that the Pooling Agreement takes significant steps to address its concerns. For example, states Trial Staff, the impact of excluding from the pool the interstate costs of return on investment and Carrier Direct Costs provides a meaningful incentive for the TAPS Carriers to compete for interstate throughput.

43. In addition to their claim that the Pooling Agreement will not result in better service to the public or economy of operation, Anadarko and Tesoro argue at length that the Pooling Agreement will inhibit intrastate competition and cause their intrastate rates to rise. Tesoro also contends that Congress has protected a state's power to regulate intrastate commerce and that the only exception that allows the Commission to regulate intrastate commerce is found in ICA sections 13(3) and 13(4).³⁶

44. Anadarko asserts that the Remaining Carriers' own data show that the Pooling Agreement will not provide sufficient incentives for them to compete and thus will undermine existing discounted rates. If the Commission does not revisit the uniform rate issue or reject the Pooling Agreement, Anadarko asks the Commission to modify the Pooling Agreement by: (a) limiting it to interstate

³⁵ *BP Pipelines (Alaska) Inc.*, 134 FERC ¶ 63,020, at PP 892-895 (2011).

³⁶ 49 app. U.S.C. § 13(3), 13(4) (1988).

costs and revenues, but eliminating intrastate costs and revenues from the cost pool, and (b) limiting its term to five years so that its effect can be considered in light of future changes to competitive circumstances on TAPS and related markets.

45. In particular, Anadarko and Tesoro contend that circumstances relating to the competitive balance among the TAPS Carriers and on the Alaska North Slope (ANS) continue to evolve. According to Anadarko, subsequent to the hearing in this proceeding, there have been significant shifts to this balance, including the following: (a) arguably, the number of carriers that may compete has been reduced from five to three; (b) independent producers have begun drilling new reserves that may result in an increase in independent and price-sensitive volumes being shipped through TAPS; (c) the upcoming expiration of Alaska's royalty in-kind contract with Flint Hills Resources Alaska LLC, which, if extended, seems likely to be at reduced volumes, making Alaska's future in-kind sales more likely to become price sensitive to competition among the carriers;³⁷ and (d) Tesoro is purchasing BP's refinery in Carson, California, which is supplied largely by ANS crude oil, further suggesting that there will be increases in price-sensitive volumes on TAPS.

46. Anadarko maintains that the Opinion No. 502 uniform rate requirement does not mandate approval of the Pooling Agreement. Anadarko acknowledges that it supported the uniform rate in the Opinion No. 502 proceeding, largely to reduce the administrative burdens and costs of participating in numerous individual TAPS Carrier rate cases. However, Anadarko claims that the potential impact of pooling on competitive behavior among the TAPS Carriers was not fully litigated as part of the uniform rate issue and that the hearing in the instant proceeding first revealed the extent of the anticompetitive impact of pooling. Thus, continues Anadarko, if the Commission believes that use of a uniform rate mandates the adoption of pooling, the Commission should set this issue for hearing to address pooling directly or, in the alternative, to allow the TAPS Carriers to file individual rates, as the RCA does.

47. Despite its own change of position, Anadarko criticizes Trial Staff's change of position on the inclusion of intrastate costs in the Pooling Agreement calculation. In Anadarko's view, this change of position is significant and undermines Trial Staff's support of the Settlement. Further, Anadarko asserts that

³⁷ According to Anadarko, because the Alaska royalties are based on the producers' netback, the amounts the state receives are inversely related to the TAPS transportation rate for intrastate volumes.

Trial Staff's litigation position on issues such as the pooling of intrastate costs is significant because the Pooling Agreement is contested. Anadarko also contends that Trial Staff recognized during the hearing phase that the pooling of intrastate costs would have a material adverse impact on competition.

48. Anadarko submits that, when the intrastate costs were pooled under section II-2(f), the TAPS Carriers never engaged in any meaningful intrastate competition. Thus, Anadarko claims that they will not compete for intrastate volumes under a similar pooling proposal in the future.

49. Moreover, argues Anadarko, while the Remaining Carriers' pooling proposal would devastate intrastate competition and rates, excluding intrastate costs from a federal pooling mechanism would have only a minimal impact on the pooling proposal. Anadarko maintains that ANS crude oil transported in intrastate commerce represents approximately 10 percent of the total costs that the Remaining Carriers seek to pool.

50. Anadarko further states that the Exiting Carriers have confirmed that they are currently TAPS Carriers, notwithstanding the notices of their intention to withdraw from TAPS. For that reason, Anadarko believes that the Pooling Agreement is not "assented to by all carriers," as required by ICA section 5(1) and the TAPS Operating Agreement.³⁸ In these circumstances, continues Anadarko, the Commission either must reject the Pooling Agreement or at least defer consideration of that agreement until it receives confirmation that Koch and Unocal have completed their withdrawal from TAPS and the appropriate amendments to the TAPS Operating Agreement have been executed.

51. Tesoro states that the RCA has not imposed a uniform rate requirement for intrastate rates and that any TAPS Carrier may file a separate and individual intrastate rate at any time. Thus, in Tesoro's view, there is no policy reason to include intrastate revenues and costs in the Pooling Agreement under an interstate uniform rate requirement because a TAPS Carrier can always file an individual intrastate rate to collect a just and reasonable intrastate rate.³⁹

³⁸ The original Operating Agreement was executed as of May 20, 1997, by the then-owners of TAPS. The currently-effective Amended and Restated Agreement for the Operation and Maintenance of the Trans Alaska Pipeline System (October 10, 1994) is attached to the Settlement as Exhibit D.

³⁹ Comments of Tesoro Alaska Company on Offer of Settlement and Opposition to Proposed Pooling Agreement (October 15, 2012) at 4-5.

52. Like Anadarko, Tesoro asserts that Trial Staff's non-opposition to the Settlement is too focused on accommodating a settlement rather than addressing the substantive pooling issues. In part, Tesoro argues that Trial Staff has not addressed its previous comments relating to: (a) the Commission's policy of fostering competition, (b) the impact on intrastate rates and competition, or (c) the impact on the development of the ANS reserves from including intrastate costs in pooling.

53. Moreover, continues Tesoro, Trial Staff previously stated that the Commission's approval of pooling under section II-2(f) was not controlling, did not constitute precedent, and was never imposed on intrastate shippers without the RCA's approval. Additionally, Tesoro contends that Trial Staff previously argued that, because the RCA does not require a uniform intrastate rate, pooling of intrastate revenues and costs could not be justified based upon the Commission's uniform interstate rate requirement.

54. The Exiting Carriers do not oppose the Pooling Agreement. Alaska does not oppose the Pooling Agreement to the extent that it relates to the interstate rate; however, it conditions its non-opposition on the understanding that Commission approval of the Pooling Agreement will not affect the RCA's authority.

2. Commission Analysis

55. The Commission has the authority to approve the voluntary prospective Pooling Agreement under ICA section 5(1). In so doing, it is not setting intrastate rates, and its approval of the Pooling Agreement does not interfere in any way with the jurisdiction of the RCA. Additionally, the Commission finds that the Pooling Agreement is in the interest of better service to the public, as well as economy in service, and that it will not unduly restrain competition.

56. As discussed below, the Remaining Carriers have met the Commission's goal of establishing a new pooling mechanism to prevent them from over- or under-recovering their costs under the uniform tariff rate.⁴⁰ Further, the objections of Anadarko and Tesoro have no merit. The record in this proceeding contains

⁴⁰ See *BP Pipelines (Alaska) Inc.*, 134 FERC ¶ 63,020, at P 830 (2011) ("The principal issue remaining to be resolved in this proceeding . . . is how best to 'develop a pooling mechanism that reallocates all of TAPS Carriers' costs based on throughput or usage, so that the allocation of costs matches the allocation of revenues on TAPS,' in accordance with the Commission directives.").

substantial evidence upon which the Commission can base a reasoned decision to approve the Pooling Agreement as a just and reasonable approach that achieves the Commission's goal, even if other approaches may also be just and reasonable.

57. The Exiting Carriers have cancelled their FERC tariffs for transportation on the TAPS system, and they have not filed new tariffs for interstate transportation. The Exiting Carriers have not pooled any volumes after July 31, 2012, and likewise, they have not pooled costs and revenues after that date. While Unocal continues to negotiate its withdrawal from TAPS with the other carriers,⁴¹ neither of the Exiting Carriers is a party to the Pooling Agreement, and neither of the Exiting Carriers has claimed that it will be injured by Commission approval of that agreement. Thus, the Exiting Carriers are not among "the carriers involved," as contemplated by ICA section 5(1). The Remaining Carriers, which are "the carriers involved" have agreed to the Pooling Agreement, which establishes the methodology for pooling their costs and revenues prospectively beginning August 1, 2012.

58. The Remaining Carriers properly rely on *Escanaba* in support of their argument that Koch and Unocal are not "carriers involved" within the meaning of ICA section 5(1), as interpreted by the Supreme Court. In that case, the Supreme Court recognized that *Escanaba* was not a party to the pooling at issue. The Court stated in part as follows:

T[he] reference to the mutual considerations to be exchanged by 'such carriers' shows that Congress meant by the phrase 'all the carriers involved' those, and those only, who are parties to the pooling of freights and the division of the proceeds. . . .

It is difficult to conceive of any pooling arrangement between two carriers which will not affect, in a greater or less degree, other carriers who interchange traffic with one or the other of the pooling [carriers], or with their connections. If the private interest of any such outside carrier should move it to refuse its assent to the arrangement, it could . . . veto the proposal, although, on the whole and in the long view, the consummation of the plan might greatly enhance the economies of operation of large and important carriers and so promote the public interest. We cannot believe that every carrier, in such sense affected by a proposed pool to which it is not a party, was intended to have a status different from, and perhaps at war

⁴¹ See *supra* note 2.

with, the interest of the efficient and economical operation of the [carriers] envisaged by the Transportation Act.⁴²

59. It is admitted that the Exiting Carriers are not signatories to the Pooling Agreement, and, as stated above, they have claimed no injury to themselves that would arise from approval of the Pooling Agreement. Further, even if Anadarko and Tesoro will be disadvantaged as they claim, they likewise are not parties to the Pooling Agreement and cannot be permitted to veto it because they speculate that intrastate rates on TAPS will increase. They cannot prevent Commission approval of the Pooling Agreement in light of what the Commission has found to be in the interest of better service to the public or of economy in operation. The Remaining Carriers' intrastate rates remain subject to the RCA's determination that such rates are just and reasonable. Additionally, by excluding a high percentage of the Remaining Carriers' costs from the pool, the Pooling Agreement will not unduly restrain competition among those carriers. Accordingly, the Commission finds that the Remaining Carriers that are signatories to the Pooling Agreement are the "carriers involved" in the pool, as contemplated by ICA section 5(1), and that the shippers' fear that they will be forced to pay higher intrastate rates as a result of approval of the Pooling Agreement is unfounded and insufficient to permit them to "veto" the Pooling Agreement.

60. In the orders on rehearing of Opinion No. 502, the parties disputed the applicability of ICA section 5(1) to the Commission's requirement that the TAPS Carriers establish a pooling methodology.⁴³ While the Commission did not rely on that section in requiring a pooling methodology, relying instead on its ancillary power in conjunction with its obligation to establish just and reasonable rates, the Commission observed as follows:

[D]espite the fact that the Commission did not order the pooling under section 5(1) of the ICA, the Commission's decision is not inconsistent with the intent of the statute.... In approving the TSA's pooling provision, the Commission found that such an arrangement was proper under the ICA because it was "in the interest of better service to the public or of economy in operation" and would not "unduly restrain competition." The Commission finds this still to be true here. It is in the public interest for the

⁴² *Escanaba & Lake Superior R. Co.*, 303 U.S. 315, 322-323 (1938).

⁴³ See *BP Pipelines (Alaska) Inc.*, 127 FERC ¶ 61,317, at PP 9-14, 19-20, (2009).

TAPS Carriers to charge a uniform rate for the identical transportation service they provide on TAPS, and in order for this to occur without some carriers over- or under-recovering their costs, there must be a pooling mechanism. Moreover, it will not unduly restrain competition for the TAPS Carriers to allocate their costs in the same fashion as they already allocate their revenues. For these reasons, the Commission will require that as long as TAPS operates in the manner it has to date, with a mismatch in the allocation of costs and revenue, there must be a pooling mechanism to ensure just and reasonable rates.⁴⁴

61. As long as the Remaining Carriers continue to charge a uniform interstate rate for transportation on TAPS, the rationale expressed above continues to support the need for a pooling mechanism to allocate TAPS costs in the same manner as revenues are allocated among the TAPS owners. As the ALJ stated in the ID, “Achieving this goal is critical for the future, long-term operation of TAPS.”⁴⁵

62. The Pooling Agreement proposed by the Remaining Carriers excludes more costs from the pool than the ALJ determined to exclude. The ALJ would have included all TAPS costs (including intrastate costs) in the pool, except for half of the return on equity, deferred return, and income tax allowance. The ALJ determined that this calculation would not impose a significant harm to competition.⁴⁶ However, the Pooling Agreement at issue here goes beyond the ALJ’s recommendation by excluding from the pool all return on equity, cost of debt, deferred return, AFUDC, income tax allowance, and Carrier Direct Costs. These costs represent 25.1 percent of the total TAPS cost of service,⁴⁷ and the Commission finds that exclusion of such a substantial portion of TAPS costs from the pool will give the Remaining Carriers ample incentive to discount their rates and compete for volumes, which is in the interest of better service to the public and economy in operation.

⁴⁴ *BP Pipelines (Alaska) Inc.*, 127 FERC ¶ 61,317, at P 40 (2009) (footnotes omitted).

⁴⁵ *BP Pipelines (Alaska) Inc.*, 134 FERC ¶ 63,020, at P 838 (2011).

⁴⁶ *E.g.*, *BP Pipelines (Alaska) Inc.*, 134 FERC ¶ 63,020, at P 842 (2011).

⁴⁷ *See* Reply Comments of the Remaining Carriers on Offer of Settlement and Application for Approval of Voluntary Pooling Agreement, at 15-17 (October 25, 2012).

63. Further, the possible adverse effects of the Pooling Agreement cited by Anadarko are couched in speculative language. For example, Anadarko states that new reserves being drilled “may” result in more price-sensitive volumes shipped; that Alaska’s royalty in-kind agreement with Flint Hills will expire, and if extended, “seems likely” to be at reduced volumes shipped, making them “more likely” price sensitive; and that Tesoro’s purchase of a California refinery, which is supplied largely by ANS crude oil, further “suggests” that there will be more price-sensitive volumes on TAPS.

64. The speculative nature of the problems predicted by Anadarko and Tesoro does not warrant rejection of the Pooling Agreement or limiting its term to five years. Other public information is inconsistent with Anadarko’s and Tesoro’s claims. For example, Tesoro officials recently stated that the company currently includes a limited quantity of ANS crude oil in its portfolio, largely replacing it with crude oil from the Bakken region.⁴⁸ Additionally, in September 2012, Tesoro placed in service a facility with the capacity to deliver approximately 50,000 bpd of Bakken crude oil to its Washington refinery.⁴⁹ Moreover, while Anadarko contends that independent oil companies, such as Royal Dutch Shell (Shell), plan to exploit crude oil prospects on the ANS, Shell and other producers, such as Statoil and Total S.A., recently have determined to delay their operations in that area until further notice.⁵⁰ Alaska itself has forecast declining production from 517,600 bpd in 2013 to 251,200 bpd by 2022.⁵¹

⁴⁸ Tesoro Corporation, Q4 2012 Earnings Call Transcript, February 7, 2013, <http://www.morningstar.com/earnings/PrintTranscript.aspx?id=48359202>.

⁴⁹ Tesoro Logistics LP, United States Securities and Exchange Commission, Annual Report, Feb. 28, 2013. <http://www.sec.gov/Archives/edgar/data/1507615/000150761513000019/0001507615-13-000019-index.htm>.

⁵⁰ Tom Fowler, *Shell’s Plan for Arctic Drilling in Doubt*, Wall Street Journal, February 11, 2013, <http://online.wsj.com/article/SB100014241278873248805045782990028156>

⁵¹ Alaska Department of Revenue, Fall 2012 Forecast Highlights, Dec. 3, 2012 at page 6. <http://www.revenue.state.ak.us/Press%20Releases/Fall%202012%20RSB%20Highlights.pdf>

65. Imposing a mandatory five-year review of the Pooling Agreement is not in the interest of better service to the public or of economy in operation. A pooling mechanism is necessary as long as the Remaining Carriers continue to charge a uniform interstate rate. The Pooling Agreement merely reallocates the costs incurred by the Remaining Carriers in the operation of TAPS so that none of them will bear a disproportionate share of the costs. The previous pooling arrangement worked effectively for more than 20 years until Alaska invoked the early termination provision of the 1985 TAPS Settlement. For these reasons, the Commission will not impose a mandatory five-year review of the Pooling Agreement.

66. Further, the Commission will not regulate intrastate commerce in any respect as a result of its approval of the Pooling Agreement; therefore, ICA sections 13(3) and 13(4) are not relevant to its decision here. The Commission is approving a pooling arrangement that includes, *inter alia*, intrastate costs and revenues in the calculation and provides for payments among the Remaining Carriers to equalize those companies' costs and revenues after intrastate volumes have been shipped under RCA-authorized intrastate rates. ICA section 5(1) does not limit the costs that the Commission may consider in approving a pooling arrangement; in particular, it does not exclude intrastate costs and revenues from a pooling methodology that may be approved by the Commission. It is also noteworthy that Alaska has not challenged the specifics of the Pooling Agreement or claimed that the Pooling Agreement infringes upon the RCA's power to establish intrastate rates. Instead, the RCA determined in Order No. 34 that costs pooled under the TSM section II-2(f) should not be included in the cost of service for intrastate rates, but specifically stated that it made no ruling regarding the propriety of the pooling established in that section as it applied to TAPS' interstate service.⁵²

67. Although Anadarko changed its position on the pooling issue during the course of this proceeding, it criticizes Trial Staff's change of position on the pooling issue and contends that the Commission should rely on Trial Staff's original arguments. The Commission observes that the ALJ acknowledged Anadarko's position,⁵³ but extensively reviewed the record in this proceeding and did not find that the pooling methodology at issue there, which included fewer

⁵² *Amerada Hess Pipeline Corp.*, Order No. 34, 2004 WL 1896911 (RCA June 10, 2004).

⁵³ *BP Pipelines (Alaska) Inc.*, 134 FERC ¶ 63,020, at P 832 (2011).

costs than the Pooling Agreement, would result in an undue burden on competition. While Trial Staff acknowledges its earlier arguments at the hearing phase opposing certain aspects of the Pooling Agreement, it explains that the Settlement before the Commission here represents significant compromises by the Remaining Carriers. As Trial Staff stated, “[T]he Settlement reflects the essence of what a settlement should be; a knowing and reasoned compromise in recognition of the risks of pursuing further litigation of the matter.”⁵⁴

68. Additionally, the Commission finds that the Pooling Agreement represents a comprehensive, long-term settlement of issues that have been the subject of lengthy and costly proceedings. Such settlements necessarily involve compromises by the parties that may not reflect all of their litigation positions. The Commission encourages such settlements, which will allow parties the benefit of their bargains when it finds those settlements to be consistent with applicable law and Commission policies.

69. Accordingly, pursuant to Rule 602(h) of the Commission’s Rules and Regulations governing contested offers of settlement,⁵⁵ the Commission approves the Pooling Agreement without modification as just and reasonable on the merits. The Commission finds that the record in this proceeding contains substantial evidence, as thoroughly summarized and analyzed by the ALJ, upon which to make this determination. Anadarko and Tesoro have failed to show that the Pooling Agreement is not just and reasonable or is not in the interest of better service to the public or of economy in operation. Moreover, Anadarko and Tesoro have not demonstrated that the Exiting Carriers should be considered “carriers involved” whose assent would be required for the Commission to approve this voluntary Pooling Agreement. Rather, as stated above, the Commission finds that the Exiting Carriers are not parties to the Pooling Agreement, have cancelled their FERC tariffs, and have not transported any interstate volumes on TAPS after July 2012. As the Commission also determined above, the level of the costs to be pooled under the Pooling Agreement (including intrastate costs) is sufficient to maintain competition among the Remaining Carriers.

⁵⁴ Initial Comments of the Commission Trial staff on Offer of Settlement and Application for Approval of Voluntary Pooling Agreement at 2-3 (October 15, 2012).

⁵⁵ 18 C.F.R. § 385.602(h) (2012).

VI. Additional Issues

70. Anadarko raises two additional issues: (a) whether the Commission can rule on issues of material fact in a contested settlement, and (b) what should be the proper standard of review for subsequent changes to the Settlement.

A. Issues of Material Fact

1. Positions of the Parties

71. Anadarko states that Rule 602(h)(1) provides that the Commission can decide the merits of contested settlement issues if: (a) the record contains substantial evidence upon which to base a reasoned decision, or (b) there is no genuine issue of material fact. Anadarko further states that the Commission's decision in *Trailblazer Pipeline Co. (Trailblazer)*⁵⁶ explains the approaches that the Commission may employ to rule on the merits of contested settlements. Although it describes all four of the *Trailblazer* approaches, Anadarko contends that only the first of those approaches is feasible in this case. According to Anadarko, under the first approach, the Commission can rule on material issues of fact in a contested settlement if there is an adequate record on which to base a decision.

72. Anadarko reiterates its arguments in favor of excluding intrastate costs and revenues from the pooling mechanism. Anadarko claims that neither the record in the Opinion No. 502 proceeding nor the record in the instant case addressed the threshold issue of whether any pooling on TAPS is consistent with the standards of ICA section 5(1).⁵⁷

⁵⁶ 85 FERC ¶ 61,345, at 62,341-342 (1998), *order on reh'g*, 87 FERC ¶ 61,110, *reh'g denied*, 88 FERC ¶ 61,168 (1999). Because the Commission is basing its decision on the first of the *Trailblazer* approaches, it will not address the applicability of the other three approaches in this order.

⁵⁷ Anadarko represents that the Opinion No. 502 hearing addressed the uniform rate issue but not pooling, while the hearing in this proceeding addressed how a pooling mechanism should be structured and implemented but not whether any pooling satisfies the standards of ICA § 5(1). *See BP Pipelines (Alaska) Inc.* 127 FERC ¶ 61,316, at P 29 (2009).

73. The Remaining Carriers also repeat arguments addressed above in this order. The Remaining Carriers further contend that the Commission previously recognized that cost pooling had a greater impact on the TAPS Carriers than any other participants and determined that “the TAPS Carriers ... are in a better position to work out the details of such an arrangement themselves.”⁵⁸ Moreover, continue the Remaining Carriers, the Commission also has recognized that it is not necessary to require the TAPS Carriers to amend the TAPS Operating Agreement in order to impose pooling. The Remaining Carriers urge the Commission to allow them to determine whether revisions to their governing documents are appropriate. Additionally, the Remaining Carriers urge the Commission not to limit the term of the Pooling Agreement to five years.

74. Trial Staff argues that the Commission actually has three options under the first *Trailblazer* approach. First, states Trial Staff, the Commission could reject the Pooling Agreement and issue a determination on the merits based on the record developed on the pooling issues. Second, continues Trial Staff, the Commission could adopt the Pooling Agreement as the merits resolution of the pooling issues. Finally, Trial Staff maintains that the Commission could modify the Pooling Agreement and adopt that finding as the disposition on the merits of the pooling issues.

75. Trial Staff acknowledges that, during the litigation phase of this proceeding, it opposed pooling any of the cost elements at issue. However, Trial Staff now believes that the Pooling Agreement represents an acceptable merits resolution of the pooling issues. In particular, Trial Staff contends that the Settlement will not change the process or otherwise intrude on the RCA’s jurisdiction to establish TAPS intrastate rates based on the individual costs-of-service of each of the Remaining Carriers.

76. However, Trial Staff agrees with Anadarko and Tesoro that the consequences of the significant changes in TAPS ownership and throughput characteristics are impossible to predict at this point. Therefore, Trial Staff states that a review of the impact of these changes on the competitive environment on TAPS in five years could be a reasonable condition for Commission to adopt in approving the Pooling Agreement.⁵⁹

⁵⁸ *BP Pipelines (Alaska) Inc.*, 127 FERC ¶ 61,317, at P 42 (2009).

⁵⁹ Trial Staff states that the Commission accepted similar language in a previous settlement relating to TAPS. *BP Pipelines (Alaska) Inc.*, 131 FERC ¶ 61,003, at P 8 (2010). However, Trial Staff also points out that the Commission

(continued...)

2. Commission Analysis

77. The Commission will approve the Pooling Agreement without modification under the first of the *Trailblazer* approaches and in accordance with section 602(h)(1) of the Commission's Rules and Regulations.⁶⁰ The record developed in this proceeding and extensively analyzed by the ALJ in the ID contains substantial evidence upon which the Commission can base a reasoned decision that the Pooling Agreement is just and reasonable on the merits. The Commission has rejected the arguments of Anadarko and Tesoro, as discussed in previous sections of this order. The Commission also has found above that the voluntary, prospective Pooling Agreement excludes more costs from the pool than the ALJ determined to be sufficient to promote competition. Finally, the Commission finds that the criticism of the 1985 TAPS Settlement's TSM and the Opinion No. 502 series of orders represent collateral attacks on those orders, and the Commission rejects arguments challenging those orders as well.

78. As stated above, the Commission will not impose a five-year term on the Pooling Agreement. To modify the agreement would change the expectations of the Remaining Carriers, prevent closure of this proceeding, and provoke additional litigation that may be unnecessary.

B. Standard of Review for Future Changes

79. The Settlement provides that the standard of review for any modification to the Settlement Agreement and the Pooling Agreement by the Commission acting *sua sponte* or proposed by a third party shall be the most stringent standard permissible under applicable law.

1. Positions of the Parties

80. Anadarko states that the language proposed by the Remaining Carriers creates uncertainty and could lead to future disputes. Anadarko also argues that this language is inconsistent with the standard of review contained in two recent

accepted the ordinary "just and reasonable" standard in another order approving a TAPS settlement. *BP Pipelines (Alaska), Inc.*, 141 FERC ¶ 61,243, at P 6 (2012).

⁶⁰ 18 C.F.R. § 385.602(h)(1) (2012).

settlements involving TAPS or its feeder lines.⁶¹ Anadarko maintains that the language of the two prior settlements is clearer, is consistent with Commission precedent, and should be adopted rather than the language proposed by the Remaining Carriers.

81. Trial Staff acknowledges that the Commission previously has approved similar settlement language submitted in at least one TAPS proceeding. However, Trial Staff states that it is unaware of any case in which the Commission has discussed the application of “the most stringent standard of review” to an agreement submitted under the ICA. Trial Staff does not seek Commission revision of this language, stating that, in the context of this proceeding, the language does not appear to conflict with the ICA, even though the practical meaning of the term, the “most stringent standard permissible under applicable law” has not heretofore been interpreted or determined in a proceeding under the ICA.

2. Commission Analysis

82. The Commission will accept the standard of review provision of the Settlement, as proposed by the Remaining Carriers. In doing so, the Commission is not determining how this standard of review language would be interpreted and applied in any future oil pipeline proceeding. The Commission has determined that the record in this proceeding supports its approval of the component parts of the Settlement,⁶² and in this context, the standard of review provision included in the Settlement is reasonable as well.

⁶¹ Anadarko cites *BP Pipelines (Alaska), Inc.*, 141 FERC ¶ 61,243, at P 6 (2012); *Kuparuk Transportation Co.*, 136 FERC ¶ 61,102, at P 4 (2011).

⁶² 18 C.F.R. § 385.602(1)(i) 2012.

The Commission orders:

As discussed in the body of this order, the Commission approves the three agreements of the Settlement without modification.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.