

125 FERC ¶ 61,215
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeem G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

BP Pipelines (Alaska) Inc.	Docket No. IS05-82-004
	Docket No. IS05-82-005
ConocoPhillips Transportation Alaska Inc.	Docket No. IS05-80-004
	Docket No. IS05-80-005
ExxonMobil Pipeline Company	Docket No. IS05-72-004
	Docket No. IS05-72-005
Koch Alaska Pipeline Company LLC	Docket No. IS05-96-004
	Docket No. IS05-96-005
Unocal Pipeline Company	Docket No. IS05-107-003
	Docket No. IS05-107-004
State of Alaska	Docket No. OR05-2-003
v.	Docket No. OR05-2-004
BP Pipelines (Alaska) Inc.	
ExxonMobil Pipeline Company	
ConocoPhillips Transportation Alaska, Inc.	
Unocal Pipeline Company	
Koch Alaska Pipeline Company	
Anadarko Petroleum Corporation	Docket No. OR05-3-014
v.	Docket No. OR05-3-015
TAPS Carriers	
BP Pipelines (Alaska) Inc.	Docket No. OR05-10-003
	Docket No. OR05-10-004
BP Pipelines (Alaska) Inc.	Docket No. IS06-70-002
	Docket No. IS06-70-003
ExxonMobil Pipeline Company	Docket No. IS06-71-002
	Docket No. IS06-71-003
ConocoPhillips Transportation Alaska, Inc.	Docket No. IS06-63-002
	Docket No. IS06-63-003
Unocal Pipeline Company	Docket No. IS06-82-002
	Docket No. IS06-82-003

Koch Alaska Pipeline Company

Docket No. IS06-66-002

Docket No. IS06-66-003

Anadarko Petroleum Corporation

Docket No. OR06-2-002

v.

Docket No. OR06-2-003

TAPS Carriers

ORDER ON REHEARING AND COMPLIANCE

(Issued November 20, 2008)

1. This matter involves the interstate rates for the Trans Alaska Pipeline System (TAPS). On June 20, 2008, the Commission issued Opinion No. 502,¹ an order on exceptions to an Initial Decision (ID)² issued on May 17, 2007, by the presiding Administrative Law Judge (ALJ) concerning the TAPS Carriers'³ 2005 and 2006 interstate rate filings for TAPS. The ID found that the proposed interstate rates for 2005 and 2006 are not just and reasonable, determined the components for establishing the rates for 2005 and 2006 and ordered limited refunds. Opinion No. 502 affirmed the ALJ on all issues, but clarified and modified the ALJ on certain issues. The Commission also directed the TAPS Carriers to make a compliance filing establishing rates for the years in question. The TAPS Carriers, BP Pipelines (Alaska) Inc. (BP), and Williams Alaska Petroleum Inc. (Williams) filed requests for rehearing of Opinion No. 502. The Commission grants in part and denies in part the requests for rehearing, and requires further action by the TAPS Carriers.

¹ *BP Pipelines (Alaska) Inc.*, 123 FERC ¶ 61,287 (2008) (Opinion No. 502).

² *BP Pipelines (Alaska), Inc.*, 119 FERC ¶ 63,007 (2007). On May 31, 2007, the ALJ issued an errata to the ID with changes to certain items. *See BP Pipelines (Alaska), Inc.*, 119 FERC ¶ 63,008 (2007). We will refer to both as the ID.

³ The TAPS Carriers consist of BP Pipelines (Alaska) Inc., ConocoPhillips Transportation Alaska, Inc., ExxonMobil Pipeline Company, Koch Alaska Pipeline Company, LLC, and Unocal Pipeline Company.

2. On July 21, 2008, the TAPS Carriers submitted a compliance filing. Flint Hills Resources Alaska LLC (Flint Hills) filed comments and a motion for clarification, and Anadarko Petroleum Corporation (Anadarko) and the State of Alaska (State) protested the compliance filing. The Commission accepts the TAPS Carriers' compliance filing, as discussed below.

I. Background

3. Crude oil streams produced from different fields on the Alaska North Slope are commingled into a common stream and shipped to market in a single pipeline, the Trans Alaska Pipeline System or TAPS. The crude petroleum from the Alaska North Slope (ANS crude) is injected into TAPS at Pump Station No. 1. Return streams from three refineries alongside TAPS are also commingled into TAPS. The common stream is delivered at the southern terminus, the Valdez Marine Terminal (Valdez).

4. ANS crude began flowing on TAPS in 1977, and protracted litigation ensued over initial rates until 1985. In 1985, six of the then eight owners⁴ entered into a settlement agreement (TAPS Settlement or TSA), which established the TAPS Settlement Methodology (TSM). The TSA provided for the use of the TSM to establish the interstate rates to charge shippers on TAPS until the year 2011, i.e., the estimated remaining useful life of the pipeline.

5. The TSA set the amount of the rates and refunds until 1985. Rates would then be set on an annual basis under the TSM provisions governing, among other things, rate base, depreciation and taxes. The financial impact of the TSA was to "front-end load" the rates in the early pre-settlement years, and to provide for diminishing rates commencing with the rates filed under the TSA in December 1985.

6. The TSA was challenged by several parties, including the two remaining TAPS owners.⁵ The Commission severed the protesting parties, approved the TSA as uncontested, concluded that the TSA was fair and reasonable and in the public interest, declined to impose the terms of the TSA on the non-settling parties

⁴ As a result of mergers and consolidation, there are now five owners of TAPS.

⁵ The two remaining TAPS owners were Amerada Hess Pipeline Corporation and Sohio Pipe Line Company.

and set their protests for hearing.⁶ The two remaining TAPS owners subsequently joined the TSA.

7. After the hearing, the Commission found that no party was aggrieved by its approval of the TSA, and terminated the rate proceedings. The Commission, however, observed that, “since the settlement rates were never adjudicated to be just and reasonable,” a non-party to the TSA could protest a proposed change in rate in the TAPS Carriers’ subsequent rate filings.⁷ The U.S. Court of Appeals for the District of Columbia Circuit affirmed the Commission’s rulings emphasizing that approval of the TSA “did not in any manner determine that the rates established under it are (or will be) just and reasonable.”⁸

8. The TSA expires by its terms as of December 31, 2011. However, under Section I-8 of the TSA any party may terminate the TSA as of January 1, 2009, provided it gives notice by January 1, 2007, of that party’s intent to renegotiate and no new agreement was reached during the two-year renegotiation period. On January 1, 2007, the State exercised its right to commence negotiations regarding a replacement agreement. To date, the parties have not negotiated a new agreement.

9. In December 2004, the TAPS Carriers filed their interstate rates for 2005.⁹ The filing increased the rates over the existing 2004 rates, which had not been protested. On December 15, 2004, the State filed a protest of the TAPS Carriers’ 2005 filed rates and a complaint with respect to the TAPS Carriers’ 2003 and 2004 filed rates (State’s 2005 Protest and Complaint). On December 16, 2004, Anadarko filed a protest and complaint (Anadarko’s 2005 Protest and Complaint) alleging the TAPS Carriers’ 2005 filed rates were unjust, unreasonable, and otherwise unlawful. Subsequently, Tesoro Petroleum Corporation (Tesoro) was

⁶ *Trans Alaska Pipeline System*, 33 FERC ¶ 61,064, *reh’g denied*, 33 FERC ¶ 61,392 (1985).

⁷ *See Trans Alaska Pipeline System*, 35 FERC ¶ 61,425, at 61,977 n.17 (1986).

⁸ *Arctic Slope Regional Corp. v. FERC*, 832 F.2d 158, 162 (D.C. Cir. 1987), *cert. denied*, 488 U.S. 868 (1988).

⁹ Each TAPS Carrier filed individual rates for services on that carrier’s share of capacity on TAPS.

granted intervention in both Anadarko's 2005 Protest and Complaint proceeding and the State's 2005 Protest and Complaint proceeding.¹⁰

10. Until 2005, no parties had protested the TAPS Carriers' interstate rate filings. However, there were disputes concerning the *intrastate* shipments of ANS crude in Alaska, which are regulated by the State and consist of approximately ten percent of the volumes of oil on TAPS. In 2002, the Regulatory Commission of Alaska (RCA) ordered the TAPS Carriers to follow a different methodology than the TSM to calculate TAPS' intrastate rates, which resulted in the TAPS Carriers filing intrastate rates substantially lower than the interstate rates.¹¹

11. On July 20, 2005, the TAPS Carriers filed a petition pursuant to section 13(4) of the Interstate Commerce Act (ICA) requesting the Commission to (1) investigate the 2005 intrastate rates imposed by the RCA, (2) find such intrastate rates unduly preferential and unjustly discriminatory against and an undue burden on interstate commerce, and (3) raise the 2005 intrastate rates to the level of the 2005 filed interstate rates.¹²

12. In December 2005, the TAPS Carriers filed their interstate rates for 2006. On December 14, 2005, Anadarko/Tesoro filed a joint protest and complaint of the

¹⁰ On December 1, 2006, the TAPS Carriers filed rates for 2007, and on November 30, 2007, the TAPS Carriers filed rates for 2008, as required by the TSA. The filings were protested. On December 28, 2006 and December 28, 2007, the Commission issued orders accepting and suspending both rate filings, making them effective January 1, 2007, and January 1, 2008, respectively, subject to refund. The Commission also ordered the proceedings regarding the 2007 and 2008 rates to be held in abeyance, subject to the outcome of the instant proceeding involving the 2005 and 2006 rates. *See BP Pipelines (Alaska) Inc.*, 117 FERC ¶ 61,352 (2006), and *Unocal Pipeline Company*, 121 FERC ¶ 61,300 (2007).

¹¹ On February 15, 2008, the Supreme Court of the State of Alaska affirmed the RCA's ruling that intrastate rates filed by the TAPS Carriers using the TSM were unjust and unreasonable and set just and reasonable rates based on cost-based ratemaking principles. *See Amerada Hess Pipeline Corporation v. Regulatory Comm'n of Alaska*, Opinion No. 6231, Alaska Supreme Court Case No. S-12231 (*Amerada Opinion*),

¹² The TAPS Carriers' July 20, 2005 Petition for the Commission to Investigate and Set Intrastate Rates and Motion to Consolidate Proceedings, Docket No. OR05-10-000.

TAPS Carriers' 2006 filed rates (Anadarko/Tesoro's 2006 Protest and Complaint), alleging that the 2006 rates were unjust, unreasonable, unduly discriminatory, and otherwise unlawful. On that same day, the State filed a protest of the TAPS Carriers' 2006 filed rates and a complaint with respect to the TAPS Carriers' 2004 and 2005 filed rates (State's 2006 Protest and Complaint). In its 2006 Protest and Complaint, the State alleged that the TAPS Carriers' 2006 filed rates (1) violated the unjust discrimination and undue preference provisions of sections 2 and 3(1) of the ICA, and (2) were inconsistent with the terms of the TSA.

13. Arctic Slope Regional Corporation (Arctic), Flint Hills, Williams, Petro Star Inc., ConocoPhillips Transportation Alaska Inc., and the RCA each moved to intervene in one or more of the proceedings described above.

14. Except to the extent that issues were withdrawn or severed, the foregoing protests and complaints and the TAPS Carriers' section 13(4) petition were consolidated and set for hearing.

15. On May 17, 2007, the ALJ issued an ID in this proceeding. The ALJ found that the TSM did not establish just and reasonable rates and, therefore, rejected the TAPS Carriers' 2005 and 2006 filed rates. In place of the TSM, the ALJ held that the TAPS Carriers' should calculate the rates for 2005 and 2006 in accordance with the methodology in *Farmers Union II*¹³ and Opinion 154-B.¹⁴ In applying this methodology, the ALJ determined the appropriate rate base, operating expenses, depreciation expenses, dismantlement, removal and restoration (DR&R) expenditures, return on investment, and income tax allowance. The ALJ required the TAPS Carriers to account for their DR&R expenditures and established a reasonable return on those funds, but declined to order refunds related to DR&R. The ALJ also found that that the TAPS Carriers should charge a uniform rate, effective January 1, 2005. The ALJ ordered refunds, but limited the refunds to the difference between the 2005 and 2006 proposed rates and the 2004 rates, which had not been protested. Finally, the ALJ found that the State's and the TAPS Carriers' petition to raise the intrastate rates was moot because the interstate rates developed in this proceeding are nearly the same as the RCA-approved intrastate rates.

16. On June 20, 2008 in Opinion No. 502, the Commission affirmed the rulings in the ID, clarified and modified the ALJ's determinations on certain issues, and

¹³ *Farmers Union Central Exchange, Inc. v. FERC*, 734 F.2d 1486 (D.C. Cir. 1984) (*Farmers Union II*).

¹⁴ *Williams Pipe Line Co.*, 31 FERC ¶ 61,377 (1985) (Opinion 154-B).

directed the TAPS Carriers to make a compliance filing establishing rates in compliance with the ID and Opinion No. 502.

II. Rehearing Requests

17. The TAPS Carriers, BP, and Williams filed requests for rehearing of Opinion No. 502. On August 5, 2008, Anadarko filed an answer to the TAPS Carriers and BP's rehearing requests. On August 14, 2008, BP filed a reply to Anadarko's answer. On August 15, 2008, the TAPS Carriers filed a response in opposition to Anadarko's answer. As a general matter, the parties request rehearing of the following issues: (1) the Commission's failure to grant refunds for DR&R expenditures; (2) the Commission's imposition of a uniform rate; (3) the Commission's use of the property balances and deferred return balances from the TAPS Carriers' December 2005 TSM filings; and (4) the Commission's approval of the proxy group used for the return on equity (ROE) determinations. The Commission grants in part and denies in part the requests for rehearing, as discussed below.

A. DR&R Refunds

1. Opinion No. 502

18. In affirming the ID, the Commission rejected Flint Hills' exceptions regarding refunds for DR&R expenses.¹⁵ Flint Hills argued that the DR&R funds were collected on an accelerated basis based on an assumed life of TAPS until 2011, and as a result, essentially all of the DR&R funds are collected, despite the fact that the life of TAPS now extends until 2034. Consequently, Flint Hills argues that in order to achieve intergenerational equity,¹⁶ half of the DR&R funds collected from past shippers should be refunded to them and collected from future shippers, otherwise future shippers will be subsidized by the payments of past shippers. The Commission declined to grant the refunds requested by Flint Hills, or any DR&R refunds, because it found that the final amount of DR&R costs are speculative.¹⁷ Thus, the Commission affirmed the ALJ's finding that at this point

¹⁵ Opinion No. 502 at P 162.

¹⁶ Intergenerational equity is the fair distribution of the costs and benefits of a long-lived project when those costs and benefits are borne by different generations' project users.

¹⁷ Opinion No. 502 at P 162.

in time, refunds for DR&R collections are premature.¹⁸ However, the Commission noted that this finding does not preclude the possibility of the Commission issuing refunds when such collections of DR&R are realized and quantified.¹⁹

2. Williams' Rehearing Request

19. Williams argues the Commission erred by failing to address the principle of intergenerational equity and its applicability to this proceeding. Williams states the Commission's rejection of Flint Hills' proposal was not based on an examination of the principle of intergenerational equity, but was based on the premise that the DR&R costs to be incurred at the end of TAPS' economic life are speculative. Williams argues all of the DR&R funds were paid by the TAPS shippers during the first half of the economic life of TAPS. Williams argues that as a result, shippers during the second half of TAPS' economic life will not have to pay DR&R costs they should have incurred because all the costs were paid in the first half of the pipeline's economic life. Williams argues that, in effect, the DR&R payments of past shippers will subsidize future shippers. Williams argues that this subsidization is exactly what the principle of intergenerational equity is intended to prevent.²⁰ Williams contends that because the Commission failed to address the intergenerational equity issue in Opinion No. 502, its rejection of Flint Hills' proposal is arbitrary and capricious and not based on reasoned decision making.

20. To achieve intergenerational equity, Williams advocates that one-half of the approximately \$1.5 billion in DR&R costs already collected plus the interest earned thereon should be returned to the shippers who paid it and commencing in 2007 and thereafter through 2034, the TAPS Carriers should collect from their shippers the one-half of the DR&R funds reimbursed to the TAPS 1977-2004

¹⁸ *Id.* P 161.

¹⁹ *Id.*

²⁰ Williams cites *Boston Edison Co.*, 34 FERC ¶ 63,023 (1986) (*Boston Edison*) (stating that a nuclear power plant's decommissioning cost estimates should ensure that such costs are spread equitably over today's and tomorrow's customers); *Trunkline Gas Co.*, 33 FERC ¶ 61,069 (1985) (*Trunkline*) (finding that in order to achieve intergenerational equity, a past shipper should participate in a settlement which required a pipeline to grand refunds for past purchases).

shippers.²¹ Williams argues this proposal would result in the TAPS Carriers having more than sufficient funds to meet their own estimated \$2.63 billion DR&R obligation. Williams also points out that even the TAPS Carriers' witness recognized that the proposed intergenerational equity reimbursement approach is mathematically feasible.²²

21. Williams further argues its proposal is not a true refund in the ordinary meaning of the word "refund" in a ratemaking context because a refund is usually when a pipeline is ordered to pay back to shippers the over-collection of money with interest. Williams states that with a true refund a pipeline owner must divest itself of the refund amount forever. Williams states that is not what it is advocating here because under its proposal, the TAPS Carriers will eventually recoup from future shippers enough money to pay for their DR&R expenses.

22. Finally, Williams argues that in order to give effect to its proposal, the absolute DR&R costs need not be known at this time. Williams explains that in Opinion No. 502 the Commission in effect found that the approximately \$1.5 billion of DR&R funds collected to date is the appropriate amount of principal DR&R funds that the TAPS Carriers need to collect in their rates before the end of TAPS in 2034.²³ Thus, Williams contends knowing the final amount of the TAPS Carriers' DR&R expense is not necessary. Williams argues the TAPS Carriers supported their total estimated DR&R expense number with record evidence and, therefore, this situation is different from other cases where the Commission had declined to consider intergenerational equity arguments.²⁴

²¹ Williams states its proposal modifies Flint Hills' proposal such that the entire one-half of the collected DR&R principal, plus the interest earned thereon, would be returned all at once to the 1977-2004 TAPS shippers, and not on a monthly basis as the TAPS Carriers receive the money from future TAPS shippers.

²² Williams cites Tr. 682-685 (Toof).

²³ Williams cites Opinion No. 502 at P 142.

²⁴ Williams distinguishes the instant proceeding from the Commission's decision in *Iroquois Gas Transmission System, L.P.*, 86 FERC ¶ 61,261, at 61,944 (1999) (*Iroquois*) (recognizing the principle of intergenerational equity, but denying the pipeline's request because it did not provide sufficient evidence to support its proposed negative salvage rate).

23. In addition, Williams asserts that implementing the required principle of intergenerational equity is administratively feasible, especially in light of the DR&R expense information the Commission directed the TAPS Carriers provide.²⁵ Williams contends the amount of DR&R collected on TAPS and the earnings thereon will be known at the latest in 2009 when the TAPS Carriers file their next FERC Form 6s. Williams further states that the Commission can direct the TAPS Carriers to provide the required information at an earlier date in a compliance filing.

3. Discussion

24. The Commission denies Williams' request for rehearing on the issue of DR&R refunds and intergenerational equity. Williams' request for refunds violates the rule against retroactive ratemaking. The DR&R costs that Williams and all other TAPS shippers paid were a component of the TAPS' filed rates during that period. In making the intergenerational equity argument, Williams is essentially asserting that these rates were unjust and unreasonable. However, under the rule against retroactive rate making, the Commission is prohibited from adjusting current rates to make up for a utility's over or under collection in prior periods.²⁶ If the Commission issued refunds to Williams to make up for past DR&R expenses, this is precisely what it would be doing.

25. When Williams chose to become a shipper on TAPS, it did so with knowledge of the assumptions underlying the TSM rates. This includes the expected useful life of the pipeline and the assumption that the recovery of DR&R costs, which were based that estimate, would cease at that time. The fact that the situation on the TAPS changed, and the life of the pipeline was extended, does not give the Commission the authority to retroactively change the rates the TAPS Carriers paid prior to that decision. If the converse of the situation occurred, so that the original estimate of DR&R expenses was too low and the TAPS Carriers established a higher rate going forward to make up for this, the shippers who had paid the lower rate would not be required to pay more to achieve intergenerational equity.

26. Further, the cases Williams cites do not support its proposal. Williams states that in the *Iroquois* case, the Commission recognized the importance of the principle of generational equity and only declined to permit the pipeline to charge

²⁵ Williams cites the ID at P 169 and Opinion No. 502 at P 21, 163.

²⁶ *Arkansas Louisiana Gas Co.*, 453 U.S. 571, 578 (1981); *Columbia Gas Transmission Corp. v. FERC*, 831 F.2d 1135, 1139-42 (D.C. Cir. 1987).

its proposed negative salvage rate (which Williams argues is analogous to DR&R expenses) because it did not provide sufficient evidence to support the rate.²⁷ This is not analogous to the situation here because the pipeline in *Iroquois* was simply asking the Commission to approve a negative salvage rate that it would charge on a prospective basis. It was not asking the Commission to retroactively change a rate by issuing refunds to past customers and imposing that amount on future customers, as Williams is here.

27. In *Boston Edison*, also cited by Williams, a utility sought Commission approval of its decommissioning cost estimates for a nuclear power plant that would not be decommissioned for several years.²⁸ In reviewing these estimates, the Commission stated that the costs should be “spread equitably over today’s and tomorrow’s customers.”²⁹ The Commission agrees that this is an important consideration when establishing decommissioning costs or DR&R expenses. In fact, this is exactly what the TAPS Settlement intended by imposing the cost of the decommissioning TAPS on ratepayers at the very outset of TAPS’ operation, rather than waiting until a later period to impose that cost on ratepayers.

28. Williams also cites the *Trunkline* case, where the Commission required a customer who had paid overcharges, but was no longer a customer, to share in the refunds the pipeline was making because of its wrongful past purchasing practices where a settlement provided for refunds in the form of reduced future rates to customers.³⁰ The Commission found it was unfair to deny that customer its share of the refunds because it was no longer a customer. That ruling has no application to the instant proceeding because the refunds in *Trunkline* were given as part of a settlement and did not involve the Commission changing past rates, as Williams seeks to do here.

29. In any event, even if the request for refunds did not violate the filed rate doctrine, the Commission declines to issue DR&R refunds at this time due to the unsettled nature of the final DR&R costs. The actual DR&R expenses will not be known until the end of the life of the pipeline and refunds, if any, should not be granted until all final costs are known.

²⁷ *Iroquois*, 86 FERC ¶ 61,261, at 61,944.

²⁸ *Boston Edison*, 34 FERC ¶ 63,023, at 65,076.

²⁹ *Id.*

³⁰ *Trunkline*, 33 FERC ¶ 61,069, at 61,154.

30. For the foregoing reasons, the Commission denies the request for rehearing on this issue.

B. Uniform Rate

1. Opinion No. 502

31. In Opinion No. 502, the Commission affirmed the ALJ's decision that rather than setting rates on an individual TAPS Carrier basis, the TAPS Carriers should charge a uniform rate.³¹ The ALJ concluded that using a uniform rate would be just and reasonable because it would result in several advantages. For example, rates would require adjustment only when total throughput on TAPS changes. Further, the ALJ found that employing a uniform rate is reasonable because, among other things, it results in a rate that is more representative of the cost to ship a barrel of oil on TAPS. In affirming the ALJ's decision, the Commission also relied on the ALJ's finding that all of the TAPS Carriers provide identical interstate transportation service, regardless of which carrier's space is used. The Commission further concluded that a uniform rate was appropriate because the TAPS Carriers have essentially the same cost of service, given that virtually all of the costs of operation are allocated to the TAPS Carriers in proportion to their ownership.

32. In response to the TAPS Carriers argument that a uniform rate violates the ICA, the Commission found that nothing in the statute prevents the Commission from setting a uniform rate for identical service, as long as the uniform rate is just and reasonable. The Commission further noted that the Commission regulates other oil pipelines in Alaska (e.g. Kuparuk Transportation Company and Endicott Pipeline Company) and these oil pipelines, regardless of the ownership structure, use a uniform rate and do not establish separate rates for each owner. In addition, the Commission stated that a uniform rate would be consistent with the RCA's requirement of a uniform rate for TAPS intrastate rates. The Commission also rejected the TAPS Carriers' argument that setting a uniform rate would violate the Sherman Anti-Trust Act. The Commission thus affirmed the ALJ's finding that the TAPS Carriers' filing of individual rates results in unjust and unreasonable rates.

33. The Commission recognized parties' concerns that there may be under-recovery associated with a uniform rate, but found that the pooling mechanism in the TSA could address these concerns. The Commission explained that a pooling mechanism was approved by the Commission in its first order approving the TSA,

³¹ Opinion No. 502 at P 242.

and that it will remain in effect for as long as the TSA continues. The Commission stated there is nothing precluding the Commission from requiring that, as part of the process of establishing just and reasonable rates, the TAPS Carriers continue to make revenue adjustments based on actual usage pursuant to a pooling mechanism. The Commission also noted that at least one of the large interest owners in TAPS, BP, stated that it would not oppose a uniform rate if an acceptable Commission-approved pooling arrangement was put into place to address over-and under-recovery.

2. The TAPS Carriers' Rehearing Request

34. The TAPS Carriers assert that Commission erred as a matter of law in imposing a uniform rate. The TAPS Carriers argue that requiring a uniform rate disregards the TAPS Carriers' rights under the ICA to file individual tariffs and to seek to recover their individual costs of service pursuant to their own rate filings. The TAPS Carriers disagree with the Commission's finding that "nothing in the ICA prevents the Commission from setting a uniform rate for the identical service, as long as the uniform rate is just and reasonable,"³² and argue the Commission may not infer authority to regulate simply because there is an absence of any contrary statutory provision.

35. The TAPS Carriers further contend that the ICA makes clear the Commission cannot impose a uniform rate. The TAPS Carriers cite section 6(1) of the ICA, which provides that "[e]very common carrier" must file a tariff with the Commission "showing all rates, fares, and charges for transportation."³³ In support of their position, the TAPS Carriers cite the U.S. Supreme Court's statement in the *Georgia* case that the ICA "was designed to preserve private initiative in rate-making as indicated by the duty of *each* common carrier to initiate *its own rates*."³⁴ The TAPS Carriers contend that here, each TAPS Carrier is a separate pipeline company operating as a common carrier and each has functioned in that manner for the past thirty years. The TAPS Carriers state that as such, each TAPS Carrier is both entitled, and in fact, required by law to file its own rates and seek recovery of its cost of service through those rates.

³² Opinion No. 502 at P 244.

³³ 49 U.S.C. App. § 6(1) (1977).

³⁴ *Georgia v. Pa. R.R. Co.*, 324 U.S. 439, 459 (1945) (emphasis added) (*Georgia*).

36. The TAPS Carriers contend when a party proposes to change an established ratemaking practice, as the protestors sought to do here, they bear the burden of proving not only that the established practice violates the ICA, but also that the proposed replacement practice is just and reasonable.³⁵ The TAPS Carriers argue the protestors made no such showing here. The TAPS Carriers assert that on the contrary, the replacement uniform rate is unjust and unreasonable because some carriers will consistently over-recover their costs as a result of the uniform rate, while others will consistently under-recover their costs.

37. The TAPS Carriers argue that in adopting the uniform rate, the Commission assumed all TAPS Carriers (1) have the same costs, and (2) will transport volumes equal to their ownership shares of the pipeline. The TAPS Carriers assert both assumptions are not true. The TAPS Carriers explain that although under the TAPS Operating Agreement the TAPS Carriers allocate many costs of operation in proportion to their ownership shares, other costs are not allocated in that manner. The TAPS Carriers further assert that under current and foreseeable operating conditions, each carrier's share of system-wide throughput does not match its ownership share of the pipeline's capacity. The TAPS Carriers argue for these reasons, a uniform rate will result in certain carriers over-recovering their costs and other carriers under-recovering their costs. The TAPS Carriers illustrate this outcome with a number of examples.³⁶

38. The TAPS Carriers further assert there is no rate mechanism in place to either prevent this situation from occurring, or correct it once the unjust and unreasonable rates have been realized. The TAPS Carriers argue the Commission's reliance on pooling as a means of addressing the deficiencies in its uniform rate approach is misplaced. The TAPS Carriers argue the Commission cannot impose a mechanism that produces unjust and unreasonable rates and then impose on the TAPS Carriers the requirement to address the unjust and unreasonable rates through other means.

39. Moreover, the TAPS Carriers argue that even if the uniform rate scheme produced just and reasonable rates, it is indefensible for the Commission to require a carrier that has collected its revenues from its just and reasonable rates to transfer a portion of its revenues to another carrier who has also collected revenues from its own just and reasonable rate. The TAPS Carriers contend that under this

³⁵ The TAPS Carriers cite *Robin Pipeline Co. v. FERC*, 795 F.2d 182, 186-87 (D.C. Cir. 1986); *Amerada Hess Pipeline Corp.*, 64 FERC ¶ 63,008, at 65,026 (1993).

³⁶ See the TAPS Carriers' July 21, 2008 Request for Rehearing at 8-11.

approach, the carrier that receives revenues through the pooling mechanism would end up with revenue above the level it collected from its just and reasonable rate, and the carrier that pays revenues to another carrier would end up with revenues below the level it collected from its just and reasonable rate. The TAPS Carriers state the net result is that neither carrier ultimately collects a just and reasonable rate. The TAPS Carriers also argue this result is confiscatory in that it deprives a carrier of its right to recover its costs without just compensation in violation of the Fifth Amendment of the Constitution.

40. The TAPS Carriers further contend the TSA pooling mechanism is deficient because it does not pool all of the TAPS Carriers' costs. Moreover, the TAPS Carriers point out that the TSA will in all likelihood expire at the end of this year since the State has triggered the TSA's termination process, after which time TAPS Carriers' voluntary cost pooling will end.

41. The TAPS Carriers contend the Commission was wrong in assuming it has the authority to require the common carriers to enter into a new pooling agreement to "make revenue adjustments based on actual usage." The TAPS Carriers state that under section 5(1) of the ICA, pooling is only allowed in limited circumstances and only where it is "assented to by all carriers involved."³⁷ The TAPS Carriers state that since presently pooling is only required through the TSA, should the TSA end, not all TAPS Carriers will have assented to pooling, and until such consent is given, the Commission is without authority to impose pooling.

42. The TAPS Carriers also take issue with the Commission's reliance on the fact that it "regulates other oil pipelines in Alaska and none of these oil pipelines establishes separate rates for each owner."³⁸ The TAPS Carriers assert that none of the pipelines cited by the Commission is a unified joint interest pipeline like TAPS, in which each owner holds an undivided ownership percentage share of the pipeline's capacity, separate and apart from the other owners.

43. The TAPS Carriers further argue that the fact that a uniform rate would be "consistent with the RCA's requirements" for intrastate rates is insufficient to justify the Commission's action. The TAPS Carriers state that consistency with the RCA's requirements does not provide a basis for a change in rate methodology or make the resulting rates just and reasonable. The TAPS Carriers also argue the Commission failed to give adequate consideration to the TAPS Carriers' concerns regarding the antitrust implications of a uniform rate, since they could be subject

³⁷ 49 U.S.C. App. § 5(1) (1977).

³⁸ Opinion No. 502 at P 245.

to anti-trust liability if they share non-public data regarding costs and throughput projections in developing a uniform rate for TAPS.

44. As a result, the TAPS Carriers request the Commission vacate its ruling on the uniform rate and find that the TAPS Carriers may file individual rates based on their individual costs and throughput.

3. BP's Rehearing Request

45. BP asserts the Commission erred because it did not require the TAPS Carriers to pool all TAPS revenues for any period for which the TAPS Carriers are required to calculate a uniform rate. BP argues that the current pooling mechanism in the TSA is an incomplete remedy to under-recovery because it allows a TAPS Carrier to recover only a portion of the revenues it needs to cover its costs. BP argues that unless the Commission orders full revenue pooling to accompany the uniform rate, carriers like BP, whose ownership share of TAPS exceeds its percentage of TAPS' total throughput, will be subject to chronic under-recovery of Commission-allowed revenues.

46. BP further argues the TSA's revenue pooling mechanism is insufficient because it will remain in effect only as long as the TSA is in effect. BP explains this is problematic because since the State has triggered the TSA termination process and TSA is likely to terminate at the end of 2008. BP argues that for as long as the TAPS Carriers are required to calculate a uniform rate, the Commission must require the TAPS Carriers to pool revenues, even after the termination of the TSA. Moreover, BP argues the Commission should require the TAPS Carriers to pool all TAPS revenues, and reallocate them in a manner that would provide each TAPS Carrier the opportunity to recover its share of costs.

4. Anadarko's Answer

47. Anadarko argues that the TAPS Carriers fail to provide any justification for granting rehearing on the issue of a uniform rate for TAPS. Anadarko argues that since the TAPS Carriers already have an effective pooling agreement in place, the concerns about under-recovery of costs are premature and not ripe for decision in this rate proceeding.

48. Anadarko further argues that the ownership adjustments among the TAPS Carriers necessary to reflect the differences between the percentage of ownership and the percentage of actual use do not prevent imposing a uniform rate. Anadarko contends that the mathematical examples offered by the TAPS Carriers do not support their position because ownership adjustments are necessary regardless of whether there is a uniform rate or individual rates. Anadarko states that such adjustments are both routine and necessary anytime there are multiple

owners of a pipeline. Anadarko explains that typically, these ownership adjustments are made within the balancing provisions of an operating agreement, but in the case of TAPS Carriers, those adjustments are made within the context of the TSA's pooling agreement.

49. Anadarko agrees with the Commission that virtually all the costs of operation of the pipeline are allocated to the TAPS Carriers in proportion to their ownership, and so the TAPS Carriers have essentially the same cost of service. Anadarko states the only other cost items claimed by the TAPS Carriers are Alyeska's³⁹ fuel and gas needs and the TAPS Carriers' "owner direct costs." With respect to Alyeska's fuel and gas needs, Anadarko contends that fuel and gas are provided by the affiliates of the TAPS Carriers in proportion to the TAPS Carriers' ownership percentages. With respect to "owner direct costs," Anadarko asserts that the total of these costs claimed by the TAPS Carriers in 2004 was \$24.26 million,⁴⁰ an amount Anadarko argues is insignificant when compared to the TAPS total revenue requirement in 2004 of \$647 million.⁴¹

50. As to the TAPS Carriers' anti-trust concerns, Anadarko contends they are vague and undefined. Anadarko notes that the TAPS Carriers now exchange information on costs through the Owners' Committee for Alyeska in order to operate TAPS.

5. The TAPS Carriers' Response

51. TAPS Carriers reiterate that the Commission's uniform rate regime will result in some TAPS Carriers under-recovering their costs while other TAPS Carriers will over-recover their costs. The TAPS Carriers argue this is because the TAPS Carriers do not have the same costs, and a uniform rate will cause any TAPS Carrier with above-average costs to under-recover its cost of service. As to Anadarko's contention that the cost differences among carriers are relatively small, the TAPS Carriers respond that this in no way justifies depriving the TAPS Carriers of their ability to recover these costs.

³⁹ TAPS is operated by the TAPS Carriers' agent, Alyeska. Alyeska's fuel and gas needs are provided by the affiliates of the carriers in proportion to that carrier's ownership percentages. Each carrier buys most of this gas from its production affiliate at prices that vary from one carrier to another.

⁴⁰ Anadarko cites Ex. A/T-20, at 21, Sch. 11-B.

⁴¹ Anadarko cites the ID at P 85, Illus. 1, ln. 12.

52. The TAPS Carriers further argue Anadarko's reliance on pooling is tantamount to an admission that a uniform rate, without a subsequent adjustment, cannot produce just and reasonable rates for each TAPS Carrier.

53. The TAPS Carriers contend that their antitrust concerns are real, despite Anadarko's characterization of them as vague. The TAPS Carriers state that the suggestion that there must not be a serious antitrust issue here because the TAPS Carriers' intrastate rates under the RCA are already governed by a uniform rate is misleading. The TAPS Carriers explain that to date no TAPS Carrier has sought to file a new intrastate rate under that RCA methodology.

6. BP's Response

54. BP asserts that the pooling issue is ripe for decision because the losses it will incur are real and imminent. BP states that if it must charge a uniform rate and the Commission does not order complete pooling, BP stands to fall short of recovering its cost of service by millions of dollars a year once the TSA is terminated.

7. Discussion

55. The Commission finds that requiring the TAPS Carriers to charge a uniform rate is just and reasonable and denies parties' requests for rehearing of this issue. However, the Commission grants the parties' rehearing requests on the pooling issue and directs the TAPS Carriers to amend their operating agreement to include a pooling mechanism, as discussed below.

56. Prior to this proceeding, each of the TAPS Carriers charged individual rates on TAPS. On rehearing, the TAPS Carriers argue that in order to change this established practice and institute a uniform rate, the protestors bear the burden of proving the old method is unjust and unreasonable and that the proposed replacement method is just and reasonable. In Opinion No. 502, the Commission found that the protestors met their burden and demonstrated that charging individual rates on TAPS resulted in unjust and unreasonable rates and the Commission affirms that finding here.⁴² As the ALJ stated in the ID, upon examination, the differences in the rates of the various TAPS Carriers are largely subjective and not related to the differences in the cost of providing service. In addition, the TAPS Carriers have failed to provide a reasonable explanation as to why their rates should vary significantly when their costs are virtually identical.

⁴² Opinion No. 502 at P 247.

The Commission finds this to be persuasive evidence that charging individual rates on TAPS is not just and reasonable.

57. The Commission also affirms its decision that a uniform rate scheme is a just and reasonable alternative to each TAPS Carrier charging an individual rate. In Opinion No. 502, the Commission explained that charging a uniform rate was just and reasonable because the TAPS Carriers use the same operator to provide the same service through the same pipeline facilities.⁴³ The Commission also explained that virtually all of the costs of operating TAPS are allocated in proportion to the TAPS Carriers' ownership, and therefore, the TAPS Carriers essentially have the same cost of service. Under these circumstances, the Commission finds that the imposition of a uniform rate is appropriate.

58. The TAPS Carriers argue that the fact that nothing in the ICA prohibits the Commission from setting a uniform rate is not a basis for concluding that the Commission has such authority. The Commission has concluded that the uniform rate is a just and reasonable rate under the circumstances present here, namely, that TAPS Carriers provide the same service, and basically have the same cost of service. The TAPS Carriers argue that by law each carrier is required to file its own individual rate. However, nothing in the ICA requires that each tariff must be different. In fact, as the ID pointed out, section 6(1) of the ICA contemplates a tariff filing under a joint rate.⁴⁴ Therefore, requiring the TAPS Carriers to charge a uniform rate does not violate the ICA.

59. In addition, the authority cited by TAPS Carriers, the *Georgia* case, clearly does not mandate that common carriers must have individual tariffs. The issue there was not the right to file individual rates, but whether the State of Georgia could bring a suit alleging that the joint rate filed was in restraint of trade and discriminatory against the State of Georgia.⁴⁵

60. The TAPS Carriers argue that the Commission erred when it noted that it regulates other oil pipelines in Alaska and none of these oil pipelines establishes separate rates for each owner because none are jointly-owned. The TAPS Carriers are mistaken. The Commission does regulate pipelines in Alaska that are jointly owned, including Alpine Transportation Corporation, a general partnership with

⁴³ *Id.* P 242.

⁴⁴ ID at P 251, n.182.

⁴⁵ *Georgia*, 324 U.S. at 459.

two partners,⁴⁶ and Kuparuk Transportation Company, a pipeline owned by the pipeline subsidiaries of four oil producers.⁴⁷

61. The TAPS Carriers' argument that the anti-trust concerns are real because the uniform rate requires consultation among the carriers has no merit. As Anadarko notes, the TAPS Carriers now exchange information on costs through the Owners' Committee for Alyeska in order to operate TAPS and will continue to exchange such information under the uniform rate.

62. On rehearing, parties express concerns regarding possible under- or over-recoveries if a uniform rate is imposed. In Opinion No. 502, the Commission recognized the potential problem of the under- or over-recovery of costs under a uniform rate.⁴⁸ However, the Commission concluded this concern could be addressed through a pooling mechanism. The Commission further noted the TSA contains a provision permitting pooling, which provides:

(B) If a TAPS Carriers' Composite Ownership Share for a year exceeds its Barrel-Mile Share for a year, that TAPS Carrier shall be entitled to receive from the Agent an amount determined by multiplying (1) the difference between the TAPS Carrier's Composite Ownership Share and its Barrel-Mile by (2) the sum of the costs in subparagraphs (A)(1) through (A)(4) above.⁴⁹

63. BP argues the pooling mechanism in the TSA would not adequately address their concerns because it pools only a portion of total TAPS revenues. BP and the TAPS Carriers also argue that the pooling agreement in the TSA is insufficient because it will become ineffective upon termination of the TSA, which is likely to happen on January 1, 2009.

64. We find merit in BP's contention that if a uniform rate is required, there must be pooling of revenues because costs are allocated on the ownership share,

⁴⁶ *Alpine Transp. Co.*, 97 FERC ¶ 63,001, at 65,001 (2001).

⁴⁷ *Kuparuk Transp. Co.*, 55 FERC ¶ 61,122, at 61,363 (1991).

⁴⁸ Opinion No. 502 at P 248.

⁴⁹ Section II-2(f)(ii)(B) of the TSA. Section II-2(f)(ii)(A) provides for the converse, namely when a TAPS Carrier's ownership share is less than the Barrel-Mile share, the TAPS Carrier is required to make payment to the Agent.

but throughput is not necessarily equal to that share. When TAPS was running at full capacity each carrier was entitled to its ownership percentage share of capacity and, thus, each carrier's throughput percentage was the same as its share of the cost. However, this no longer is true. As BP points out, in the past years the TAPS Carriers' ownership shares have varied from their throughput shares, and this may continue in the future, absent the pooling of all revenue.

65. The TAPS Carriers dispute that the Commission has authority to require the carriers to enter into a new pooling arrangement to make revenue adjustments based on actual usage. The TAPS Carriers state that the ICA permits pooling only when "assented to by all the carriers involved," and there is no assurance that all the TAPS Carriers would agree to a new pooling mechanism once the TSA expires.

66. The TAPS Carriers' reliance on section 5(1) of the ICA as a bar to the Commission's action to require pooling is misplaced. The original section 5(1) of the ICA forbade all agreements for the division of net proceeds. However, as the Supreme Court explained in *Escanaba*,⁵⁰ the very case cited by TAPS Carriers, the Transportation Act, 1920, qualified this prohibition by excepting such arrangement if the Commission finds that pooling "will be in the interest of better service to the public or of the economy in operation, and will not unduly restrain competition."⁵¹ In that case, the Supreme Court continues:

The strict sanctions of the original Act, intended to preserve competition between carriers, were, in a number of instances, relaxed. Mergers and consolidations were authorized, pooling arrangements were permitted ... all for the sake of economy and efficiency and the prevention of destructive competitive practices, and all subject to the supervision and control of the Interstate Commerce Commission, and its finding that the action proposed or ordered would be in the public interest.⁵²

⁵⁰ *Escanaba & Lake Superior R.R. Co. v. United States*, 303 U.S. 315, 319-20 (1938) (*Escanaba*).

⁵¹ 49 U.S.C. App. § 5(1) (1977).

⁵² *Escanaba*, 303 U.S. at 320. This case is inapposite since it involves the question of whether the assent of a party affected by the agreement, but not a party to the agreement, was necessary for a pooling arrangement.

67. Here the pooling arrangement satisfies the requirements of the ICA because pooling is a necessary incident to the Commission establishing a just and reasonable rate. None of the consequences that Congress sought to prevent through section 5(1) of the ICA are implicated by the Commission imposing a pooling arrangement here.

68. Accordingly, we grant BP's request for rehearing on this issue and direct the TAPS Carriers to include a pooling mechanism when the uniform rate becomes effective and to modify their governing operating agreement to the extent necessary. The pooling mechanism should be all-inclusive, so that the revenue requirement is based on usage, not the ownership share.

C. Property Balances and Deferred Return Balances

1. Opinion No. 502

69. The Commission affirmed the ALJ's finding that (1) the appropriate balances for accumulated depreciation to be used in the Opinion No. 154-B methodology can be found in the TAPS Carriers' annual rate filings; and (2) the \$450 million of original investment has been properly excluded from the TAPS Carriers' rate base.⁵³

70. The Commission also found that the ALJ properly recognized the \$450 million of rate base previously amortized and recovered, as well as all the other costs recovered in rates before and after 1985.⁵⁴ The Commission found that the TAPS Carriers already received the benefits of the amortization in the form of forgiven and reduced refunds, and cost-based just and reasonable ratemaking requires that these benefits be recognized in future rates.

71. The Commission affirmed the ALJ's ruling that the appropriate adjustment and amounts for deferred returns are reflected in Anadarko/Tesoro's Opinion No. 154-B cost of service presentation and the amount of deferred return in 2005 is \$198.31 million and in 2006 is \$175.283 million.⁵⁵

⁵³ Opinion No. 502 at P 76.

⁵⁴ *Id.* P 97. The Commission stated that the refund forgiveness from 1977-1981, the reduced refund liability for 1982-1985, and the TSM rate calculations beginning in 1986, were all premised on the collection of specific amounts of depreciation, deferred returns, and \$450 million of amortized plant.

⁵⁵ *Id.* P 95.

72. The Commission also found that it makes no difference how the deferred returns were calculated under the TSM, or whether they represent more or less than deferred returns typically calculated under Opinion No. 154-B.⁵⁶ The Commission stressed that the TSM calculations, including the calculation of deferred returns, were the basis of the rates actually filed with the Commission, actually paid by the shippers and actually collected by the TAPS Carriers over the years. Therefore, the Commission found that the \$175 million shown in the TAPS Carriers' 2006 filings and adopted by the ALJ represents the amount of deferred returns uncollected as of 2006.

2. The TAPS Carriers' Rehearing Request

73. The TAPS Carriers argue the Commission erred in calculating TAPS rates for 2006 using the property balances and deferred return balances derived from the TAPS Carriers' December 2005 TSM filings, despite the fact that the 2005 rates set by the Commission were determined under Opinion No. 154-B and not under the TSM. The TAPS Carriers assert the Commission should have used Opinion No. 154-B to establish the 2006 rates instead of extracting amounts from the TAPS Carriers' December 2005 TSM filings. The TAPS Carriers point out the Commission clearly stated in Opinion No. 502 that Opinion No. 154-B and the Commission's cost of service regulations must apply for determining the lawfulness of the TAPS Carriers' 2005 and 2006 rates.⁵⁷

74. The TAPS Carriers argue the TSM's method of calculating property and deferred return balances is inconsistent with Opinion No. 154-B. The TAPS Carriers contend the TSM includes an accelerated unit of throughput depreciation methodology, under which the TSM rate base is almost fully depreciated by 2011, in calculating property balances. The TAPS Carriers state in comparison, under Opinion No. 154-B, the Commission approved Anadarko/Tesoro's depreciation schedule which uses straight-line depreciation and a 2034 end date. The TAPS Carriers argue that having adopted the TSM property balances as of January 1, 2005, for purposes of calculating the 2005 Opinion No. 154-B rates, the Commission should have continued to depreciate those same property balances using the new depreciation methodology for 2006, instead of returning to the TSM to derive new property balances for the 2006 rates. The TAPS Carriers state it is illogical and unfair to switch, as of January 1, 2005, to an Opinion No. 154-B methodology with specified starting balances, while at the same time ordering that

⁵⁶ *Id.* P 102.

⁵⁷ The TAPS Carriers cite Opinion No. 502 at P 63.

rates for a later year use inputs that are not the direct product of the newly-imposed methodology.

75. Similarly, the TAPS Carriers argue there is a significant difference in how deferred return is calculated under Opinion No. 154-B from the TSM's calculation. The TAPS Carriers explain that the TSM's calculation of deferred return is based on a different amortization schedule and a different deferred return base than that produced by Opinion No. 154-B. Thus, the TAPS Carriers argue that in contrast to Opinion No. 154-B, the TSM's depreciation and deferred return recovery are subtracted from the deferred return base before applying the inflation factor, thereby reducing the amount of TSM deferred return collected in later years. The TAPS Carriers further argue the Commission stated in Opinion No. 502 that using a 100 percent equity capital structure in calculating the deferred return in TSM overstates the deferred return and ultimately violates the principle of Opinion No. 154-B that deferred returns are not allowed on debt-financed rate base.⁵⁸

76. The TAPS Carriers state as a practical matter, it does not make a difference which property and deferred return balances are used for 2006 since the TAPS Carriers' 2006 rates will probably fall below the refund floor. However, as a legal matter, the TAPS Carriers argue the Commission should calculate rates consistent with Opinion No. 154-B and not continue to import property and deferred return balances from the TSM. The TAPS Carriers request that property and deferred return balances be calculated from January 1, 2005 forward consistent with Opinion No. 154-B.

3. Anadarko's Answer

77. Anadarko argues that the TAPS Carriers' request for rehearing concerning the use of the TSM filings for calculating property and deferred return balances for 2006 should be denied. Anadarko claims that it is too late in the proceedings to advocate the use of new property and deferred return balances. Moreover, Anadarko argues the TAPS Carriers did not provide in their rehearing request a record cite for the 2006 balances they now advocate, or even give the amount of property and deferred return balances they now claim are appropriate for 2006. Anadarko contends the TAPS Carriers had ample time to suggest appropriate balances and should therefore not be allowed to propose new property and deferred return balances for 2006.

⁵⁸ The TAPS Carriers cite Opinion No. 502 at P 97.

4. The TAPS Carriers' Response

78. The TAPS Carriers argue that Anadarko's answer neither responds to the TAPS Carriers' showing that the use of TSM property and deferred return balances is inconsistent with Opinion No. 154-B, nor attempts to defend the use of TSM inputs in calculating the 2006 rates under an Opinion No. 154-B methodology. The TAPS Carriers assert that instead, Anadarko first argues that the use of TSM inputs does not make any practical difference, as the TAPS Carriers acknowledged in their rehearing request, and second, that it is "too late" to use new property and deferred return balances that are not in the record. The TAPS Carriers argue neither excuse justifies the failure to apply Opinion No. 154-B correctly.

79. The TAPS Carriers agree that the question of which property or deferred return balances to use for 2006 makes no difference with respect to the amount of refunds owed by the TAPS Carriers under Opinion No. 502 for 2006. However, the TAPS Carriers argue that does not justify the continued importation of property and deferred return balances from the TSM in calculating rates under that methodology, since depreciated and deferred return in one year affects the net carrier property balances in future years. The TAPS Carriers assert there is no justification for continuing to use TSM property and deferred return balances in the computation of Opinion No. 154-B rates for the years 2007 and beyond. The TAPS Carriers further argue the TSA is likely to be terminated as of January 1, 2009. Thus, the TAPS Carriers state there will not be any TSM filings after that point from which to continue to derive property and deferred return balances.

80. The TAPS Carriers argue Anadarko's argument that the TAPS Carriers should not be allowed to propose new property and deferred return balances for 2006 that are not in the record, is without merit. The TAPS Carriers contend that assuming the Opinion No. 154-B methodology is consistently applied, the rates for 2006 would simply be calculated by applying the Opinion No. 154-B methodology and the depreciation rates approved by the Commission in Opinion No. 502 to the property balances used by the Commission to establish the 2005 rates. The TAPS Carriers assert the precise levels of the 2006 property balances are a matter for calculation in a compliance filing, and Anadarko and any other interested party could challenge the calculations. Thus, the TAPS Carriers argue that contrary to Anadarko's assertion, there is no need to introduce new evidence into the record to determine the Opinion No. 154-B property balance.

5. Discussion

81. The Commission denies the TAPS Carriers' request for rehearing on this issue. The TAPS Carriers argue that the Commission erred in calculating TAPS rates for 2006 using the property balances and deferred return balances derived

from the TAPS Carriers' December 2005 TSM filings, despite the fact that the 2005 rates set by the Commission were determined under Opinion No. 154-B and not under the TSM.⁵⁹ We disagree and affirm our decision in Opinion No. 502 that the property and deferred return balances from the TAPS Carriers' December 2005 TSM filings should be used to calculate the 2006 Opinion No. 154-B rates.

82. The Commission recognizes that the method of calculating property and deferred return balances under the TSM is different from how these amounts are calculated under Opinion No. 154-B. However, as Anadarko pointed out, the data necessary to calculate property and deferred return balances pursuant to the Opinion No. 154-B methodology is not in the record. The TAPS Carriers argument that they will furnish these amounts in a compliance filing is not persuasive. The TAPS Carriers had ample time to submit the relevant property and deferred return balances for 2006 at other points in this proceeding.

83. Moreover, which data the parties use to calculate the rates for 2005 and 2006 is irrelevant because both calculations produce rates for 2005 and 2006 that are below the 2004 rate refund floor. While the TAPS Carriers acknowledge this, they argue that the Commission should use the Opinion No. 154-B data because in future rate proceedings, there will not be any TSM filings from which to derive property and deferred return balances since the TSA will likely terminate in 2009. The Commission agrees that the parties will not likely be able to use the property and deferred return amounts from the TAPS Carriers' TSM filings in the future. However, it is premature for the Commission to prescribe here, in the proceeding for the TAPS Carriers' 2005 and 2006 rates, how the TAPS Carriers' rates for 2007 and 2008 will be calculated. Questions concerning the TAPS Carriers' rates commencing in 2007 will be resolved in the pending proceedings concerning those rates. For the foregoing reasons, the Commission denies the TAPS Carriers' request for rehearing on this issue.

D. Return on Equity Proxy Group

1. Opinion No. 502

84. The Commission affirmed the ALJ's capital structure, ROE, and cost of debt findings. In doing so, the Commission approved the ALJ's use of a proxy group consisting entirely of master limited partnerships (MLP) for the purposes of TAPS' ROE. The Commission found the proxy group appropriate because its risk

⁵⁹ The TAPS Carriers do not challenge on rehearing the Commission's use of the TSM to establish beginning property and deferred return balances for the purposes of calculating Opinion No. 154-B rates for 2005.

profile was comparable to that of the TAPS Carriers and it consisted of a representative group of oil pipeline companies previously found acceptable by the Commission and the State.

85. The Commission also noted that a few months prior, the Commission issued a *Policy Statement* permitting the inclusion of MLPs in the proxy groups used to determine gas and oil pipelines' ROE.⁶⁰ In accordance with the *Policy Statement's* directive, the Commission ordered the ROE amounts adopted by the ALJ to be modified, such that the long-term growth projections for MLPs, which are lower than the growth projections for corporations, should be 50 percent of projected growth in gross domestic product (GDP).⁶¹

2. The TAPS Carriers' Rehearing Request

86. The TAPS Carriers argue the Commission did not properly apply the recently-issued *Policy Statement* on proxy groups in Opinion No. 502, and therefore, the Commission should reopen the record for a paper hearing on the issues of the proper capital structure, cost of debt, and allowed ROE. According to the TAPS Carriers, Opinion No. 502 improperly ordered the return on investment determinations to be made using a proxy group that was chosen prior to the issuance of the *Policy Statement*, with the sole adjustment being the request that the MLPs' long-term growth projections be 50 percent of GDP projections. The TAPS Carriers argue the *Policy Statement* requires that the most representative possible proxy group should be determined in each individual rate case, applying the *Policy Statement's* standards. The TAPS Carriers assert that here the Commission should establish a process for indentifying the members of a proxy group composed in accordance with the *Policy Statement*. The TAPS Carriers cite to two recent oil pipeline cases where the Commission ordered paper hearings on the proxy group issue.⁶²

87. Included in the rehearing request is a chart demonstrating how the return on investment values would be higher if the Commission had used a proxy group comprised of additional MLPs mentioned in the appendix to the *Policy*

⁶⁰ *Policy Statement on the Composition of Proxy Groups for Determining Gas and Oil Pipeline Return on Equity*, 123 FERC ¶ 61,048 (2008) (*Policy Statement*).

⁶¹ Opinion No. 502 at P 194.

⁶² *SFPP, L.P.*, 123 FERC ¶ 61,116 (2008) (*SFPP*); *Texaco Ref. & Mktg., Inc.*, 123 FERC ¶ 61,117 (2008) (*Texaco*).

*Statement.*⁶³ The TAPS Carriers argue this chart demonstrates that the impact of the Commission's failure to apply the *Policy Statement* to the TAPS rates is significant.

3. Anadarko's Answer

88. Anadarko disputes that the *Policy Statement* requires the Commission to reopen the record to permit additional evidence on capital structure, debt cost, and ROE. Anadarko argues that while the *Policy Statement's* acceptance of the use of MLPs in proxy groups may have represented a change for a gas pipeline, it generally confirmed the existing practice of using MLPs in establishing equity returns for oil pipelines. Anadarko argues this is demonstrated by the fact that all of the parties who submitted ROE evidence in this proceeding, including the TAPS Carriers, recommended the same proxy group consisting entirely of MLPs, which the Commission subsequently accepted. Anadarko contends the *Policy Statement* did not present any information that is new, different, or otherwise unavailable to the TAPS Carriers at the time they prepared their evidence.

89. Anadarko further points out that all of the companies in the proxy group proposed by the TAPS Carriers and accepted by the Commission appear on the illustrative list of acceptable companies in Appendix A, Table 2 of the *Policy Statement*. Anadarko asserts that the proxy group approved in Opinion No. 502 does not need to be reexamined because it includes fewer companies than those listed in Table 2 because the list of companies in Table 2 was only for illustrative purposes. Anadarko concludes that the TAPS Carriers are attempting to use the *Policy Statement* as a pretext to justify a second bite at the cost of capital issue.

4. Discussion

90. The Commission finds that it properly applied the *Policy Statement* in Opinion No. 502 and rejects the TAPS Carriers' request for a paper hearing on the return on investment issues. We find no merit in the TAPS Carriers' argument that because the *Policy Statement* was issued after the selection of the proxy group

⁶³ The proxy group approved by the Commission in Opinion No. 502 consisted of Buckeye Partners, L.P., Enbridge Energy Partners, L.P., Kinder Morgan Energy Partner, L.P., and TEPPCO Partners, L.P. The TAPS Carriers argue that to be in compliance with the *Policy Statement*, the proxy group should consist of the original members plus Enterprise Products Partners and Plains All American for 2005, and Magellan Midstream Partners for 2006.

in this proceeding, the Commission should hold a paper hearing to select a new proxy group consistent with the *Policy Statement's* mandates.

91. The Commission issued its *Policy Statement* on proxy groups to address the shrinking number of available corporations for use as proxy companies in determining the ROE for gas and oil pipelines.⁶⁴ In recent years, as more and more gas pipelines restructured to become MLPs, there were fewer companies that satisfied the Commission's requirement that pipeline operations constitute a high proportion of the business of any firm included in a gas proxy group.

92. In contrast, the majority of oil pipelines have historically been organized as MLPs. Thus, the Commission has for some time used MLPs in determining ROEs for oil pipelines. Thus, the *Policy Statement's* determination that MLPs are suitable for inclusion in ROE proxy groups was not a departure for the oil industry, since the existing practice was to use MLPs as proxies.

93. Given the use of MLPs in oil proxy groups was common practice prior to the issuance of the *Policy Statement*, it is not surprising that in this proceeding all of the parties submitting ROE evidence advocated the same proxy group, which consisted of four oil MLPs. It was not until the issuance of the 2006 *Sepulveda* case⁶⁵ that the composition of the ROE proxy group became an issue in this proceeding. In *Sepulveda*, the Commission expressed concern about including in oil proxy groups MLPs with distributions that exceed earnings because doing so could skew the discounted cash flow (DCF) analysis. In response to the *Sepulveda* case, Flint Hills argued in its Brief on Exceptions to the ID that the proxy group approved by the ALJ in this proceeding was not appropriate because it included MLPs with distributions that exceeded earnings.⁶⁶

94. However, on April 17, 2008, the Commission issued the *Policy Statement*. The *Policy Statement* clarified any confusion resulting from the *Sepulveda* decision and affirmed the oil industry's practice of including MLPs in proxy

⁶⁴ *Policy Statement* at P 1.

⁶⁵ *Texaco Refining and Mktg., Inc. v. SFPP, L.P.*, 117 FERC ¶ 61,285 (2006) (*Sepulveda*), *order on reh'g*, 124 FERC ¶ 61,117 (2008). The *Sepulveda* case was issued prior to the issuance of the ID, but after all pre-filed testimony had been submitted in this proceeding.

⁶⁶ *Order on ID* at P 181, 187.

groups for ROE determinations.⁶⁷ The *Policy Statement* also addressed Flint Hills' concerns regarding the potential skew to the ROE portion of the DCF analysis resulting from the inclusion of MLPs in the proxy group. The *Policy Statement* found that to mitigate this problem, when MLPs are used as proxies, the long-term growth projection component of the DCF analysis should be 50 percent of projected growth in GDP.⁶⁸

95. In establishing its position on the composition of proxy groups, the *Policy Statement* made clear that it was not deciding which particular corporations or MLPs should be included in gas or oil proxy groups. The *Policy Statement* stated that such a determination should be made in each individual case, with the Commission examining as much information as possible regarding the business activities of each potential proxy group member.⁶⁹ The *Policy Statement* also emphasized that the proxy group must be risk-appropriate.⁷⁰

96. The Commission approved the proxy group in Opinion No. 502 in light of the guidelines set forth in the *Policy Statement*. The Commission engaged in a thorough analysis of the proxy group's risk profile and determined it was comparable to that of the TAPS Carriers.⁷¹ The Commission also stated that the proxy group consisted of a representative group of oil pipeline companies previously found acceptable by the Commission and endorsed by the State.⁷² Thus, the Commission determined, in accordance with the *Policy Statement*, that the ROE proxy group was the most representative possible proxy group because it consisted of oil pipeline MLPs that were both risk-appropriate and representative.⁷³ The Commission also ordered the ROE amounts to be adjusted

⁶⁷ See *Policy Statement* at P 49.

⁶⁸ *Id.* P 96.

⁶⁹ *Id.* P 51.

⁷⁰ The *Policy Statement* explained the importance of risk-appropriate proxy groups in light of *Petal Gas Storage, L.L.C. v. FERC*, 496 F.3d 695 (D.C. Cir. 2007), which vacated and remanded a prior Commission proxy group ruling and stated that the Commission's "proxy group arrangements must be risk-appropriate." *Policy Statement* at P 24, 51.

⁷¹ Opinion No. 502 at P 179.

⁷² *Id.*

⁷³ *Id.* P 194.

to reflect the determination in the *Policy Statement* that the long-term growth projection for MLPs should be 50 percent of projected growth in GDP.⁷⁴ Thus, the Commission's approval of the proxy group in Opinion No. 502 was consistent with guidelines set forth in the *Policy Statement*.

97. The TAPS Carriers suggest that the proxy group in this proceeding is deficient because it does not include certain MLPs listed in Table 2 of Appendix A to the *Policy Statement* (Table 2) and the inclusion would change the ROE value. The TAPS Carriers' argument has no merit because the Commission provided Table 2 for illustrative purposes and not as an exclusive list of MLPs appropriate for inclusion in oil proxy groups.⁷⁵ As the *Policy Statement* explained, the most representative possible proxy group for ROE purposes should be determined on an individual basis.⁷⁶

98. In Opinion No. 502, the Commission looked at the particular facts of this proceeding and determined that the most representative possible proxy group was the one agreed upon by the parties and approved by the ALJ. Consistent with the *Policy Statement*, the parties to this proceeding assisted the Commission in its decision-making process by providing evidence regarding the business activities of the firms included in the proxy group, such as U.S. Securities and Exchange Commission filings of the TAPS Carriers and the four proxy group companies.⁷⁷ Thus, the parties had a full opportunity to raise issues concerning the composition of the proxy group, both at the trial stage and in their Briefs on Exception. The issuance of the *Policy Statement* did not diminish this opportunity. Thus, the TAPS Carriers' argument that the Commission should hold a paper hearing to reexamine the composition of the proxy group in light of the *Policy Statement* is misplaced.

99. In support of its request for a paper hearing, the TAPS Carriers cite two cases where the Commission ordered paper hearings to examine the oil proxy groups for ROE determinations. However, these cases are distinguishable from the instant proceeding. In *SFPP*, an order on an ID, parties filed exceptions

⁷⁴ *Id.*

⁷⁵ See *Policy Statement*, Appendix A, Table 2 (stating at the bottom of the table, "This Appendix is for illustrative purposes only and does not prejudice what would be an appropriate proxy group for use in individual proceedings.").

⁷⁶ *Id.* P 51.

⁷⁷ See Makhholm Rep., SOA-44 at 59-60 (Table 4).

directly challenging the ALJ's findings regarding the composition of the proxy group.⁷⁸ Similarly, in *Texaco*, parties requested rehearing on the issue of the exclusion of a certain proxy company.⁷⁹ To resolve these outstanding issues, the Commission ordered a limited paper hearing, directing parties to submit additional evidence as to which specific MLPS should be included in the proxy group consistent with the *Policy Statement*.⁸⁰

100. Here, all of the parties who submitted ROE evidence advocated the same proxy group and the ALJ and the Commission approved it. Only Flint Hills excepted to the composition of the proxy group and it did so on an issue resolved by the *Policy Statement* (i.e., that the inclusion of MLPs with distributions that exceed earnings would skew the DCF analysis). No parties to this proceeding argued in their Briefs on Exception that the composition of the proxy group was otherwise unjust and unreasonable.⁸¹

101. The TAPS Carriers also argue the paper hearing should reexamine the Commission's capital structure and cost of debt findings in Opinion No. 502. Those findings were based on well-established precedent providing for the use of a hypothetical capital structure when a company's actual or parent capital structure produces an equity ratio that is anomalous and does not accurately reflect the pipeline's risk profile.⁸² The *Policy Statement* had no impact on this determination. The *Policy Statement's* scope is limited to the composition of proxy groups for ROE determinations. Therefore, even if the issuance of the *Policy Statement* did require the reexamination of the composition of the proxy group for ROE purposes, it would not impact the Commission's capital structure and cost of debt findings. The Commission denies the TAPS Carriers' request for rehearing on this issue.

⁷⁸ *SFPP*, 123 FERC ¶ 61,116 at P 3.

⁷⁹ *Texaco*, 123 FERC ¶ 61,117 at P 6.

⁸⁰ *SFPP*, 123 FERC ¶ 61,116 at P 12; *Texaco*, 123 FERC ¶ 61,117 at P 19.

⁸¹ The only exception the TAPS Carriers raised with respect to the ALJ's ROE findings was the ALJ's failure to add a two percentage point risk premium.

⁸² See *Transcontinental Gas Pipeline Corp.*, 90 FERC ¶ 61,279, at 61,298 (2000); *Michigan Gas Storage Co.*, 87 FERC ¶ 61,038 (1999); *Transcontinental Gas Pipeline Corp.*, 84 FERC ¶ 61,084, at 61,414 (1998) (Opinion No. 414-A).

III. Compliance Filing

102. On July 21, 2008, the TAPS Carriers submitted a compliance filing. The TAPS Carriers state that Opinion No. 502 directed them to submit a compliance filing calculating the rates for 2005 and 2006, as well as prospective rates that the TAPS Carriers will be required to set out in their tariffs upon approval of the filing. The TAPS Carriers further state that they will file a refund report and make refunds to shippers within thirty days of the Commission's order approving the compliance filing.

103. The TAPS Carriers provide alternate approaches to calculating the rates for 2005 and 2006 in Exhibits 1 and 2 of Attachment A. Exhibit 1 includes rates for 2005 and 2006 calculated using test period data, while Exhibit 2 includes rates calculated using actual data.⁸³ The rates per barrel using test period data are as follows: 2005 - \$1.92, 2006 - \$2.02. The rates using actual data are: 2005 - \$2.11 and 2006 - \$2.72.

104. The TAPS Carriers explain their compliance filing does not contain rate calculations for 2007 or 2008. The TAPS Carriers assert that Opinion No. 502 did not require them to provide such calculations. The TAPS Carriers further assert that the proceedings concerning the TAPS Carriers' 2007 and 2008 rate filings in Docket No. IS07-75-000, *et al.*, were held in abeyance subject to the outcome of this proceeding.⁸⁴ The TAPS Carriers state that it is their understanding that the analysis of the 2007 and 2008 rates filings will take place in Docket No. IS07-75-000 and will be necessary only for purposes of determining whether refunds are owed for 2007 and that portion of 2008 prior to the date on which the prospective rates take effect. The TAPS Carriers state that to the extent the 2007 and 2008 rates calculated pursuant to Opinion No. 502 are below the 2004 refund floor, the Carriers would owe refunds equal to the difference between the filed rates and the 2004 floor. The TAPS Carriers state that to the extent the 2007 and 2008 rates are above the 2004 refund floor, the TAPS Carriers would owe refunds for the

⁸³ The TAPS Carriers state the actual data for 2005 is derived from this proceeding's hearing record, where 2005 was used as the base period for the 2006 rates. The TAPS Carriers explain that the actual data for 2006 is not in the record and therefore, the TAPS Carriers include in their compliance filing schedules using the actual data reported in the TAPS Carriers' 2006 Form 6 reports, including a breakdown of certain data and supporting affidavits. *See* the TAPS Carriers' July 21, 2008 Compliance Filing at Attachment B.

⁸⁴ *See BP Pipelines (Alaska) Inc.*, 117 FERC ¶ 61,352 (2006); *Unocal Pipeline Co.*, 121 FERC ¶ 61,300 (2007).

difference between the filed rates and the new 2007 and 2008 rates. The TAPS Carriers state that it is their understanding that they will have an opportunity in Docket No. IS07-75-000 to demonstrate whether the 2007 and 2008 rates are above or below the 2004 refund floor. For these reasons, the TAPS Carriers limited their compliance filing in this proceeding to the calculation of the rates for 2005 and 2006.

105. The TAPS Carriers state that the Commission did not specify how to set the prospective rate in Opinion No. 502. The TAPS Carriers assert that in past oil pipeline proceedings, the Commission has based the prospective rate on the applicable test year rate indexed to the date the prospective rate takes effect. However, TAPS Carriers state that under current regulations, the TAPS rates are not subject to indexing.⁸⁵ Accordingly, the TAPS Carriers assert that if the prospective rate is to be based on an un-indexed 2005 and 2006 rate, it will not account for inflation (and other charges) during the intervening period. In light of this, the TAPS Carriers argue the best approach for setting the prospective rate is to use the 2006 rate calculated using actual data, which is set forth in Exhibit 2. The TAPS Carriers argue the calculations in Exhibit 2 are the most appropriate because they are based on recent actual cost and throughput information.

106. The TAPS Carriers also provide in Attachment C an exhibit demonstrating their DR&R collections and earnings to date.⁸⁶

A. Protests

107. On August 4, 2008, Flint Hills filed comments and a motion for clarification in response to the TAPS Carriers' compliance filing. On August 5, 2008, Anadarko and the State filed protests to the compliance filing.

108. On August 14, 2008, the TAPS Carriers filed answers to the State's and Anadarko's protests. On August 19, 2008, Anadarko filed an answer to Flint Hills' motion for clarification. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure prohibits an answer to a protest unless otherwise ordered by the decisional authority. We are not persuaded to accept the TAPS Carriers' or Anadarko's answers and will, therefore, reject them.

⁸⁵ The TAPS Carriers cite 18 C.F.R. § 342.0(b) (2008).

⁸⁶ The TAPS Carriers provide this exhibit to comply with a directive by the ALJ in the ID and the Commission takes no action with respect to this portion of the filing.

109. Anadarko states the Commission should accept the rates in Exhibit 1, which are \$1.92 per bbl for 2005 and \$2.02 per bbl for 2006, because they comply with Opinion No. 502. Anadarko and the State assert the Commission should reject the rates in Exhibit 2 because those rates fail to comply with Opinion No. 502 and are otherwise unlawful. Anadarko and the State argue that Exhibit 2 contains a purported “prospective” rate, which constitutes an unauthorized rate increase based on data the TAPS Carriers concede is not in the record, and thus was never litigated or ruled on in Opinion No. 502. Anadarko contends the Commission cannot rely on such evidence after the close of the record because doing so is inconsistent with fundamental canons of due process and the Commission’s own regulations.⁸⁷ Anadarko argues the Commission has consistently rejected attempts to introduce new evidence after the hearings and record are closed,⁸⁸ and therefore, the Commission should reject the TAPS Carriers’ attempt to do so here. Accordingly, Anadarko and the State argue the Commission should reject the rates in Exhibit 2.

110. Anadarko and the State argue the TAPS Carriers’ contention that Opinion No. 502 does not specify how the prospective rate should be set is without merit. Anadarko states there is no mystery regarding the Opinion No. 502 compliance rate for 2006 forward, which the TAPS Carriers properly calculated in Exhibit 1. Anadarko argues that the ICA clearly states that the just and reasonable rate set by the Commission is the rate “to be thereafter observed.”⁸⁹ Anadarko also states in accordance with the ICA, upon finding the 2005 and 2006 TSM rates to be unjust and unreasonable in Opinion No. 502, the Commission set just and reasonable rates “for 2005 and 2006 and prospectively thereafter,”⁹⁰ and therefore, the 2006 rate set by Opinion No. 502 (\$2.02 per bbl) is the rate “to be thereafter observed.” The State agrees.

111. The State also argues the TAPS Carriers’ discussion regarding the status of the 2007 and 2008 rate proceedings and the impact of the “2004 refund floor,” as well as their discussion of indexing a rate for purposes of setting a prospective

⁸⁷ Anadarko cites *Office of Consumers’ Counsel v. FERC*, 783 F.2d 206, 232-33 (D.C. Cir. 1986).

⁸⁸ Anadarko cites *Nw. Pipeline Corp.*, 92 FERC ¶ 61,287, at 61,991 (2000); *Tenn. Gas Pipeline Co.*, 80 FERC ¶ 61,070, Opinion No. 406-A, at 61,222 (1997).

⁸⁹ Anadarko cites ICA § 15(1).

⁹⁰ Anadarko cites Opinion No. 502 at P 211, 226, and Ordering Paragraph A.

rate, are outside the scope of the Commission's directive in Opinion No. 502 to "establish[] rates in conformance with the ID and this order." The State asserts that to the extent the TAPS Carriers' compliance filing goes beyond making the changes directed by the Commission, it should be stricken and disregarded.

112. In its comments and motion for clarification, Flint Hills states the TAPS Carriers' suggestion that the instant compliance filing could be used to set a prospective rate to become effective during the remainder of 2008 is procedurally incorrect given that the 2007 and 2008 proceedings are being decided in separate dockets that are currently held in abeyance. Flint Hills argues it would be inconsistent with the statutory scheme to impose a prospective rate change for the separate and pending 2007-2008 proceeding based on the limited information submitted in this docket, which focuses on the 2005 and 2006 rates. Flint Hills states both Commission Trial Staff and Anadarko/Tesoro properly recognize that, "[t]he compliance filings ordered by the Commission in Opinion No. 502 will not automatically reduce the 2007 and 2008 Tariffs," and that a rate reduction, if any, for those years can only be realized after a separate filing by the TAPS Carriers' applying the Opinion No. 502 methodology to 2007 and 2008 data, along with comments from parties in the pending 2007 and 2008 rate proceeding.

113. Flint Hills further argues the TAPS Carriers suggest that the 2006 rate based on actual data, or the 2005 rates escalated in accordance with the Commission's oil pipeline rate indexing policy, could be carried forward as the 2007 and 2008 rates. Flint Hills asserts the TAPS Carriers' proposal to index the 2005 and 2006 rates into "prospective" 2008 rates is far beyond the scope of the instant compliance filing and was not an issue in Opinion No. 502.

114. Flint Hills further argues the issue of which of the TAPS Carriers' several 2005 and 2006 rate proposals to employ is moot because all those calculations produce rates for 2005 and 2006 that are below the 2004 rate refund floor. Thus, Flint Hills explains that the refunds in this case will be limited to the difference between the original proposed 2005 and 2006 rate increases and the pre-existing 2004 rates, without regard to which of the lower rate levels calculated by the TAPS Carriers in response to Opinion No. 502 is the most appropriate. Flint Hills requests clarification that this compliance filing deals only with refunds due for the 2005-2006 rate periods, and not the 2007-2008 rate periods.

B. Discussion

115. The Commission finds that the rates in Exhibit 1 of the TAPS Carriers' filing comply with Opinion No. 502 and are accepted. The Commission rejects the rates in Exhibit 2 because they are based on "actual" data that is not in the record. We agree with Anadarko that it is not appropriate to use the actual data reported in the TAPS Carriers' 2006 Form 6 reports because this data has not been

subject to review or challenge by other parties. Additionally, as Flint Hills points out, which data the TAPS Carriers use to calculate the rates for 2005 and 2006 is moot because both calculations produce rates for 2005 and 2006 that are below the 2004 rate refund floor.

116. In response to Flint Hills' request, the Commission clarifies that the TAPS Carriers' compliance filing calculates rates for 2005 and 2006 and prospectively thereafter, but does not calculate rates for the 2007 and 2008 rate periods. The TAPS Carriers' 2007 and 2008 rates are pending in separate dockets held in abeyance pending the outcome of this proceeding. Any issues concerning the 2007 and 2008 rates and the related refunds will be addressed in those separate proceedings.⁹¹

The Commission orders:

(A) Requests for rehearing are denied in part and granted in part, as discussed in the body of this order.

(B) The TAPS Carriers shall modify their governing operating agreement to include an all-inclusive pooling mechanism consistent with the discussion in this order.

(C) Exhibit 1 of the TAPS Carriers' compliance filing is accepted effective January 1, 2005, and Exhibit 2 of the compliance filing is rejected.

(D) The TAPS Carriers shall issue refunds of the difference between the TAPS Carriers' 2004 interstate rates and the TAPS Carriers' 2005 and 2006 filed interstate rates within 30 days of issuance of this order, and file a refund report within 30 days thereafter.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁹¹ *BP Pipelines (Alaska) Inc.*, 121 FERC ¶ 61,300, at P 1

9 (2007); *BP Pipelines (Alaska) Inc.*, 117 FERC ¶ 61,352, Ordering Paragraph C (2006).