

128 FERC ¶ 61,169  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
and Philip D. Moeller.

BP Pipelines (Alaska) Inc.  
ConocoPhillips Transportation Alaska, Inc.  
ExxonMobil Pipeline Company  
Koch Alaska Pipeline Company  
Unocal Pipeline Company

Docket No. OR06-10-004

ORDER DENYING REHEARING

(Issued August 18, 2009)

1. Flint Hills Resources Alaska LLC (Flint Hills) and Petro Star, Inc. (Petro Star) filed for rehearing of the Commission's December 2, 2008 Order Accepting Compliance Filing (December 2008 Order).<sup>1</sup> The December 2008 Order accepted the Trans Alaska Pipeline System (TAPS) Carriers'<sup>2</sup> April 2, 2008 filing, effective June 1, 2006, that established the processing cost adjustment for the West Coast Heavy Distillate cut. The Commission directed the TAPS Carriers to submit the compliance filing in Opinion No. 500.<sup>3</sup> Flint Hills and Petro Star contend the effective date of June 1, 2006, violates the 15-month limitation in section 4412 (b)(2) of the Motor Carrier Safety Reauthorization Act of 2005 (section 4412 (b)(2)).<sup>4</sup> For the reasons given below, the Commission denies rehearing.

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<sup>1</sup> *BP Pipelines (Alaska) Inc., et al.*, 125 FERC ¶ 61,254 (2008)

<sup>2</sup> 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.

<sup>3</sup> *BP Pipeline (Alaska) Inc.*, Opinion No. 500, 122 FERC ¶ 61,236, Ordering Paragraph (B) (2008), *appeal docketed Petro Star v. FERC* (D.C. Cir. 08-1192).

<sup>4</sup> Pub. L. No. 109-59, 119 Stat. 1714 (2005) (The Act).

## **Background**

2. This matter involves crude oil valuation under the TAPS Quality Bank, which is a system for adjusting crude oil values to account for the differing qualities of Alaska North Slope (ANS) commingled crude oil shipped on TAPS.
3. The TAPS Quality Bank uses a distillation valuation model, which calculates the value of crude oil streams based upon the value of the distilled products, called cuts. Some cuts are products with market prices, while others, like the Heavy Distillate, for which there is no market, are assigned a proxy market product, and require further processing to meet that proxy's specifications. Where processing is necessary, the valuation methodology deducts these processing costs from the market price of the refined, finished product, reducing the value of that particular cut.
4. An independent neutral expert called the Quality Bank Administrator (QBA) administers the TAPS Quality Bank. The TAPS tariff requires the QBA to give notice of any proposed or needed modification to the existing valuations.
5. In 2005, the Commission, in Opinion No. 481, established the proxy to value the West Coast Heavy Distillate cut as Platts' West Coast spot quote for Los Angeles (LA) Pipeline Low Sulfur (LS) (EPA) Diesel (LS Diesel), which has a sulfur content of 500 parts per million (ppm).<sup>5</sup> Since ANS crude has a sulfur content of 5,000 ppm, the QBA made a downward adjustment of 6.4302 cents per gallon (cpg) from the reference price to account for the cost of removing sulfur to meet the 500 ppm sulfur standard of the proxy. On July 28, 2006, the TAPS Carriers filed a notice with the Commission that as of June 1, 2006, Platts would no longer report the LS Diesel reference price and, and would now report an ultra low sulfur diesel price with a sulfur content of only 8 ppm. Thus, a new proxy for the West Coast Heavy Distillate cut was required.
6. The QBA's notice advised that because more expensive processing is required to meet the lower 8 ppm sulfur specification, he recommended using the LA Pipeline Ultra Low Sulfur (ULS) (EPA) Diesel (ULS Diesel) minus a proposed processing cost adjustment of 10.4549 cpg for the West Coast Heavy Distillate cut.

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<sup>5</sup> *Trans Alaska Pipeline System*, 113 FERC ¶ 61,062 (2005) PP 50-78 (Opinion No. 481), *order on reh'g*, 114 FERC ¶ 61,323 (2006) (Opinion No. 481-A), *order on reh'g*, 115 FERC ¶ 61,287 (2006) (Opinion No. 481-B) (collectively, Opinion No. 481), *aff'd sub nom. Petro Star Inc. v. FERC*, No. 06-1166, 2008 U.S. App. LEXIS 5328 (D.C. Cir. Mar. 6, 2008), *cert. denied*, January 12, 2009.

7. When all the parties agreed to the proposed new proxy, but some objected to the proposed processing cost adjustment to the proxy's price, the Commission issued an order on September 26, 2006, which accepted the QBA's recommendation of the new proxy and the proposed processing cost adjustment of 10.5459 cpg "effective June 1, 2006, subject to refund," and established a hearing to determine the amount of the processing cost adjustment.<sup>6</sup> The order stated the value of the cut "will be subject to refund when the Commission issues the final order."

8. On September 7, 2007, after hearing, the Administrative Law Judge (ALJ) issued an Initial Decision (ID).<sup>7</sup> The ID determined the factors the QBA should use to calculate the processing cost, and left it to him to make the calculation. The Commission affirmed the rulings in the ID in Opinion No. 500, issued March 20, 2008, and directed the TAPS Carriers "to make a compliance filing establishing the processing cost adjustment for the West Coast Heavy Distillate cut."

9. The compliance filing established an 8.1340 cpg processing cost adjustment as of June 1, 2006, the effective date for the adjustment under the Commission's September 26 Order, a little more than 2 cents less than the QBA's proposed amount of 10.4549 cpg.<sup>8</sup> In the compliance filing, the TAPS Carriers stated that after Commission action, revised monthly invoices would be issued starting June 2006, since the Commission had accepted QBA's originally proposed 10.4549 cpg processing cost adjustment subject to refund.

10. Flint Hills protested the filing contending that the proposed June 1, 2006, effective date is a retroactive TAPS Quality Bank adjustment that exceeds the permissible 15-month period for retroactive changes to quality bank adjustments permitted by section 4412(b)(2). That section provides that:

[i]n a proceeding commenced after the date of enactment of this Act, the Commission may not order retroactive changes in TAPS quality bank adjustments

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<sup>6</sup> *BP Pipeline (Alaska) Inc.*, 116 FERC ¶ 61,291 (2006) (September 26 Order).

<sup>7</sup> *BP Pipeline (Alaska) Inc.*, 120 FERC ¶ 63,018 (2007).

<sup>8</sup> The September 26 Order also provided, as required by the Quality Bank tariff that the cost adjustment would be revised annually each February using the Nelson Farrar Refinery Operating Cost indices to reflect changes in those costs. Accordingly, the 8.1340 cpg processing cost adjustment as of June 2006 was revised to 9.1719 cpg effective February 2007, and to 9.3421 cpg effective February 2008.

for any period that exceeds the 15-month period immediately preceding the earliest date of the first order of the Federal Energy Regulatory Commission imposing quality bank adjustments in the proceeding.<sup>9</sup>

11. Flint Hills asserted the instant proceeding falls under section 4412(b)(2) since the proceeding was commenced after the enactment of the Act in August 2005. Flint Hills argued that the first order imposing quality bank adjustments in this proceeding from which the 15-month period is calculated only occurs when the processing cost adjustment is fixed in numerical form in the compliance filing. Flint Hill rejects the September 26 Order as the first order imposing adjustments because it was “an interim adjustment ... subject to refund depending on the outcome of the hearing.”<sup>10</sup> Thus, Flint Hills argued the effective date for the compliance filing cannot be earlier than 15 months prior to the date the Commission accepts the compliance filing. It stated that if the Commission accepts the compliance filing by an order issued May 1, 2008, the effective date of that order cannot precede February 1, 2007.

### **The December 2008 Order**

12. The Commission concluded the September 26 Order was the first order referred to in section 4412(b)(2) which imposed a quality bank adjustment in this proceeding and accepted the compliance filing because June 1, 2006, is within the permissible 15-month period under section 4412(b)(2).

13. The Commission held that the September 26 Order fits the statutory definition in section 4412(b)(2) since it was the first order issued by the Commission in this proceeding, and it imposed a quality bank adjustment by changing the valuation of the Heavy Distillate cut from the existing LS Diesel price minus 6.4302 cpg to the ULS Diesel price minus 10.4519 cpg, subject to refund. That processing cost adjustment has been in effect since that time.

14. The order found no merit in Flint Hills’ argument that the term “imposing” in section 4412(b)(2) refers to the Commission’s order that “approves the final quantification of a new adjustment.”<sup>11</sup> The September 26 Order subjected the quality bank adjustment imposed and effectuated by that order to a hearing that potentially could result in a change to that adjustment. However, section

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<sup>9</sup> Since there are references to other parts of section 4412, the entire section is set forth in the attached Appendix.

<sup>10</sup> Flint Hills’ May 7, 2008 Reply at 3.

<sup>11</sup> Flint Hills’ Protest at 2-3.

4412(b)(2) does not require the adjustment in the first order be final and not subject to change. On the contrary, by referring to “the earliest date of the first order,” Congress clearly contemplated that the Commission might issue subsequent orders in the proceeding which could change the initially established quality bank adjustment.

15. The order noted that while the first order in response to a pipeline filing is usually issued before 15 months would elapse, the ruling here did not mean that the 15-month limitation in section 4412(b)(2) can never come into play, and referred to when there was an “unlawful order.” This was apparently the type of situation that motivated Congress to adopt the 15-month limitation as reflected in the material cited in Flint Hills’ Protest at n.9. Moreover, the order stated that Flint Hills’ position, that the term “imposing” in section 4412(b)(2) refers to the compliance filing in a proceeding, stands the language in that section on its head because the order accepting the compliance filing is the last order in that proceeding. Interpreting section 4412(b)(2) as Flint Hills proposed would read the word “first” out of the provision.

### **Requests for Rehearing and Subsequent Pleadings**

16. Flint Hills and Petro Star filed requests for rehearing of the December 2008 Order. Union Oil Company of California and Chevron U.S.A. Inc. (collectively Chevron) filed a motion for leave to file a response and response, and ConocoPhillips Alaska Inc. (Conoco) filed a response to the requests. Flint Hill filed a reply to Chevron’s response. Chevron filed a sur-reply to Flint Hills’ reply. Flint Hills filed a reply to Conoco’s response. The Commission will accept all the filings under Commission Rule 213<sup>12</sup> because they assist the Commission in its decision-making process.

### **Flint Hills’ Rehearing Request**

17. Flint Hills argues the Commission erred because the September 26 Order did not “impose” a quality bank adjustment within the meaning of section 4412(b)(2). Flint Hills refers to the fact that the September 26 Order accepted the proposed adjustment “subject to refund” and subject to the outcome of the hearing established by that order which “made clear that no adjustment would be imposed until after the hearing.”<sup>13</sup>

18. Flint Hills argues it is obvious the Commission’s interpretation of section 4412 is not correct since it renders section 4412(b)(2) meaningless because under

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<sup>12</sup> 18 C.F.R. § 385.213(a)(2) (2009).

<sup>13</sup> Request at 3.

the tariff provisions for proposed Quality Bank adjustments there can never be a retroactive period exceeding 15 months preceding the date of an order establishing a hearing to investigate such a proposed quality bank adjustment.

19. Flint Hills asserts that given the actual time required under these tariff provisions and the Commission's hearing process<sup>14</sup> the "first order" referenced in section 4412(b) could not have been directed to the initial order establishing a hearing, but must have been directed towards an order issued *after* the hearing process, here it is the order accepting the compliance filing. Flint Hills contends this interpretation is consistent with the rest of section 4412, and refers to subsection 4412(c) which provides the Commission "shall issue a final order" with respect to any claim relating to the quality bank no later than "15 months after the date on which the claim is filed..." This, Flint Hills asserts, makes clear that Congress was concerned about the delay inherent in the hearing process, rather than any delay in the issuance of an initial order establishing that process.

20. Flint Hills also contends the Commission's attempt to demonstrate that its interpretation would be meaningful because it would operate in situation involving "unlawful" orders has no basis because it allows a case to remain unresolved for years if the matter becomes subject to judicial review without any limitations or retroactive applications.

21. Moreover, Flint Hills argues, an initial order accepting a quality bank adjustment proposal and setting the matter for hearing, like the September 26 Order, is interlocutory because it does not impose any rates that ultimately will apply during the rate period, and as such is not subject to judicial review. Thus, the only orders in this case that conceivably could be found "unlawful" on judicial review are the December 2008 Order approving the compliance filings or Opinion No. 500, because they are the types of orders imposing just and reasonable rates that could be the proper subject of petitions for review. In sum, it concludes the

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<sup>14</sup> Flint Hills describes the hearing process as follows: 1) a proposed adjustment is filed by the QBA; 2) the Commission allows the proposed adjustment as the interim rate pending adjudication of the final lawful rate of imposing a quality bank adjustment; 3) the matter is set for hearing; 4) the hearing is conducted; 5) an initial decision is issued; 6) briefs on an opposing exceptions to the initial decision are filed; 7) the Commission issues an order addressing how the adjustment is to be calculated; 8) a compliance filing is made for the purpose of calculating the monetary adjustment; 9) an order on the compliance filing is issued; 10) an order on rehearing is issued; 11) the matter is appealed to the D.C. Circuit; 12) D.C. Circuit upholds FERC; or 13) remands for further proceedings (from which appeals have often also been taken).

Commission's view that Congress intended to limit retroactive application to situations involving unlawful orders does not make sense.

22. Flint Hills argues that if the Commission does not accept the order or the compliance filing as the first order imposing the adjustment under section 4412(b)(2), the Commission should find that Opinion No. 500 is the first order. Flint Hills explains that Opinion No. 500 clearly imposed the adjustment that applied, and was not subject to any changes.

23. Finally, Flint Hills argues the Commission's holding in the December 2008 Order that section 4412(b)(2) has no effect on the Commission's authority to order refunds pursuant to section 15(7) of the ICA is contrary to the plain meaning of section 4412.

### **Petro Star's Request for Rehearing**

24. Petro Star similarly argues the Commission's ruling that the September 26 Order is "the first order of the [Commission] imposing quality bank adjustments" for the Heavy Distillate Cut is arbitrary and capricious, because the September 26 Order did not "impose" anything; it merely accepted a filing subject to refund after an evidentiary hearing.

25. Petro Star argues that the Commission rationale for finding the September 26 Order is the "first order" since "section 4412(b)(2) does not require the adjustment in the first order be final and not subject to change" and that using the date of the final compliance would negate the statute's reference of the "first order" fails because neither addresses the crucial issue of whether the September 26 Order "imposed" Quality Bank adjustments. An order such as the September 26 Order, which merely accepts a new tariff subject to a hearing and potential refunds does not "impose" retroactive changes in TAPS Quality Bank adjustments. In support Petro Star cites *ExxonMobil Oil Corp. v. FERC*, 487 F.3d 945, 967-68 (D.C. Cir. 2007) (*ExxonMobil*), in which Petro Star claims the Court held that interim rates, accepted by the Commission subject to refund, "is not tantamount to the Commission's prescribing (i.e. "imposing") rates itself."<sup>15</sup> Thus, the Court held those rates were not entitled to protection from reparations under *Arizona Grocery Co. v. Atchison, T. & S.F. Ry. Co.*, (284 U.S. 370) (1932), because they had not been "approved," "prescribed," or "declared" by the Commission.

26. In Petro Star's view, only two orders could arguably be sufficiently definitive under *ExxonMobil, supra*, to be the "first order" within the meaning of section 4412(b)(2). The first would be the December 2008 Order, which

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<sup>15</sup> Request at 8.

implemented Opinion No. 500, and the second, would be Opinion No. 500, which established the methodology to apply to the Heavy Distillate cut.

27. Petro Star also takes issue with the December 2008 Order's reference to ICA section 15(7) as authorizing its action here, when section 4412 clearly limits the Commission's ability to order retroactive Quality Bank adjustments. Petro Star asserts section 4412(b)(2) applies categorically "*In a proceeding commenced after the date of enactment of this Act,*" involving retroactive changes in TAPS quality bank adjustments. Therefore, section 4412(b)(2) applies to any such proceeding, including proceedings involving new or changed rates filed under section 15(7).

28. Petro Star opines that the September 26 Order overlooks section 4412(c)(2), which requires a final Commission order within 15 months of the initiation of a proceeding. It argues that read as a whole, section 4412 indicates Congress (1) directed the Commission to complete proceeding involving TAPS Quality Bank claims within 15 months after the claim is filed, and (2) limited any retroactive Quality Bank adjustments to those same 15 months. It contends the Commission's interpretation of 4412(b)(2), flouts Congress' intent, made manifest by section 4412(c), that retroactive Quality Bank adjustments should parallel the 15-month period that Congress specifically deemed sufficient to complete Quality Bank proceedings. Thus, the 15-month period in which the Commission may order retroactive adjustments corresponds to the length of time that Congress considered appropriate for Quality Bank proceedings.

### **Responses to the Rehearing Request**

29. The responses to the rehearing requests state that there is no merit to requesters' contention that the September 26 Order cannot be the "first order imposing quality bank adjustment" in the proceeding because it was an interim order subject to refund, and that such an interim order is not a final order. They argue that section 4412(b)(2) does not require that the first order must be a final order since that section 4412(b)(2) refers to the "first order" of the Commission imposing quality bank adjustments, not to a "final order" imposing adjustments.

30. The responses states that contrary to Flint Hills' contention, where there is an "unlawful order" section 4412 would have application, under the Commission's interpretation of that section, and does not render the section a nullity. The responses state that where the court remands a quality bank adjustment proceeding, the order by the Commission in that proceeding which changes the prior adjustment would become the "first order" subject to the 15-month limit in section 4412.

31. Chevron suggests in its response that section 4412 could come into play if a shipper filed a complaint for reparations under section 13(1) of the ICA. In such a

case, the complainant could claim a retroactive quality bank adjustment as reparations for a two-year period preceding the filing of a complaint.<sup>16</sup> It asserts section 4412(b)(2) would come into play to limit the retroactive period for such reparations to 15 months preceding the Commission's first order imposing changes in response to the complaint.

32. With respect to Petro Star's contention that the retroactive adjustments contained in section 4412(b)(2), parallel the 15-month time period for the Commission to rule that is set forth in section 4412(c)(2), Chevron's response notes that since Congress used the term "first order" in section 4412(b)(2) and "final order" in section 4412(c)(2) it is implausible that Congress intended the 15-month terms in each of the two provisions to parallel each other.

33. In Flint Hills' reply to the responses, it asserts the argument that the Commission proceeding on remand from the Court would be a new proceeding is incorrect because the remand does not start a new Commission proceeding, but requires the Commission to reassess within the existing proceeding. Thus, Flint Hills maintains, the Commission's interpretation renders the statute a nullity because there never would be a period subject to the 15-month limitation. Flint Hills also disputes Chevron's reparation argument asserting that Flint Hill's position cannot be squared with the history leading up to the enactment of section 4412, because reparations were not involved in the *OXY-Exxon* cases.<sup>17</sup>

### **Discussion**

34. Section 4412 is ambiguous because it does not define all the terms it uses, such as "claim" and "imposing," nor is it clear whether the "adjustment" defined in section 4412(a) refers to a change in an existing amount, or refers to a new monetary charge. The Commission's interpretation of section 4412 is reasonable and consistent with what Congress sought to address in that section, but requesters' interpretation is not. In view of the rehearing requests, a more detailed

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<sup>16</sup> *BP West Coast Prod., LLC v. FERC*, 374 F.3d 1263, 1303-06 (D.C. Cir. 2004); *Exxon Mobil Corp. v. FERC*, 487 F.3d 945, 962 (D.C. Cir. 2007).

<sup>17</sup> On first blush Chevron's "reparations" situation as an example when section 4412 would apply seems to have merit, but reparations was never a remedy involved in *OXY-Exxon*. Since the "illegal order" situation suffices as to when the 15-month limit in section 4412 would apply under the Commission's interpretation of section 4412 we see no need to consider whether the reparations situation is an alternative basis for finding the Commission's interpretation would not render the statutory provision meaningless.

description of the situation that existed in 2005 when Congress enacted section 4412 is appropriate.

35. In 1993, the Commission determined that the existing Quality Bank valuation methodology was no longer just and reasonable, and a change was necessary. The Commission accepted a contested settlement that incorporated the current distillation methodology for valuing ANS crude oil. In 1995, in *OXY USA v. FERC*, 64 F.3d 679 (D.C. Cir. 1995) (*OXY*), the Court affirmed that a change was necessary, but remanded to the Commission the valuation of the Distillate and Resid cuts. Upon remand, the Commission approved, with modifications, another contested settlement revising the valuation of the Resid cut, and making certain other valuation changes. In 1999, in *Exxon v. FERC*, 182 F.3d 46 (D.C. Cir. 1999) (*Exxon*), the Court affirmed the Commission's order, except that the Court again rejected and remanded the valuation of the Resid cut. In addition, the Court questioned the Commission's decision to apply the new Resid valuation prospectively, stating that when legal error is committed there is a "strong equitable presumption in favor of retroactivity that would make the parties whole."<sup>18</sup> Accordingly, the Court also remanded the issue of the effective date of the new valuations. Upon remand, the Commission set those issues, and others, for hearing. In August 2004, the ALJ issued an Initial Decision, determining the Resid cut valuation, and held that the QBA must "recalculate the Quality Bank from December 1993 forward and make appropriate refunds."<sup>19</sup> Before the Commission acted on the exceptions to the Initial Decision, Congress enacted section 4412.

36. While the cited legislative history referred to a proposed bill that was not enacted, nevertheless, it shows the concern Congress intended to address was the extended refund period, possibly 12 years that certain TAPS shippers would incur if refunds were provided back to 1993.<sup>20</sup>

37. Congress enacted section 4412 in August 2005. That section was limited to TAPS' Quality Bank matters, not to any other TAPS' Commission matters, such as tariff rates for transportation. Section 4412(b)(1) provided that in proceedings commenced before enactment of section 4412, retroactive adjustment, namely any

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<sup>18</sup> 182 F.3d at 49.

<sup>19</sup> 108 FERC ¶ 63,030 at P 2952.

<sup>20</sup> For example, Flint Hills cited Sen. Stevens' statement that the proposed legislation "will eliminate the risk and uncertainty associated with the prospect of nearly unlimited retroactive application of Quality Bank payment methodology changes." 151 Cong. Rec. at 83753 (April 15, 2005).

refunds ordered in the pending proceeding, was limited back to February 1, 2000. In Opinion No. 481, issued in October 2005, the Commission applied section 4412 and limited the refunds back to February 1, 2000.<sup>21</sup> For proceedings commenced after its enactment, section 4412(b)(2) limited the period for any retroactive changes in Quality Bank adjustments to the “15-month period immediately preceding the earliest date of the first order ... imposing quality bank adjustments in the proceeding.” The December 2008 Order determined that the September 26 Order satisfied the statutory criteria set out, namely, it was the “first order” and “imposed” a quality bank adjustment.

38. The September 26 Order put in place a new processing cost for valuing the Heavy Distillate cut. We find no merit in the argument that the September 26 Order is not the “first order” referred to in section 4412 because it was not the order that definitively established the amount of the processing cost adjustment because the Commission set final determination of the adjustment for hearing, subject to refund. That in no way negates the fact that the September 26 Order accepted a new proxy for the Heavy Distillate cut and directed the QBA to assess a new processing cost adjustment to the Heavy Distillate cut’s proxy price. The QBA has assessed that amount since that time, and in fact was imposed on a retroactive basis from September 26, 2006, to June 1, 2006. That the September 26 Order was not an order subject to court review does not detract from the fact that it was an order that affected the value of the commingled crude oil stream of TAPS’ shippers. As the December 2008 Order stated, section 4412(b)(2) refers to an “order,” not an “order subject to review.” Moreover, requesters attempt to rewrite section 4412(b)(2) by adding “retroactive” before the words “first order” to make the 15-month period refer to the period preceding “the first order imposing retroactive quality bank adjustments,” rather than as section 4412(b)(2) states “the first order imposing quality bank adjustments.”

39. Cases cited by requesters in support of their claim that an order accepting a rate subject to refund does not “impose” a rate are not on point. *Electrical District No. 1 v. FERC*, 774 F.2d 490 (D.C. Cir. 1985), involved whether the Commission had “fixed” a just and reasonable rate under the Federal Power Act. *ExxonMobil Oil Corp v. FERC*, 487 F.3d 945 (D.C. Cir. 2007), involved whether the Commission had “approved or prescribed” a just and reasonable rate and, therefore, whether reparations could be ordered under the Interstate Commerce Act. The instant case, in contrast to those cases, involves the question of what was the “first order of the Federal Energy Regulatory Commission imposing quality bank adjustments in the proceeding” as set out in § 4412(b)(2) of the Motor Carrier Safety Reauthorization Act of 2005.

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<sup>21</sup> See 113 FERC ¶ 61,062 at PP 176-77 and 235.

40. Even if those cases involved the same statutory language at issue here, we would still find them inapposite on the alternative basis that the circumstances in those cases are not analogous to the circumstances present here. In *Electrical District No. 1 v. FERC*, 774 F.2d 490 (D.C. Cir. 1985), an electrical utility sought to increase its rates. The Commission found the proposed rates produced an excessive return and Order A directed the utility to file a revised rate schedule “which reflect the findings in this decision.” After the Commission clarified Order A, the utility made that filing, and the Commission granted the utility’s request to make the rate effective as of the date of Order A. The Court reversed, stating that Order A which set forth “no more than the basic principles pursuant to which the new rates are to be calculated” did not “fix the rates” under the Federal Power Act, so the old rate continued in effect until the revised rate schedule was filed.<sup>22</sup> Here, the Commission’s September 26 Order accepted the TAPS Carriers’ July 2006 filing establishing the new proxy for the Heavy Distillate cut effective June 1, 2006, only the amount of the processing cost adjustment to the new proxy was to be determined. Thus, by the Commission’s September 26 Order the old proxy was no longer operative, and the new proxy would apply as of June 1, 2006, so the September 26 Order was the first order imposing the quality bank adjustment for the Heavy Distillate cut as of June 1, 2006.

41. In *ExxonMobil Oil Corp v. FERC*, 487 F.3d 945 (D.C. Cir. 2007) an oil pipeline filed rates and certain shippers filed complaints challenging the rates. While the Commission accepted and suspended the rates subject to refund, nevertheless the order acknowledged that the Commission was uncertain of the methodology that it would use to determine a just and reasonable rate for the rates in question. The Commission subsequently issued an order reducing the rates, but denied the challenging shippers reparations relying on the *Arizona Grocery* doctrine that where the Commission has “prescribed” a reasonable rate, it may not then subject a carrier to reparations based on the Commission’s revised determination of reasonableness.<sup>23</sup> The court reversed finding that it could not be said that the Commission had “approved or prescribed” a reasonable rate “where, as here, the Commission accepts a pipeline’s proposed tariff subject to suspension and refund without even establishing the methodology for determining the final rate...”<sup>24</sup> Accordingly, the court held that reparations should be permitted. Here

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<sup>22</sup> 774 F.2d at 493. The court cited section 206 of the FPA which provides that when the Commission finds a rate unjust and unreasonable “the Commission shall determine the just and reasonable rate ... *to be thereafter observed and in force, and shall fix the same by order.* 16 U.S.C. § 824e(a) (emphasis added).”

<sup>23</sup> *Arizona Grocery Co. v. Atchison, Topeka and Santa Fe Ry. Co.*, 284 U.S. 370 at 390 (1932).

<sup>24</sup> 487 F.3d at 968.

requesters do not argue that there was no methodology to value the Heavy Distillate cut only the processing cost adjustment for the new proxy had to be determined, in sharp contrast to the situation in *ExxonMobil*.

42. The Commission could not do otherwise than to accept the compliance filing, effective June 1, 2006. The TAPS Carriers' April 2, 2008 compliance filing reflected the Opinion No. 481 determinations resulting in a calculated amount of 8.1340 cpg as of June 1, 2006,<sup>25</sup> the date when the ULS (EPA) Diesel became the new reference price. Requesters urge the Commission to effectuate the compliance filing at some later date, which would be 15 months prior to the date the Commission accepts the TAPS Carrier's compliance filing, a moving date. Requesters never state what the Heavy Distillate cut processing cost adjustment for the Heavy Distillate would be for the period from June 1, 2006 to that date, possibly because to do so would highlight the lack of merit in their position.

43. Clearly, the prior processing cost adjustment could not apply because that was based on the LS diesel, which Platts no longer reported. The other alternative would be to allow the QBA's proposed processing cost adjustment, which all parties recognized would not necessarily be the amount of the litigated processing cost adjustment, to stay in effect for the period after June 1, 2006, even though it was found to result in an unjust and unreasonable rate. Such an outcome could not have been the intent of Congress in enacting section 4412 and is completely without any logical or legal basis, and contrary to all Quality Bank precedent involving changes in reference prices.

44. Moreover, as the Commission explained, section 4412 applies in the "illegal order" situation, which is exactly the situation existing when Congress enacted section 4412. In this case, the Commission imposed the proposed quality bank processing cost adjustment in the September 26 Order effective June 1, 2006, subject to the outcome of the hearing. When the amount was determined after hearing and affirmed by the Commission's Opinion No. 500, the new amount became effective June 1, 2006, as all parties understood it would be, from the outset of the proceeding.

45. On the other hand, if Opinion No. 500 were to be reversed on appeal, the Commission would establish a new proceeding to determine the processing cost adjustment, and the date of the first order in the new remand proceeding would be the date to which the section 4412(b)(2) 15-month limit would apply. This would accomplish what Congress sought to achieve in adopting section 4412. Requesters reject this analysis and assert that the date of the compliance order at issue here

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<sup>25</sup> The amount would be subject to annual revision to reflect changes in costs.

would still govern. This would be contrary to Congress' purpose in enacting section 4412 because this would permit the retroactive adjustment to apply for a period extending many years, exactly what section 4412 was designed to prevent.

46. Requesters also mischaracterize the Commission's reference to ICA section 15(7) in the December 2008 Order. The Commission merely stated in P 20 that this section authorizes the Commission to make retroactive adjustments. The December 2008 Order did not state, as Petro Star contends, that ICA section 15(7) negated the application of section 4412(b)(2) in this case. On the contrary, the order acknowledged that section 4412 limits the number of months preceding the "first order" during which the retroactive adjustment can be effective. Since the date of the first order was September 26, 2006, the June 1, 2006 effective date fell within that time frame.

The Commission orders:

The requests for rehearing are denied.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

## APPENDIX – Section 4412

## SEC. 4412. QUALITY BANK ADJUSTMENTS

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

(b) PROCEEDINGS—

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

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

(c) DEADLINE FOR CLAIMS

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

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