

138 FERC ¶ 61,164
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

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

Docket No. OR06-10-007

ORDER ON REMAND

(Issued March 9, 2012)

1. This matter is on remand from the decision of the United States Court of Appeals for the District of Columbia Circuit (Senior Judge Randolph dissenting)¹ which vacated and remanded Commission orders concerning the date of the “first order” imposing retroactive changes in TAPS quality bank adjustments.² Section 4412(b) (2) of the Motor Carrier Safety Reauthorization Act of 2005, Pub. L. No. 109-59, 119 Stat. 1144, 1778-79 (2005) (§ 4412) imposes a limit on the period for TAPS Quality Bank retroactive adjustments. That section provides that:

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.³

¹ *Flint Hills Resources Alaska, LLC v. FERC*, 631 F.3d 543 (D.C. Cir. 2011) (Remand Opinion).

² *BP Pipeline (Alaska), Inc.*, 125 FERC ¶ 61,254 (2008) (Compliance Order), *order denying reh’g*, 128 FERC ¶ 61,169 (2009) (Rehearing Order).

³ See Appendix A.

2. As more fully explained below, there were three possible dates which might have been chosen as the “first order” in this proceeding:

September 26, 2006: Hearing Order

March 20, 2008: Opinion No. 500

December 2, 2008: Compliance Order

3. The Commission held that the September 26, 2006 Hearing Order was the “first order.” The court majority determined that the Commission’s interpretation of § 4412(b)(2) was inconsistent with the statute’s language and purpose since the September 26, 2006 Hearing Order merely “allowed” the proposed adjustment to take effect as filed, but did not give any actual effect to the statutory provision by limiting the refund period in comparison to what it would have been in the absence of § 4412(b)(2). The court stated that upon remand the Commission should address two issues, which the court did not decide, first, what was the “first order,” and second, the contention that § 4412(b)(2) limits refunds to a maximum total period of 15 months, and resolution of the latter issue should occur in an analysis integrating it with a lawful choice of “the first order.”

4. Upon consideration of the relevant factors, the Commission concludes that the “first order” is the March 20, 2008 Opinion No. 500. Given that finding, the retroactive refunds are applicable back to 15 months preceding that date, namely January 2007. Moreover, refunds also would apply for the period after March 20, 2008, since those refunds would not be retroactive adjustments.

I. Background

5. 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. 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, in a particular stream. Some cuts are products with market prices, while others, like the Heavy Distillate cut (H.D. cut), which is the subject of this proceeding, for which there is no market, are assigned a proxy market product, and require further processing to meet that proxy’s specifications. The valuation methodology deducts these processing costs from the proxy’s market price, reducing the value of that particular cut.

6. 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 of the cuts. When a change is proposed parties may file comments within 30 days of the notice, and the change will become effective on the 60th day after the filing if the Commission takes no action as of that date.

7. A Commission opinion in 2005, Opinion No. 481⁴ set the proxy for the H.D. cut with a sulfur content of 500 parts per million (ppm), and since ANS crude had a sulfur content of 5,000 ppm, there was a 6.4032 cents per gallon (cpg) downward adjustment in the proxy price to reflect the processing costs.
8. On July 28, 2006, the TAPS Carriers filed a notice with the Commission that as of June 1, 2006, a new proxy for the West Coast H.D. cut was required, and the QBA had determined that proxy which had a lower sulfur content of 8 ppm.
9. The QBA's notice advised that because more expensive processing is required to meet the lower 8 ppm sulfur specification, he proposed a processing cost adjustment of 10.4549 cpg for the West Coast H.D. cut.
10. In filed comments all the parties agreed to the proposed new proxy, but some objected to the proposed processing cost adjustment. Accordingly, 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.⁵ The order stated the value of the cut "will be subject to refund when the Commission issues the final order." No party sought rehearing of the September 26, 2006 order.
11. On September 7, 2007, after hearing, the Administrative Law Judge (ALJ) issued an Initial Decision (ID).⁶ 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 H.D. cut.⁷ No party filed for rehearing of Opinion No. 500. Review of Opinion No. 500 was also not sought.⁸

⁴ *Trans Alaska Pipeline System*, Opinion No. 481, 113 FERC ¶ 61,062 (2005), *order on reh'g*, Opinion No. 481-A, 114 FERC ¶ 61,323, *order on reh'g*, Opinion No. 481-B, 115 FERC ¶ 61,287 (2006), *aff'd*, *Petro Star v. FERC*, (D.C. Cir. No. 06-1166, *et al.* (March 6, 2008).

⁵ *BP Pipeline (Alaska) Inc.*, 116 FERC ¶ 61,291 (2006) (September 26 Order).

⁶ *BP Pipeline (Alaska) Inc.*, 120 FERC ¶ 63,018 (2007).

⁷ *BP Pipelines (Alaska) Inc.*, Opinion No. 500, 122 FERC ¶ 61,236 (Ordering Paragraph (B) (2005)).

⁸ A petition to review Opinion No. 500 was filed, but was voluntarily dismissed while the appeal in this proceeding was pending.

12. On April 2, 2008, the TAPS Carriers made the compliance filing which established an 8.1340 cpg processing cost adjustment for the period covering June 2006 through January 2007, a little more than 2 cents less than the QBA's proposed amount of 10.4549 cpg. The September 26 Order had 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 compliance filing indicated that 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. 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.

13. Flint Hills Resources Alaska LLC (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. 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.

II. The December 2008 Order

14. On December 2, 2008, the Commission accepted the compliance filing concluding that the September 26 Order hearing order was the first order referred to in section 4412 which imposed a quality bank adjustment in this proceeding and therefore June 1, 2006 was within the permissible 15-month period under section 4412.

15. 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 H.D. cut from the prior proxy with a processing cost adjustment of 6.4302 cpg to the new proxy price minus 10.4519 cpg, subject to refund. That processing cost adjustment has been in effect since June 1, 2006. 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."⁹

16. Flint Hills and Petro Star, Inc. filed requests for rehearing of the December 2008 Order. ConocoPhillips Alaska Inc. (Conoco) and Union Oil Company of California and Chevron, U.S.A. Inc. (Chevron) filed responses to the requests.

⁹ Flint Hills' Protest at 2-3.

17. Flint Hills argued 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.”¹⁰

18. Petro Star’s view was that only two orders could arguably be sufficiently definitive to be the “first order” within the meaning of section 4412(b)(2). The first would be the December 2008 Compliance Order, which implemented Opinion No. 500, and the second, would be Opinion No. 500, which established the methodology to apply to the H.D. cut.

III. The Rehearing Order

19. The Rehearing Order stated that 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 order stated that the September 26 Order put in place a new processing cost for valuing the H.D. cut, and there was 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. The order concluded that the Commission’s interpretation of section 4412, that the September 2006 hearing Order was the “first order” is reasonable and consistent with what Congress sought to address in that section, but the requesters’ interpretation is not.

20. The order held that cases cited by requesters in support of their claim that an order accepting a rate subject to refund does not “impose” a rate, *Electrical District No. 1 v. FERC*, 774 F.2d 490 (D.C. Cir. 1985) (*Elec. Dist. No. 1*), and *ExxonMobil Oil Corp v. FERC*, 487 F.3d 945 (D.C. Cir. 2007) were not on point, and distinguished them.

IV. The Remand Opinion

21. On review, the court majority agreed with the Commission that the language of § 4412 was ambiguous and that the purpose of the statute was to limit refunds’ retroactive reach in cases that have dragged on interminably. Nevertheless, the court majority determined that the Commission’s interpretation of the phrase “the first order . . . imposing quality bank adjustments” was not a permissible one because (1) it “does not readily match ordinary usage of the terms Congress employed,” and (2) “if it fulfills Congress’ goal at all,” the Commission’s interpretation “does so only with respect to a

¹⁰ Rehearing Request at 3.

specialized set of delays that no word of § 4412 singles out for special treatment, or for a realm (that of § 13(1)). . . . that may be irrelevant . . . to the Congressional concern.”¹¹

22. The opinion noted that under the tariff, the TAPS Carriers’ proposed adjustment in the July 2006 Notice would take effect of its own accord within 60 days. Moreover, the court continued, in a “conventional” Commission proceeding under the Interstate Commerce Act section 15(7), and under the tariff, the Commission’s hearing order would, (apart from the possible suspension) “simply allow the carriers’ new rate to take effect in accordance with the carriers’ filing.” The opinion then concluded that “[a] Commission decree under which nature simply takes its course – nature in this case being the new adjustment – cannot, in the conventions of ordinary discourse, be described as ‘imposing’ the adjustment.”¹²

23. The Hearing Order at n.3 stated:

The QBA recommends the previously effective proxy price for Heavy Distillate be used to value West Coast Heavy Distillate, for the period commencing June 1, 2006 based on Opinion No. 481, until the new valuation being proposed in the Replacement Notice goes into effect. We see no need for this interim valuation.

24. The opinion stated that the Commission did not explain in the September 26, 2006 Hearing Order what authorized the agency to choose the effective date of June 1, 2006, for the proposed adjustments, a date earlier than the one specified in the TAPS Carriers’ notice. The Opinion concludes, “if we were to characterize the Commission’s footnote filling the gap between cessation of the old and initiative of the new as ‘imposing’ an adjustment,” it seems unlikely to have been the sort of imposition of an adjustment that Congress contemplated. *Id.*

25. As to the second reason, the opinion states that, “far more” against the Commission’s interpretation than “ordinary language,” which the opinion characterizes as “somewhat” against the Commission’s theory, “is the usual conception that Congress expects its legislation to accomplish something – here, of course, to limit refunds’ retroactive reach in cases that have dragged on interminably.”¹³ Given how the Commission’s refund authority operates in a “standard proceeding under ICA section 15(7), the court majority concludes that “under the Commission’s view,” at least for “standard proceedings, section 4412 would limit refunds “only in a case where the

¹¹ 641 F.3d at 549.

¹² *Id.* at 546. The dissent stated that “The Commission’s interpretation fits comfortably within the language of section 4412(b)(2).” *Id.* at 549.

¹³ *Id.*

Commission had delayed issuing any hearing order until 15 months after the filing's effective date." Thus, according to the opinion, the Commission's interpretation would give no effect to section 4412(b)(2) in a "standard" proceeding under section 15(7) and therefore does not accomplish what Congress intended. The court directed that upon remand the Commission should address two issues, first, what was the "first order," and second, the contention that § 4412(b)(2) limits refunds to a maximum total period of 15 months, and resolution of the latter issue should occur in an analysis integrating it with a lawful choice of "the first order."

V. Pleadings on Remand

26. Flint Hill's filed a request that the Commission address the issues on remand. In response, Conoco presented its views on the remanded issue. Flint Hills filed a response to Conoco's filing. On November 22, 2011, Petro Star filed a motion for summary disposition of the remanded issues that the Commission adopt the Compliance Order as the first order. On December 7, 2011, Conoco and Chevron filed responses to Petro Star's motion. Flint Hills filed in support of Petro Star's motion and in response to Conoco and Chevron's responses.¹⁴

A. Conoco's Response

27. Conoco argues that Opinion No. 500 was the first order issued by the Commission imposing quality bank adjustments in this proceeding. It contends that while Opinion No. 500 did not set forth a specific numerical processing cost adjustment, Opinion No. 500 ruled in detail on every element of the formula used to calculate the processing cost adjustment, such that all parties could easily calculate the resulting adjustment.

28. In fact, Conoco asserts, Opinion No. 500 permitted the Commission to use the formula it approved to determine the amount of the processing cost adjustment. Thus, in response to one exception to the I.D. that the "end result" of the hearing process must fall "in the zone of reasonableness," Opinion No. 500 stated "the processing cost adjustment that results from the rulings in the I.D. – approximately 8.13 cents per gallon – falls squarely within the range posited by BP."¹⁵ This amount, Conoco points out, was almost identical to the 8.1340 cpg of the processing cost adjustment in the April 2, 2008 compliance filing.

¹⁴ On December 23, 2011, Petro Star moved to file an answer to Conoco and Chevron's responses to Petro Star's motion. We do not accept Petro Star's filing since answers to answers are not permitted under section 385.213(a)(2) of the Commission's regulations, and Petro Star has already set forth its position a number of times.

¹⁵ Opinion No. 500, 122 FERC ¶ 61,236 at P 173.

29. Conoco asserts that Opinion No. 500 is an order which imposed the adjustment consistent with D.C. circuit court precedent. Conoco states that while one 1985 case in that circuit had suggested that there must be an exact number in order to fix a rate, *Elec. Dist. No. 1*, that position was not followed by subsequent cases in the circuit. Conoco cites to *Transwestern Pipeline Co. v FERC*, 897 F.2d 570 (D.C. Cir. 1990), *cert. denied*, 498 U.S. 952 (1990) (*Transwestern*) and *City of Anaheim v. FERC*, 558 F.3d 521 (D.C. Cir. 2009) (*City of Anaheim*). In both the D.C. Circuit stated that an order approving a formula for setting a rate should be deemed an order fixing a rate “so long as purchasers can supply their own inputs to the formula *and thereby know the numerical rates*” (emphasis added). *City of Anaheim* 558 F.3d at 524. Conoco asserts that Opinion No. 500 clearly meets this standard.

30. Moreover, Conoco states that Commission precedent is consistent with the court’s approach that it is not necessary that there be a stated numerical amount to consider an order as fixing the rate. Thus, in *Independent Energy Producers Ass’n v. California Indep. Sys. Operator Corp.*, 128 FERC ¶ 61,165 (2009) (*Independent Energy*) the Commission addressed the precise question present here. There, as here, the issue was the effective date of a rate for purposes of calculating refunds. The Commission held that it is not necessary for the order to set the exact numerical rate to be charged to consider that order as fixing the rate. The Commission noted, at P 25, that an order that “only decides general ratemaking issues” does not fix a rate, (quoting Opinion No. 500, 122 FERC ¶ 61,259 at P 10 (2008)), but that an order does fix the effective date of the rate when an order approving a formula “allowed purchasers to supply their own inputs to the formula and thereby *know* the numerical rates’ charged,” *id.* P 30 (quoting *City of Anaheim*, 558 F.3d at 524) (emphasis in original). Conoco concludes that since Opinion No. 500 permitted parties to know what the processing cost adjustment for the H.D. cut would be as a result of that opinion, it should be considered the “first order that imposed” the adjustment for purposes of section 4412.

31. As to the second remanded issue, Conoco asserts that the limitation on retroactive adjustments applied to adjustments only prior to the date of the first order imposing quality bank adjustments. Conoco argues the limitation in section 4412 does not apply to the period after that first order. Conoco asserts that the position advocated by Flint Hills, that the refunds can be ordered only for a 15-month period, is directly contrary to the wording in § 4412. That section’s limitation on retroactive adjustments applies only to “the 15-month period immediately preceding the earliest date of the first order.” Clearly, Conoco argues, if Opinion No. 500 is the first order for purposes of section 4412, retroactive quality bank adjustments, are permitted 15 months back from the time of issuance Opinion No. 500. Applying the Opinion No. processing cost adjustment amount after issuance of Opinion No. 500 would not be a retroactive adjustment.

B. Flint Hills' Response to Conoco

32. Flint Hills' response to Conoco's filing asserts that several factors weigh against Opinion No. 500 being considered as the first order. First, Flint Hills states that Opinion No. 500 did not impose any quality bank adjustment, but merely ruled on certain issues that arose out of the hearing and the ALJ's I.D. Flint Hills further contends that Opinion No. 500 was not the first order because no invoices were issued as a result of Opinion No. 500.¹⁶

33. Flint Hills states that adjusted quality bank invoices were not issued by the QBA until after the December 2, 2008 Compliance Order. Thus, it asserts, invoices for the adjusted rates (so as to meet the change required by Opinion No. 500) would be "retroactive" for any period prior to December 2, 2008 when the Compliance Order issued. Flint Hill's position is that the period between the issuance of Opinion No. 500 on March 20, 2008, even if it was the "first order," and December 2, 2008, when the compliance order was issued, must be considered a retroactive adjustment period, and prohibited by section 4412 because the retroactive adjustment would exceed 15 months contrary to section 4412 which limits retroactive adjustments to 15 months. Flint Hills argues that accepting Opinion No. 500 as the "first order," could result in different rates being applicable in different periods. Thus, it contends only if the Compliance Order is found to be the "first order imposing quality bank adjustments" is the language and purpose of section 4412 followed, by allowing retroactive rates to apply for no more than 15 months prior to the order in which the Commission approved the changes to the existing rate.

C. Petro Star's Motion

34. Petro Star, similar to Flint Hills, argues that the Compliance Order is the first order of the Commission imposing quality bank adjustments in this proceeding, and that the Commission is prohibited by § 4412(b)(2) from ordering refunds for a period exceeding a total maximum of 15 months.

35. Petro Star disputes the position that to qualify as a first order for purposes of § 4412(b)(2) it was not necessary that the order establish a numerical quality bank adjustment but suffices if the order was so clear that all shippers and refineries could accurately calculate the adjustment for themselves. Petro Star argues that the

¹⁶ Flint Hills also urges the Commission to consider all the arguments Flint Hills presented previously without specifying which it is relying on. The Commission has addressed those in the rehearing order and will not repeat that discussion here. Moreover, the prior arguments were directed at why the Hearing Order was not the first order. In fact, Flint Hills conceded that Opinion No. 500 satisfied the requirement to be considered the first order. *See infra*, P 60-61.

methodology approved by the Commission in Opinion No. 500 is lengthy and complex. Petro Star then cites to the ruling in Opinion No. 500, 122 FERC ¶ 61,236 at P 170:

The law is clear that the ALJs are not required to determine the precise value that results from their rulings, and their obligation is only to decide the disputed issues presented to them by the parties. The ALJs properly left it to the QBA and the TAPS Carriers to calculate the precise value of the Heavy Distillate cut in compliance with the rulings in the I.D. or as modified by the Commission, a practice consistently followed by the Commission and upheld by the courts.

36. Petro Star, as did Flint Hills, cites to *Elec. Dist. No. 1*, and asserts that Conoco's reliance on *Transwestern* and *City of Anaheim* is misplaced. As for *Anaheim*, Petro Star states the "Court did not address the nature of the rates at issue, nor did it address the issue of what constitutes an allowable 'formula rate.'"¹⁷ As for *Transwestern*, Petro Star asserts that there the pipeline filed specific numerical percentages that were to be used in the calculation. Petro Star asserts that the Commission's numerous and complex findings in Opinion No. 500 simply cannot be considered to culminate in a formula rate acceptable under *Transwestern*.

37. Similarly, Petro Star argues, Commission precedent in *Independent Energy*, which involved when rates were fixed under a settlement, has no application here since there the rate formula terms and conditions enabled all parties to supply their own inputs and knew the numerical rate to be charged. In contrast, it contends, Opinion No. 500 did not approve a settlement in which the parties themselves agreed to a specific rate formula.

38. Here, Petro Star concludes, the Compliance Order therefore was the first order giving TAPS quality bank shippers and Alaska refiner's notice of the specific numeric monetary adjustments required to calculate the precise value of the H.D. cut in the TAPS quality bank.

39. As to the second question, Petro Star contends that § 4412(b)(2) unambiguously prohibits any retroactive quality bank adjustments other than adjustments for the 15-month period specified in that section. It argues that Conoco attempts to avoid this fact by mischaracterizing § 4412(b)(2) as establishing a "limit on retroactive adjustments [that] applies only to "the 15-month period immediately preceding the earliest date of the first order.""

40. In support of its position, Petro Star cites to the Remand Opinion:

Section 4412 ... imposes a limit on the retroactivity of [Commission] orders changing "quality bank adjustments" paid to oil shippers on the

¹⁷ Petro Star Motion at 7.

Trans Alaska Pipeline System (“TAPS”). Specifically, it provides that for proceedings starting after the date of enactment such orders cannot reach back more than 15 months before “the earliest date of *the first order* of the [Commission] *imposing quality bank adjustments in this proceeding.*”

631 F.3d at 544 (emphasis in original).

41. Petro Star argues that § 4412(b)(2) expressly prohibits the Commission from ordering retroactive adjustments for any period other than the 15 month preceding the “first order . . . imposing quality bank adjustments” in this proceeding. That prohibition applies whether the “first order” is Opinion No. 500 or the Compliance Order.

42. Petro Star concludes that the Compliance Order is the first order imposing quality bank adjustments in this proceeding, and that § 4412(b)(2) limits retroactive quality bank adjustments in this proceeding to the 15-month period immediately preceding the December 2, 2008 date of the Compliance Order.

D. Chevron’s Answer to Petro Star’s Motion

43. Chevron asserts that Petro Star urging that the Compliance Order in the first order imposing Quality Bank adjustments in this proceeding stands the words of section 4412 on its head because the Compliance Order is the final order in the proceeding. Chevron asserts that Petro Star’s argument that Opinion No. 500 cannot be the first order because it does not calculate the previous amount of the primary cost is wrong since Opinion No. 500 “does calculate the value of the Heavy Distillate adjustment adopted by the Commission.”¹⁸ Chevron explains that using the methodology approved in prior opinion Opinion No. 481, the issue in this proceeding was merely to determine the processing cost adjustment that would be subtracted from the price of the new proxy. The calculations to make the compliance filing merely apply the formula approved in Opinion No. 481. Chevron argues to the extent Petro Star relies on *Elec. Dist. No 1*, that case is not on point because here there was a formula rate which Opinion No. 500 implemented. Moreover, in subsequent cases the D.C. Circuit narrowed application of *Elec. Dist. No. 1* to its specific facts and did not apply it to a case involving a formula rate, which is what is present in this proceeding.

44. Finally Chevron asserts that there is no basis for Petro Star’s contention that section 4412 limit refunds to the 15 months preceding the first order, whatever that order may be. Chevron argues that section 4412 prohibits “retroactive” adjustment, not refunds. Adjustment to implement Opinion No. 500 after its issuance dates are not retroactive adjustments, and thus section 4412 has no application to them.

¹⁸ Chevron Answer at 4.

E. Conoco's Answer

45. Conoco's answer responds to Petro Star's argument that Opinion No. 500 is not an order involving a formula rate. Conoco states that Opinion No. 500 was such an order because it involves what changes should be made to the inputs to be used in calculating the processing cost adjustment. Here the formula was known as set forth in Opinion No. 481, and using the rulings on the changes to the inputs which is what Opinion No. 500 did, a party could readily calculate what the resulting adjustment would be.

46. Contrary to Petro Star's contention that the calculation was "complex," Conoco notes that not a single party objected to the numbers in the Compliance Filing, the only protest involved the period of the retroactive adjustment.

47. Conoco also argues that Petro Star's contention that the 15-month period for retroactive adjustment limits the refunds to that period before the first order has no basis in the statutory language. Moreover, Conoco asserts, once the Commission accepted the formula rate inputs in Opinion No. 500 and it became effective, adjustments in the rate back to the effective date is not retroactive ratemaking. Thus, the adjustment between the December 2008 date of the Compliance Order and the March issuance date of Opinion No. 500 are not retroactive adjustments within the meaning of section 4412. In short, Conoco concludes it would not violate section 4412(b)(2) for the Commission to require retroactive adjustments for the 15 month period prior to the issuance of Opinion No. 500, and also require the adjustments necessary to implement the revised quality bank processing cost adjustment that went into effect as of the date of the issuance of Opinion No. 500.

F. Flint Hills' Response in Support of Petro Star's Motion

48. Flint Hills filed in support of Petro Star's motion and in response to Chevron and Conoco's answers to that motion. Flint Hills again argues that the Commission should adopt the Compliance Order as the "final order" for purposes of section 4412. Flint Hills also filed against adopting Opinion No. 500 as the first order. Flint Hills asserts that Opinion No. 500 did not impose any quality bank adjustment since no invoices imposing retroactive adjustments were issued in response to Opinion No. 500. Rather Opinion No. 500 directed that a compliance filing should be submitted.

49. Flint Hills also disputes Chevron and Conoco's contention that § 4412 contains no restriction on retroactive quality bank adjustments *after* the date of the "first order." In support Flint Hills refers to the language in section 4412 that states that 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 ... (emphasis added). Flint Hills contends that invoices are clearly "retroactive," if they are for any period prior to their December 2, 2008 approval by the Commission in the Compliance Order. Flint Hills argues that to accept Chevron and Conoco's position would subject shippers in this case to a 23 months and 13 days period of retroactive

adjustments/refunds, in direct contravention of § 4412 and Congressional intent that any retroactive refunds be limited to 15 months.

VI. Discussion

A. Opinion No. 500 Was the First Order

50. The Remand Opinion directed the Commission to determine which was the first order imposing TAPS' adjustment in this proceeding. The opinion noted there were three possible dates, but the court ruled that the September 26, 2006 Hearing Order could not be that order, leaving only the March 2, 2008 Opinion No. 500, or the December 2, 2008 Compliance Order as the first order.

51. The court rejected the Hearing Order because that order basically directed that which would have occurred absent that order and thus "cannot in the convention of ordinary discourse, be described as 'imposing'" the adjustment.¹⁹

52. The opinion did not refer to any dictionary or other definition of the word "impose." However, the opinion does note the Hearing Order made the proposed new proxy rate effective as of the date the old proxy rate was no longer available, a date earlier than the one proposed by the TAPS Carriers which allowed continuation of the prior rate for a period of time after the quote for that rate was no longer available. The opinion states:

Accordingly, if we were to characterize the Commission's footnote filling the gap between cessation of the old and initiative of the new as 'imposing' an adjustment, it seems most unlikely to have been an adjustment, or an imposition of an adjustment, of the sort that the drafters of § 4412(b)(2) might have contemplated.²⁰

53. Flint Hills and Petro Star again argue that Opinion No. 500 cannot be the first order because it did not impose any specific numerical adjustment but merely ruled on certain issues, and rely on *Elec. Dist. No 1*.²¹

¹⁹ 631 F.2d at 546.

²⁰ *Id.* at 546.

²¹ The term "imposed" is not found in either the NGA or the FPA, which was applicable in the *Elec. Dist. No. 1* case, where section FPA 206 uses the term "fix the rate." Black's Law Dictionary defines "imposed" as "levy[ing] or exact[ing] (a tax or duty)." Black's Law Dictionary 771 (8th ed. 1999). Similarly, the Merriam-Webster dictionary states that to impose is "to establish or apply by authority." Merriam-Webster Dictionary (2011), available at <http://www.meriam-webster.com>.

54. Under the D.C. Circuit's clarifications of *Elec. Dist. No. 1* in *Transwestern* and *City of Anaheim*, we find, however, that Opinion No. 500 is an order imposing a rate. In *Transwestern* the court narrowed the applicability of *Elec. Dist. No. 1* to its specific facts and held that to fix a rate it is sufficient that the order establish a formula pursuant to which the rate may be calculated. The court stated:

The Commission need not confine rates to specific, absolute numbers but may approve a tariff containing a rate 'formula' or a rate 'rule' (as *Public Service Co. of New Hampshire* assumed); it may not, however, simply announce some formula and *later* reveal that the formula was to govern from the date of announcement (as it had done in *Electrical District No. 1*). We recognize that this view of *Electrical District* fails to implement its objective of eliminating the problems of drawing lines as to what notice is adequate, but we think that where the Commission explicitly adopts a formula and indicates when it will take effect, courts may not (without invading the Commission province) say that such a formula may never qualify as a 'rate' within the meaning of § 4 or § 5 of the Natural Gas Act.

897 F.2d at 578.

55. Here the parties were on notice from the Hearing Order that the new proxy price was subject to refund based upon the outcome of the hearing so the second element of the Court's *Transwestern* holding, that the parties have notice that the formula would be effective prior to the compliance filing, also is satisfied.

56. In *City of Anaheim* the D.C. Circuit stated that an order approving a formula for setting a rate should be deemed an order fixing a rate "so long as purchasers can supply their own inputs to the formula *and thereby know the numerical rates.*"²² (emphasis added).

57. Opinion No. 500 meets the standard described in those cases. Opinion No. 500 ruled on the factors necessary to calculate the processing cost adjustment. Moreover, as Conoco notes, in Order No. 500, the Commission in response to the contention that the rulings must be in the zone of reasonableness, stated that it would be since the processing cost adjustment would be about 8.13 cpg, which fell within the range suggested by witnesses at the hearing. Moreover the Commission's determination of the amount of the processing cost adjustment based on the rulings it affirmed, namely 8.13 cpg, was almost identical to the adjustment amount in the April compliance filing of 8.1340 cpg.

58. In fact, as noted above, in prior proceedings before the Commission, in their December 2008 requests for rehearing of the Commission's December 2008 order, both Flint Hills and Petro Star argued that the Commission should have chosen Order No. 500

²² *City of Anaheim v. FERC*, 558 F.3d 521 at 524 (D.C. Cir. 2009).

as the first order under section 4412, and not the Hearing Order. They conceded that Opinion No. 500 was sufficiently definitive in its rulings that it could be considered as imposing an adjustment.

59. Flint Hills contended in its rehearing request that if the Commission did not accept the order on 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 explained that Opinion No. 500 determined the methodology for calculating the adjustment and “set the framework for calculating the monetary adjustment that would apply during the rate period.”²³ This satisfies the standard in the cases cited above for determining whether a formula rate will be deemed as having fixed a rate. Accordingly, Flint Hills’ description of Opinion No. 500 represents an acknowledgement that Opinion No. 500 imposed an adjustment.

60. Similarly, Petro Star in fact conceded in its rehearing request that Opinion No. 500 was the “First Order” imposing quality bank adjustments. One section of its December 31, 2008 request for rehearing, was entitled, “III. OPINION NO. 500 IS THE APPROPRIATE ‘FIRST ORDER,’ IMPOSING QUALITY BANK ADJUSTMENTS.”²⁴ (Bold in Original.)²⁵ Petro Star argued that while there were two possible orders that could arguably be the “first order” within the meaning of section 4412, “Petro Star believes that March 20, 2008, the date of Opinion No. 500 is the logical choice.”²⁶ The reason for that belief was that Opinion No. 500 “definitely resolved the issue set for hearing...” Moreover, Petro Star argued that the subsequent compliance order should not be considered the first order because the calculations the QBA was directed to make “merely implement the monetary adjustments within the meaning of Section 4412(a) that were determined in Opinion No. 500,” and concluded that “it makes perfect sense to hold that Opinion No. 500 is the ‘first order’ for purposes of [Section 4412.]”²⁷

61. Finally, there is no merit to Flint Hills’ contention Opinion No. 500 did not impose an adjustment because no invoices were issued as a result of that order. The Commission always requires a compliance filing to implement such an order, which was filed a month later.

²³ Flint Hills’ Rehearing Request at 20.

²⁴ Petro Star Request for Rehearing at 11.

²⁵ That section of Petro Star’s rehearing request is attached as Appendix B.

²⁶ Petro Star Request for Rehearing at 11.

²⁷ Rehearing Request at 12.

62. For all these reasons, the Commission finds that Opinion No. 500 was the “first order” for purposes of section 4412.

B. What Refunds Are Applicable.

63. Given that the Commission finds the March 20, 2008 Opinion No. 500 is the first order, we will now answer the second question. The Remand Opinion held that the Hearing Order was not the “first order” for the purposes of § 4412, so the 15-month period of permissible retroactive changes could not be calculated from that date. Now that we have determined that the March 20, 2008 Opinion No. 500 is the “first order,” the 15-month permissible period for retroactive changes is calculated from that date.

64. To put this into context, the following chart shows what processing cost adjustment was in effect during this proceeding:

Until June 1, 2006 - Old Proxy Cost Adjustment,

July 28, 2006 - TAPS Carriers propose new 10.4549 cpg adjustment (the Replacement Proxy).

September 20, 2006 - Hearing Order accepts Replacement Proxy effective June 1, 2006, subject to refund, with the 10.4549 cpg adjustment.

March 20, 2008 - Opinion No. 500 – affirms I.D., orders compliance filing but states adjustment would probably be 8.13 cpg.

April 2, 2008 - Compliance filing with 8.1340 cpg adjustment.

December 2, 2008 - Order accepting compliance filing effective June 1, 2006.

65. Section 4412 states that the Commission may not order changes in retroactive Quality Board adjustments “for any period that exceeds the 15-month period immediately preceding the earliest date of the order ... imposing quality bank adjustments in the proceeding.” Opinion No. 500 imposed the adjustment. Flint Hills and Petro Star would rewrite section 4412 to make the 15-month period preceding Opinion No. 500 as the limit on the amount of retroactive adjustment can be made. However, that is not what section 4412 states. That section limits retroactive changes to “the 15-month period immediately preceding the earliest date of the First Order....” it does not limit changes in adjustment to a 15-month period.

66. In fact, Flint Hills and Petro Star seek to ignore that the Court describes Section 4412 as prohibiting the Commission from issuing an order that changes the Quality Board adjustment that “reach back more than 15 months before the earliest date of the first order.”²⁸ Adjustments after the first order obviously do not reach back. Therefore, retroactive change can be made for the 15-month period from January 2007 through March 2008 to change the QBA’s adjustment amount that had been in effect. Prior to January 2007, the QBA’s adjustment of 10.4549 cpg would remain and not be changed.

67. From March 20, 2008 forward, the cost adjustment would be the 8.1340 cpg imposed by Opinion No. 500. Section 4412 has no application to any change after the March 20, 2008 date because any change, even if considered a retroactive change would not be for the period “preceding the first order imposing quality bank adjustments in the proceeding.”

68. In fact Petro Star admitted in its December 2008 rehearing requests that the only retroactive period would be the change to the invoiced processing cost adjustments going back from the date of issuance of Opinion No. 500, and any changes to invoices going forward would not be a retroactive adjustment. This is apparent from its statement in the rehearing request that the Commission’s December 2008 Rehearing Order which permitted adjustment back to June 1, 2006, “established a retroactive adjustment period of 21 months, 20 days, between June 1, 2006 and the March 20, 2008 date on which Opinion No. 500 was issued.”²⁹ Under our interpretation of the statute, and our conclusion that Opinion No. 500 is the first order, changes after Opinion No. 500’s issuance date would not be retroactive changes.

The Commission orders:

(A) The March 20, 2008 Opinion No. 500 is the first order imposing Quality Bank adjustment.

²⁸ 631 F.3d at 544.

²⁹ Rehearing Request at 5.

(B) Retroactive changes can be made in invoices for the 15-month period from January 2007 through March 2008, and changes can be made in all invoices after issuance of Opinion No. 500.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

APPENDIX A – 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.

APPENDIX B

**III. OPINION NO. 500 IS THE APPROPRIATE “FIRST ORDER”
IMPOSING QUALITY BANK ADJUSTMENTS**

(Pages 11-12 of Petro Star’s December 31, 2008
Request for Rehearing in Docket No. OR06-10-003)

It follows directly from the preceding discussion that only two orders concerning the HDC could arguably be sufficiently definitive under ExxonMobil Corp., *supra* pp. 8-9, to be the “first order” within the meaning of § 4412(b)(2). The first is the December 1 Order itself, which implemented Opinion No. 500. The second is Opinion No. 500, which established the methodology to be applied to the HDC. The 15-month period immediately proceeding the December 2 Order would run from September 3, 2007 (again, well after the Commission’s September 6, 2006, Order). The 15-month period immediately preceding Opinion No. 500 would run from December 21, 2006 (also after the Commission’s September 26 Order accepting the rates subject to hearing and refund) through March 20, 2008.

Of the two possible “first order” dates, Petro Star believes that March 20, 2008, the date of Opinion No. 500, is the logical choice. The TAPS Carriers’ subsequent development of the Opinion 500 compliance filings was complex and time-consuming, but did not present any new substantive issues that had not been resolved by Opinion No. 500. Only the “first order” issue remains. Opinion No. 500 definitely resolved the issues set for hearing in the September 26 Order. Opinion No. 500 supported the ID’s determination of “how the QBA should calculate the processing cost and left it to the ALJ to calculate the amount of that adjustment.” Order P 9. Those calculations merely implement the “monetary adjustments” (within the meaning of § 4412(a)) that were determined in Opinion No. 500. Accordingly, they should not be considered retroactive for the purpose of § 4412(b)(2).

In contrast to Order No. 500, the September 26 Order resolved nothing definitively. It simply set in motion the process by which the Commission could impose refunds retroactively to the date the Commission accepted the TAPS Carriers’ proposed HDC adjustment after determining its lawfulness. The TAPS Carriers never have contended that there should be retroactive adjustments prior to June 1, 2006, and the Commission accepted their tariffs subject to refund only as of that date. If the phrase “first order” were construed to include an order that merely accepts a new tariff under § 15(7), subject to a hearing and potential refunds, all or most of the 15-month period allowed by § 4412(b)(2) would precede the filing of the new tariff. However, the filed rate doctrine and the rule against retroactive rate-making prohibit the retroactive application of a new tariff to periods preceding its filing. *Ark.-La. Gas Co. v. Hall*, 453 U.S. 571, 577 and

n.8 (1981) (explaining that “the filed rate doctrine has its origins in this Court’s cases interpreting the Interstate Commerce Act,” and “the Commission may not impose a retroactive rate alteration ...”). Thus, it makes perfect sense to hold that Opinion No. 500 is the “first order” for purposes of § 4412(b)(2), and no sense at all to hold that the September 26 Order that launched the proceeding is such a “first order.”