

145 FERC ¶ 61,117
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Flint Hills Resources Alaska, LLC, Complainant

v.

Docket No. OR13-31-000

BP Pipelines (Alaska) Inc., ConocoPhillips
Transportation Alaska, Inc., and ExxonMobil
Pipeline Company, Respondents

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

Docket No. OR14-6-000

ORDER DISMISSING COMPLAINT, INITIATING AN INVESTIGATION
AND ESTABLISHING HEARING

(Issued November 8, 2013)

1. On August 20, 2013, Flint Hills Resources Alaska, LLC (Flint Hills) filed a complaint against the Trans Alaska Pipeline System (TAPS) owners¹ over the TAPS Quality Bank (QB) formula pursuant to sections 9, 13(1) and 15(1) of the Interstate Commerce Act (ICA). Flint Hills petitions the Commission to investigate its claim that the currently effective QB formula fails to accurately produce a just and reasonable value

¹ The current owners of TAPS are BP Pipelines (Alaska) Inc. (BP), ConocoPhillips Transportation Alaska Inc. (ConocoPhillips), and ExxonMobil Pipeline Company (Exxon). Koch Alaska Pipeline Company, LLC, and Unocal Pipeline Company, previous owners of TAPS, provided notice to the Commission of their withdrawal from TAPS, effective August 1, 2012, and the transfer of their TAPS interests to the current owners.

for the Resid cut,² and to issue a final order adopting a new methodology for valuing Resid effective within the fifteen-month period preceding the filing date of the complaint. As discussed below, we dismiss Flint Hills' complaint as untimely filed. The Commission concurrently will initiate an investigation and establish a hearing to investigate the questions of fact and law raised by the complaint.

Background

2. TAPS consists of a 48-inch diameter common carrier crude oil pipeline owned and operated by the TAPS Carriers, extending approximately 800 miles from Pump Station No. 1 on Alaska's North Slope (ANS) to the Marine Terminal located in Valdez, Alaska, on Alaska's southeastern coast. Since 1977, TAPS provides the only commercially viable method for moving crude oil from ANS oil fields to the shipment point at Valdez. Because the crudes produced on the ANS have different qualities (i.e. different proportions of the various types of hydrocarbon molecules), they all have different values to refiners. Producers inject into TAPS at Pump Station No. 1, all their ANS crude oil production where all of the production streams are commingled. Alaskan refiners, located along the system, remove crude from the TAPS common stream primarily to make refined products such as gasoline and jet fuel and use for generation. The unused portion is injected back into the TAPS common stream. As a result of this commingling, and the refineries actions, a shipper will usually not receive at the Valdez Terminal the same quality of crude tendered at Pump Station No. 1.

3. The TAPS owners designed the QB to compensate shippers for differences in the values of the crude oils tendered versus the value of the commingled ANS common stream they receive at Valdez. QB requires shippers of crude oils that have a lower value than the ANS common stream to pay into the QB, while shippers of crude oils with a value higher than the ANS common stream receive payments from the QB.

4. The QB has been the subject of litigation almost from its very inception. The first TAPS QB proceeding commenced in 1979 and resulted in a settlement in 1984 that established a gravity-based methodology to compensate shippers.³ The "gravity" methodology determined crude oil values based on the American Petroleum Institute (API) gravities of each injected stream as compared to the API gravity of the ANS common stream.

² As explained *infra*, Resid is the portion of the petroleum stream remaining after distillation of all other cuts. Under the QB formula, Resid is any material that does not boil out until the temperature reaches or exceeds 1050°F.

³ *Trans Alaska Pipeline System*, 29 FERC ¶ 61,123 (1984).

5. In 1989 complaints were filed asserting that the gravity-based QB methodology no longer was just and reasonable as a result of increased Natural Gas Liquids (NGLs) blending at Prudhoe Bay because the gravity methodology overvalued NGLs, and increasing refinery operations along TAPS. After extended litigation the Commission, in December 1993, replaced the gravity-based QB methodology with a distillation methodology.⁴ The distillation methodology recognizes various crude cuts boil off at different temperatures. The cuts recognized by the distillation methodology are: (1) Propane; (2) Isobutane; (3) Normal Butane; (4) Light Straight Run (LSR); (5) Naphtha; (6) Light Distillate; (7) Heavy Distillate; (8) Vacuum Gas Oil (VGO); and (9) Resid. The crude is valued as the sum of the value of the products from the distillation.

6. The D.C. Circuit affirmed the Commission's adoption of the distillation QB methodology in *OXY U.S.A. Inc. v. FERC*, 64 F.3d 679 (D.C. Cir. 1995), but the valuation of certain cuts was the subject of continuing litigation. After a lengthy hearing in 2002 and 2003 that took 108 days, with 19 witnesses, and 1474 exhibits introduced into evidence, the ALJ issued an extensive Initial Decision consisting of 3,084 Paragraphs.⁵ In 2005 the Commission issued a decision affirming the Initial Decision, as modified, that resolved all of the issues relating to valuation of various cuts.⁶ The D.C. Circuit affirmed the Commission in all respects in *Petro Star Inc. v. FERC*, No. 06-1166 (D.C. Cir. March 6, 2008) (unpublished opinion). One of the main issues in the continuing litigation was the valuation of Resid. As approved in Opinion No. 481, the existing QB formula determines a value that assumes Resid will be used as a coker feedstock. Coking is the process which breaks down Resid into lighter fuel product and a heavy residue, such as asphalt. Under the QB formula Resid's value is the value of the products from the coking less the cost of coking. Opinion No. 481 explained how the QB would calculate coking costs.

The Complaint

7. Flint Hills owns and operates the North Pole Refinery in North Pole, Alaska. During the refining process Flint Hills extracts middle distillate products from the common stream crude, and redelivers the remaining unused portion of the extracted TAPS stream. Since Flint Hills extracts the more valuable crude components in the refining process, Flint Hills pays into the QB. Flint Hills' complaint alleges that the

⁴ *Trans Alaska Pipeline System*, 65 FERC ¶ 61,277 (1993).

⁵ *Trans Alaska Pipeline System*, 108 FERC ¶ 63,030 (2004).

⁶ *Trans Alaska Pipeline System*, Opinion No. 481, 113 FERC ¶ 61,062 (2005) (Opinion No. 481).

valuation of Resid under the existing QB formula needs changing because the current formula undervalues Resid.

8. Flint Hills claims the QB formula functioned as intended from November 1, 2005, the effective date of Opinion No. 481, through December 2008. Thereafter, beginning in January 2009, Flint Hills asserts the evidence indicates the QB formula began valuing the products of ANS crude at levels below the Platts market price for ANS crude. Flint Hills contends the result of the latter calculation makes no economic sense, as the formula should assess a value for finished products at a higher value than the unprocessed ANS crude. Flint Hills concludes the reason for these inconsistent results is the QB formula's undervaluation of Resid under current conditions.

9. Flint Hills states the market has generally placed a higher value on Resid as a coker feedstock than as a blended component of marine fuel oil 380 (FO-380). Flint Hills compared the values Platts placed on ANS coking yields and ANS cracking yields for the entire 2005-2013 period, and concluded the value of ANS coking yields was always higher than the value of ANS cracking yields, proposing this is contrary to the results of the QB formula from January 2009 forward.⁷ Flint Hills contends there are two reasons for the QB's understated value of Resid: (1) the demand for motor gasoline has declined as increased availability for lighter crude oils has developed, and more stringent environmental laws has reduced the demand for coking capacity and the value of West Coast refinery assets; and (2) the liquid product yields from an older refinery's coking operations used in the QB formula are below the yields for a refiner using an updated coker operating under design conditions. Flint Hills suggests the recovery of a return factor and fixed operating costs, once valued in refinery margins and coker margins, is no longer a factor and is misleadingly still being valued in the QB formula.

10. Flint Hills references its expert, Dr. Verleger, an oil industry consultant, to explain the market shift in the QB's Resid processing cost adjustment. Flint Hills explains that excess coking capacity resulted in cancelled coker projects and diminished values for refining assets sold in the West Coast market. Flint Hills suggests the current QB adjustment for Resid includes a reduction in its value to reflect fully allocated replacement costs and a 20 percent annual return factor when those factors far exceed the processing costs the market currently allows for recovery. In addition, Flint Hills utilizes the expertise of Mr. Lieberman, a refining engineer, to conclude that existing coker yields contained in the QB formula understate the liquid yields achieved by an updated coker operating under design conditions. Flint Hills suggests this discrepancy in coker yields could explain why the QB formula calculates a higher value for FO-380 versus Resid as a coker feedstock.

⁷ Cracking is a refining process which breaks down the larger, heavier, and more complex hydrocarbon molecules into simpler and lighter molecules by the action of heat and the presence of a catalyst.

11. Flint Hills proposes to modify the existing QB formula methodology for valuing Resid. Flint Hills asserts the Resid processing Cost Adjustment should reflect only the marginal Costs of coking, and references Dr. Verleger to explain the market shift in the QB's Resid processing cost adjustment. Flint Hills explains that refiners evaluate their crude slate in terms of marginal benefits and marginal costs for processing different types of crudes in existing refinery capacity, and the marginal cost of processing Resid through the existing coker will depend on the Coker's utilization and operating status. Flint Hills states Mr. Lieberman's analysis shows an updated coker facility operated under design conditions would produce a significantly greater yield of liquid products, and less solid coke yields and fuel gas. Finally, Flint Hills asserts the QB formula should include a minimum value equal to the value of Resid as a blending agent. Flint Hills explains that refiners with coking capacity have two options to maximize the value of Resid: as a coker feedstock or as a blending agent. If the value in the real market of using Resid as coker feedstock were to drop consistently below its value as a blending agent, Flint Hills claims refiners could divert Resid from coking to blending. In this way, the value of Resid used for blending represents a floor for its value.

12. Flint Hills concludes the Commission should change the existing methodology for valuing Resid in the following three respects:

First, the existing processing cost adjustment subtracted from the value of the products yielded from coking to determine the value of Resid must be limited to only the marginal costs of coking. Second, the coking yields in the existing QB formula must be adjusted to reflect current yields that can be achieved from an updated coker operated under design conditions. Third, the QB formula should incorporate, as a price floor, the value of Resid when blended and sold as FO-380.⁸

Notice of Filing and Responsive Pleadings

13. On August 21, 2013, the Commission issued a public notice of Flint Hills' complaint. Flint Hill's motions to answer, intervene, and protests were due by September 9, 2013. Pursuant to Rules 211 and 214,⁹ all timely filed motions to intervene and any motions to intervene out-of-time filed before the issuance date of this order are granted.

⁸ Complaint at 26-27.

⁹ 18 C.F.R. § 385.211 and § 385.214 (2013).

14. BP and the State of Alaska filed motions to intervene, but did not file comments. Petro Star filed a motion to intervene. ConocoPhillips filed a motion to intervene and motion to dismiss, or in the alternative, request for a hearing. Exxon filed a motion to reject the complaint and comments. Tesoro Alaska Company and Anadarko Petroleum Corporation (Tesoro/Anadarko) filed a motion to intervene and a motion to dismiss the complaint. TAPS Carriers filed an answer to the complaint.

15. ConocoPhillips stated that Flint Hills has not demonstrated changed circumstances warranting a change in the QB methodology, and therefore the Commission should dismiss the complaint. ConocoPhillips notes that while the Commission has found that changes to the QB methodology approved in 2005 were instituted as a result of changes in circumstances, in every instance such changes have involved a discontinuation in the public reporting of prices of, or change in the quality specifications for, a product used in the QB methodology.¹⁰

16. ConocoPhillips states that Flint Hills does not claim there has been any change in any products or product specifications used in the QB methodology; rather, Flint Hills cites to changes in general world economic conditions to substantiate a change in the QB methodology. ConocoPhillips states that if the Commission were to accept these claims, the Commission would open a Pandora's Box where any party that wishes to advantage itself in the QB will be free to concoct a claim of changed economic circumstances, returning the Commission and the parties to the same pattern of almost continuous QB litigation that existed from 1989 to 2008.

17. ConocoPhillips states that, if the Commission does not dismiss the complaint as being deficient on its face, the Commission should initiate a hearing to address the many factual issues raised by that complaint. ConocoPhillips notes that in its complaint, Flint Hills makes many factual claims regarding the value of Resid as a coker feedstock and fuel oil blend stock, and due to the time limitations provided by the Commission to comment on the complaint and the lack of transparency regarding many of Flint Hills' assertions, a hearing may be warranted to provide ConocoPhillips and other parties a reasonable opportunity to conduct discovery regarding the bases for Flint Hills' assertions and present their own contrary evidence prior to reaching a decision.

18. Tesoro/Anadarko request the Commission set the complaint for phased hearings, if the Commission does not reject the complaint outright. Tesoro/Anadarko suggest the Commission phase its consideration of the Complaint by examining first whether Flint Hills demonstrated material changed circumstances to support a change in the current methodology. Only upon an affirmative finding of such material circumstantial changes, state Tesoro/Anadarko, would the hearing continue to the second phase, where

¹⁰ See *BP Pipelines (Alaska) Inc.*, Opinion No. 500, 122 FERC ¶ 61,236, at P 11 (2008) (Opinion No. 500).

parties can provide evidence on appropriate revisions to the current methodology. Tesoro/Anadarko note that cyclical shifts in market dynamics are common, and typically self-correct over time, and have never been relied upon as the basis for reexamining the QB formula. Tesoro/Anadarko state that if an approved methodology is to have any durability, it should be modified only upon a showing, supported by substantial evidence, of paradigm changes that fundamentally undermine the continued validity and reasonableness of the existing methodology. Tesoro/Anadarko assert Flint Hills has advanced insufficient evidence to support initiation of new proceedings to reopen the QB formula, as it appears to be nothing more than transient shifts that are inherent in crude oil and refined products markets and subject to self-correction.

19. The Indicated TAPS Carriers filed an answer to the complaint, and requested a waiver and urged the Commission hold concurrent hearings with the Regulatory Commission of Alaska (RCA). The Indicated TAPS Carriers administer the QB, and state they do not have a financial stake in the QB, and for that reason do not take a position on the methodology except to ensure that it is capable of being administered. Indicated TAPS Shippers request that, if the Commission initiates an investigation of the complaint, to convene the proceeding on a concurrent basis with any investigation initiated by the RCA since all barrels, both inter and intrastate, are transported in a common stream and the methodologies must be identical.

20. Exxon filed a motion to reject the complaint, and comments. Exxon requests that the Commission reject the complaint on the grounds that it was not filed within two years of the date the claim arose in violation of the deadline for filing TAPS claims under Section 4412(c)(1) of the Motor Carrier Safety Reauthorization Act of 2005 (Motor Carrier Act).¹¹

21. Alternatively, Exxon asks that in the event the Commission does not reject the complaint, the Commission should establish a trial-type hearing and issue an order to resolve the numerous material questions of fact and law the complaint raises within fifteen months as required by Section 4412(c)(2) of the Motor Carrier Act.

22. Exxon states the Complaint is time barred, as Flint Hills repeatedly states that the existing QB formula became unjust and unreasonable beginning in January 2009, more than four years prior to the date of the complaint, and Section 4412(c)(2) established a deadline for filing QB claims no later than two years after the date on which the claim arose. Exxon notes that Flint Hills' proposed remedy would increase the QB's Resid value by more than \$19 per barrel. ExxonMobil states this result is illogical, since, if West Coast cokers have substantially declined in value because of the relative decline in

¹¹ Pub. L. No. 109-59, 119 Stat. 1144, 1778-79 (2005).

value between heavy sour crudes and light sweet crudes, it follows that the relative market value of Resid will have declined as well.

23. Exxon further states that Flint Hills' analysis ignores the fundamental test of the QB's accuracy, which is how each cut's valuation compares to the other cuts' valuations with regard to their respective market values. Exxon asserts that if, as Flint Hills claims, the QB undervalues Resid as compared to its market value, one must determine whether other QB cuts valuations are likewise undervalued as compared to their market values.

24. Finally, Exxon points out that Flint Hills did not challenge the use of Resid's Coker feedstock as the basis for setting Resid's value in the QB; rather, as support for its claim that the QB undervalues the Resid cut, Flint Hills calculates a blending value of ANS Resid using a blending formula developed by its witness Miller. Exxon points out several perceived errors in this valuation of Resid as a fuel oil blend stock. Exxon asserts Flint Hills ignores the fact that all parties previously agreed that all costs, not just variable costs, should be taken into account in estimating the costs of processing ANS cuts into marketable products, and the refiners' use of variable cost analysis hardly justifies this as a major proposed change in methodology. Exxon asserts Flint Hills provides no basis to determine whether "updating" the QB's coker would be cost effective, and did not address processing costs for the "updated" West Coast coker. Exxon states Flint Hills must first establish that it makes economic sense to incur the capital costs of modifying the coker, if coker operators can recover only their variable operating costs under current market conditions. Exxon notes that it is a bedrock principle of the QB methodology that all cuts be valued based on assumptions arising from a similar time period, and the proposal to update the coker while all other cuts continue to be valued without updated processing units clearly violates that principle. Exxon asks that in the event the Commission sets the complaint for hearing, the costs of "updating" the coker, as well as the other aspects of the QB methodology, must be assessed to determine whether it would be reasonable to increase the QB coker's liquid yields.

25. Flint Hills and Petro Star filed answers to the motions to dismiss, and Exxon filed a motion to respond and response to Flint Hills' answer. The Commission accepts all the filings pursuant to Commission Rule 213 as they assist in the decision making process.

Timeliness of Complaint

A. The Parties' Positions

26. The complaint alleges the existing QB formula worked as intended from the November 1, 2005 effective date of Commission Opinion No. 481 through December 2008. The complaint states that during the same period, the QB formula consistently valued Resid higher than if it were valued as a blended component of FO-380. This relationship was consistent with the Commission's prior finding in

Opinion No. 481 that the predominant and more valuable use of Resid is as a coker feedstock rather than as a blender.¹²

27. The complaint alleges new evidence indicates that beginning in January of 2009, the existing QB formula started to calculate a total value of products distilled and processed from ANS crude that was below Platts assessed market price for ANS crude. The complainant contends that beginning in 2009 the existing formula started to calculate Resid values below the market-based value of Resid as a blending agent for FO-380. Flint Hills argues that, although throughout the entire 2005-2013 period the market generally placed a higher value on Resid as a coker feedstock than as a blended component of FO-380, the QB formula no longer reflects market conditions, and it inaccurately values Resid at levels below that of FO-380.

28. As a result of these alleged problems with the existing TAPS QB formula, Flint Hills requests the Commission determine a new TAPS QB formula, and includes a new methodology for valuing Resid. Specifically, Flint Hills requests the Commission establish and effectuate the new formula fifteen months immediately preceding the order imposing the requested adjustments consistent with section 4412(c)(2) of the Motor Carrier Act.¹³

29. Exxon asserts the Commission must reject Flint Hills' complaint because the complaint was not timely filed. Exxon contends the complaint did not meet the two year deadline period specified in section 4412(c)(1) of the Motor Carrier Act. That section provides:

- (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.

30. Exxon argues that by its own admission, Flint Hills' claim arose in January 2009, more than four years prior to the date of its complaint. Exxon refers to Flint Hills' contention that a comparative analysis of certain published price benchmarks with TAPS Quality Bank results shows that, beginning in January 2009, the TAPS Quality Bank formula began producing uneconomic and contradictory results due to the formula's

¹² Opinion No. 481, 113 FERC ¶ 61,062 at P 16.

¹³ That section provides:

- (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.

undervaluation of the Resid cut. Exxon asserts the complaint, filed in August 2013, was well beyond two years from the January 2009 date when Flint Hills' claim arose.

31. In response to Exxon's motion, Petro Star argues that Flint Hills' "claim" did not arise at the start of the change that Flint Hills describes. Rather, Petro Star contends Flint Hills has been injured each month that it has been compelled to pay unjust and unreasonable Quality Bank adjustments because of the miscalculation of Resid.¹⁴ Petro Star asserts that if conditions change to make the results of the existing QB formula unjust and unreasonable, the Commission has a continuing responsibility to correct the formula to ensure the just and reasonable standard is met whenever any party brings it to the Commission's attention. Petro Star concludes there is no reason to believe section 4412(c)(1) was ever intended to prevent aggrieved parties from petitioning the Commission to correct a Quality Bank methodology that is no longer just and reasonable, whenever they come forward to seek relief.

32. Flint Hills asserts that Exxon's position is contrary to the recognized standard for determining when "a claim arises." That standard, Flint Hills argues, is that the time when a claim arises "does not commence earlier than the date the plaintiff can file suit and obtain relief."¹⁵ Moreover, that date does not occur until "the plaintiff has a complete and present cause of action."¹⁶ Flint Hills further contends that Exxon's motion is erroneously premised on Exxon's contention that Flint Hills' claim arose as of January 2009, the first month in which the existing QB formula began to calculate results below the value of ANS crude. Flint Hills argues Exxon's contention has no merit because it is beyond dispute that in January 2009 Flint Hills could not have sought relief as there was no cause of action against the carriers related to the QB formula that could have been considered complete at that time.

33. Flint Hills states that since the party bringing a complaint has the burden to show the existing rates are unjust and unreasonable and what new rates would be just and reasonable, such a showing could not be considered "complete and present" based on data from a single month, namely January 2009. Rather, Flint Hills continues, due to normal market fluctuations, it would take an extended period of time to show a "complete and present" pattern to provide the necessary support for a *prima facie* case on which

¹⁴ *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971) (*Zenith*).

¹⁵ *See TRW Inc. v Andrews*, 534 U.S. 19, 34 (2001) (*TRW*).

¹⁶ *Bay Area Laundry and Dry Cleaning Pension Fund v. Ferbar Corp. of California*, 522 U.S. 192 at 201 (1997) (*Bay Area*).

Flint Hills could file a claim and obtain relief against the existing formula. Until such a definite pattern emerged supporting Flint Hills' contention, Flint Hills could not have filed a complaint. Thus, Flint Hills argues, the Commission cannot consider January 2009 as the time from which the section 4412(c)(1) deadline should be measured.

34. Exxon responds that Flint Hills erroneously characterizes Exxon's motion as urging that Flint Hills should have filed its complaint in January 2009, the first month in which Flint Hills' claim allegedly arose. Exxon states that Flint Hills also argued that it was not required to file its complaint at that time because it could not file until the date on which its claim became "complete and present," and that such a showing required an "extended period of time." Exxon clarifies it never contended that Flint Hills should have filed its complaint in January 2009. Rather, its position is that under section 4412(c)(1) – "Deadline for Claims" – Flint Hills was clearly required to file its claim "not later than 2 years after the date on which the claim arose," by January 2011.

35. Exxon states that while Flint Hills argues that it could not file until its claim was "complete and present," Flint Hills never indicates when its claim became complete and present. Exxon argues that while Flint Hills states that data for one month – January 2009 – was insufficient for its claim to become complete and present, Flint Hills does not assert that it was unable to make such a showing with data through January 2011, the end of the statutory claims period.

B. Discussion

36. The parties here take differing views of how to determine whether Flint Hills' complaint was filed before the two year deadline for filing claims under section 4412(c)(1). That section requires that a TAPS' Quality Bank claim must be filed "not later than two years after the date on which the claim arose." Flint Hills and those supporting it argue that in determining a limitation period, "the period does not commence earlier than the date the plaintiff can file suit and obtain relief" citing *TRW*. Further, they contend, citing *Bay Area*, that a plaintiff only satisfies that requirement "when the plaintiff has a complete and present cause of action."

37. Flint Hills states that in the early months of 2009, there were QB formula valuation fluctuations when compared to the Platts Assessed Market Price of ANS. It argues that until those fluctuations subsided and a definite pattern emerged, handpicking data from any one of those months would not have presented a "complete and present" pattern on which to support Flint Hills' claim that the existing QB formula was broken and no longer produced just and reasonable results. Further, Flint Hills maintains, it was necessary to have additional evidence beyond data for January 2009 to determine why the QB formula was broken and no longer produced just and reasonable rates. Thus, Flint Hills argues that January 2009 "cannot start the statute of limitations clock" for section 4412(c)(1).

38. Petro Star supports Flint Hills' position, but from a different perspective. Petro Star argues that Flint Hills has been injured each month that it has been compelled to pay unjust and unreasonable QB adjustments because of the misvaluation of Resid, citing *Zenith*.

39. Moreover, Petro Star argues, Exxon's proposed construction of section 4412(c)(1) would defeat the central principles of both the ICA and the Commission's authority to establish TAPS rates that are just and reasonable. Petro Star contends that if Exxon's position was adopted, if an unjust and unreasonable QB rate or practice were to persist for two years, the Commission at that point could act only on its own initiative to effect a remedy and complaints by affected parties would be "rejected" because of the limitation in section 4412(c)(1). Petro Star concludes such a result would be entirely inconsistent with the fundamental mandate of the ICA that rates and charges must be just and reasonable.

40. Exxon asserts that it never contended that Flint Hills should have filed its complaint in January 2009. Rather, Exxon maintains that Flint Hills was, under section 4412(c)(1), "Deadline for Claims," required to file its claim "not later than 2 years after the date on which the claim arose," or by January 2011. Exxon asserts that this two-year time period set forth in section 4412(c)(1) offers ample time for a potential complainant to assess the merit of the claim and determine whether to bring it. Exxon asserts that Flint Hills offers no interpretation of the statute whatsoever, nor does it provide an example of how the statute applies to its current claim or to any other claim. In effect, since it offers no situation in which the Commission could apply section 4412(c)(1) to deny a claim, it renders that part of section 4412(c)(1) meaningless. Exxon concludes that the Commission should not accept Flint Hills' position that section 4412(c)(1) has no meaning and can therefore be ignored, but should dismiss the complaint.

C. Commission Determination

41. The Commission, faced with applying a section unique to TAPS, and adopted by Congress, as the court explained in *Flint Hills Resources of Alaska v. FERC*, 634 F.3d 543 (D.C. Cir. 2011), to limit the extent of retroactive refunds in cases that have dragged on interminably,¹⁷ believes neither approach urged by the parties is sound.

42. Cases cited by parties urging that the section 4412(c)(1) deadline did not apply to the Flint Hills complaint because the complaint involves a continuing violation are not on point. In *Zenith*, there was a continuing anti-trust conspiracy against the plaintiff which prevented it from selling its products in Canada. Thus, the deadline for an antitrust claim

¹⁷ See 634 F.3d at 546.

was renewed each time it was so prevented.¹⁸ Here, there is no claim of any intentional conduct violating the complainant's rights. Rather, at issue is a rate found by the Commission to be a just and reasonable rate, affirmed by the D.C. Circuit court in *Petro Star*, but which complainant asserts is now no longer just and reasonable. Thus, it is appropriate to determine whether the complaint should have been filed any time prior to two years before it was filed in August 2013.

43. *Bay Area* cited by proponents is consistent with our ruling here. In that case, an employer was a member of a multiemployer pension fund. Under the Multiemployer Pension Protection Amendment Act (MPAA), a withdrawing employer is obligated to make certain periodic payments after its withdrawal from such a plan. The employer withdrew from the plan, and later was sued when it failed to make the periodic payments it was obligated to make after it withdrew from the plan. The Supreme Court held that the applicable statute of limitations period commenced when the employer failed to make a required payment, not when it withdrew from the plan. However, the limitations period commenced on each subsequent scheduled payment date. Here, there is no schedule of payments and the limitation period should be determined on whether there was a cause of action two years prior to the date the complaint was filed.

44. To adopt Flint Hills' argument would in effect render section 4412(c)(1) meaningless, because the parties could always claim it was injured by the QB payment assessed against it for the last shipment. To render section 4412(c)(1) meaningless would be contrary to the standard, cited in *Flint Hills*,¹⁹ that Congress intends its legislation to accomplish something.

45. Rather than trying to find a date when a claim first arose and adding two years, as Exxon urges, or adopt the "continuing violation" position that the claim arose anew each month, the Commission will use the complaint filing date in determining whether the section 4412(c)(1) deadline was satisfied by Flint Hills' August 20, 2013 complaint. Thus, the question is was there a claim two years before the August 20, 2013 filing.

46. Flint Hills does not state exactly when its cause of action arose. However, it does state that commencing in January 2009 the QB formula began producing uneconomic and contradictory results due to the formula's undervaluation of the Resid cut. Flint Hills then continues that these results have continued until the present. Flint Hills asserts that it could not have "filed a complaint prior to the end of December 2011."²⁰ However, the

¹⁸ "A plaintiff may allege a new cause of action for every time a conspiracy in restraint of trade operate against him." *Stanton v. District of Columbia Court of Appeals*, 127 F.3d 74, 78 (D.C. Circuit 1997).

¹⁹ See *Flint Hills*, 631 F.3d at 543.

²⁰ Flint Hills' Answer at 8.

data from the beginning of 2011 does not appear to be different from the data for the subsequent six or seven months of 2011. Flint Hills does not, nor could it claim, the data for the earlier part of 2011 was unavailable to Flint Hills at that time. Under these circumstances, by August 1, 2011, after more than two years of results following the change in January 2009 of the results of the Resid valuation under the QB formula, a reasonable person in Flint Hills' position would have determined the QB was no longer just and reasonable as to the Resid valuation. Thus, we conclude the August 20, 2013 complaint is barred as beyond the two year deadline in section 4412(c)(1) because by August 2011, in the exercise of due diligence, Flint Hills could have brought suit and sought relief. Accordingly, we will dismiss Flint Hills' complaint.²¹

47. The Commission is not barred from seeking to determine whether a rate is no longer just and reasonable no matter how long it may have become unjust and unreasonable. Here, we find that based upon the pleadings submitted to date, a sufficient showing has been made as to whether the existing QB formula is just and reasonable insofar as it values Resid. In *OXY U.S.A., supra*, the court stated that "the fact that a rate was once found reasonable does not preclude a finding of unreasonableness in a subsequent proceeding."²² The pleadings to date have raised issues whether there has been "changed circumstances," warranting review of the existing QB formula. Accordingly, the Commission will establish a hearing to determine whether the existing QB formula for valuing Resid is just and reasonable, and if it is not, what adjustment should be made to the QB formula. As there is an existing just and reasonable rate, any change in the QB formula would be prospective only.²³

48. Since we are dismissing the complaint, section 4412(c)(2) does not apply to the hearing we are establishing. Nevertheless, in view of the underlying reason for enactment of section 4412, the Commission directs the ALJ to issue an Initial Decision no later than six months from the date this order issues to permit the Commission to issue a final order within fifteen months.²⁴

²¹ See *Strong v. Williams*, 970 F.2d 1043, 1049 (2d. Cir. 1992).

²² 64 F.3d at 679. See also *Tesoro Alaska Petroleum Co. v. FERC*, 234 F.3d 1286 (D.C. Circuit) (2000).

²³ *Arizona Grocery Co. v. Atchison, Topeka and Santa Fe Ry.*, 284 U.S. 370 (1932).

²⁴ Consistent with the complainant's statement that the Alternate Dispute Resolution (ADR) mechanism in 18 C.F.R. § 385.206(b)(9) (2013) was not used because as all the past TAPS litigation showed, issues relating to the Quality Bank are highly contentious, and Flint Hills did not believe that ADR procedures would resolve the complaint, the Commission will not invoke the ADR mechanism.

The Commission orders:

(A) The complaint filed by Flint Hills in Docket No. OR13-31-000 is dismissed, and that proceeding is terminated.

(B) As discussed in the body of this order, an investigation under section 15(1) of the Interstate Commerce Act is instituted in Docket No. OR14-6-000 into the lawfulness of the existing Quality Bank methodology insofar as the valuation of Resid.²⁵

(C) The Chief Administrative Law Judge shall designate a Presiding Judge for the purpose of conducting hearings in accordance with the directives in the body of this order.

(D) The Chief Administrative Law Judge shall establish a schedule that requires the Presiding Judge to issue an initial decision within six months of the date of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

²⁵ All parties to the OR13-31-000 docket will be considered to be parties to the Docket No. OR14-6-000 proceeding.