

127 FERC ¶ 61,317
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

BP Pipelines (Alaska) Inc.	Docket No. IS05-82-006
ConocoPhillips Transportation Alaska Inc.	Docket No. IS05-80-006
ExxonMobil Pipeline Company	Docket No. IS05-72-006
Koch Alaska Pipeline Company LLC	Docket No. IS05-96-006
Unocal Pipeline Company	Docket No. IS05-107-005

State of Alaska	Docket No. OR05-2-005
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v.

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

Anadarko Petroleum Corporation	Docket No. OR05-3-016
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v.

TAPS Carriers

BP Pipelines (Alaska) Inc.	Docket No. OR05-10-005
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BP Pipelines (Alaska) Inc.	Docket No. IS06-70-004
ExxonMobil Pipeline Company	Docket No. IS06-71-004
ConocoPhillips Transportation Alaska, Inc.	Docket No. IS06-63-004
Unocal Pipeline Company	Docket No. IS06-82-004
Koch Alaska Pipeline Company	Docket No. IS06-66-004

Anadarko Petroleum Corporation	Docket No. OR06-2-004
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v.

TAPS Carriers

ORDER ON REHEARING

(Issued June 30, 2009)

1. This matter involves the 2005 and 2006 interstate rates for the Trans Alaska Pipeline System (TAPS). On June 20, 2008, the Commission issued Opinion No. 502,¹ which affirmed the rulings in an Initial Decision² that the existing method for establishing rates on TAPS no longer resulted in just and reasonable rates, and determined an alternative method for calculating rates on TAPS, and that found there should be a uniform rate for all of the TAPS Carriers.³ The Commission noted that any concerns about under- or over-recovery resulting from the uniform rate could be addressed by a revenue pooling mechanism, such as the one already in place in the TAPS Settlement Agreement (TSA).⁴ On November 20, 2008, the Commission affirmed Opinion No. 502's ruling regarding the uniform rate, but found that the pooling mechanism in the TSA was an incomplete remedy to under-recovery.⁵ Therefore, the Commission directed the TAPS Carriers to implement a more inclusive pooling mechanism.⁶ On December 22, 2008, three TAPS Carriers (the Indicated TAPS Carriers)⁷ filed a request for rehearing of the November 20 Order, arguing that the Commission had no authority to impose such a pooling mechanism. For the reasons set forth below, the Commission denies the parties' request for rehearing.

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

² *BP Pipelines (Alaska), Inc.*, 119 FERC ¶ 63,007 (2007) (Initial Decision).

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

⁴ The TSA was a settlement entered into by the owners of TAPS and the State of Alaska (Alaska) in 1985, which the Commission accepted in *TransAlaska Pipeline System*, 33 FERC ¶ 61,064 (1985) (TSA Order). The TSA established the TAPS Settlement Methodology (TSM), which would be used to establish the interstate rates on TAPS.

⁵ *BP Pipelines (Alaska), Inc.*, 125 FERC ¶ 61,215, at P 55-64 (2008) (November 20 Order).

⁶ *Id.* P 68.

⁷ The three are Conoco, Exxon, and Unocal.

I. Background

2. Crude oil streams produced from different fields on the Alaska North Slope are commingled into a common stream and shipped to market in a single pipeline, TAPS. TAPS is jointly owned by the TAPS Carriers, each having an undivided interest, with capacity rights based upon the carrier's ownership interest. Costs are allocated to the carriers based upon their ownership interest. TAPS is operated by the TAPS Carriers' agent, Alyeska Pipeline Service Company.

3. At the hearing on the 2005 and 2006 rates for TAPS, it was undisputed that all of the TAPS Carriers provide identical interstate transportation service to shippers regardless of which carrier's space is used. However, in the past, each of the TAPS Carriers charged individual rates for interstate transportation service on TAPS and these rates varied significantly between the carriers. In the Initial Decision, the Administrative Law Judge (ALJ) found that the variations in the individual rates were not caused by differences in cost of service because all of the TAPS Carriers basically have the same cost of service.⁸ The ALJ found that "use of individual rates by the [TAPS] Carriers has an unjust and unreasonable result," determined that employing a uniform rate is reasonable, and directed the TAPS Carriers to charge a uniform rate.⁹

4. In Opinion No. 502, the Commission affirmed the ALJ's determination that a uniform rate was just and reasonable. However, the Commission also recognized the parties' concerns that there may be under-recovery associated with a uniform rate because each of the carriers' ownership interest is not the same as their throughput. The Commission determined that this problem could be addressed by the revenue pooling mechanism already in existence in section II-2(f)(ii)(B) of the TSA.¹⁰ That section provides:

⁸ Initial Decision at P 251.

⁹ *Id.*

¹⁰ The Commission accepted the pooling mechanism in the TSA upon the application of the TAPS Carriers pursuant to section 5(1) of the Interstate Commerce Act (ICA), 49 U.S.C. § 5(1), when the TAPS Carriers submitted the TSA to the Commission as a contested settlement. *See Trans Alaska Pipeline System*, 33 FERC ¶ 61,064 (1985). Section 5(1) of the ICA prohibits carriers from agreeing or combining to pool or divide traffic, service, or earnings, unless authorized by the Commission.

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

5. In Opinion No. 502, the Commission stated that nothing precludes the Commission from requiring that, as part of the process of establishing just and reasonable rates, the TAPS Carriers make revenue adjustments based on actual usage.¹¹ However, Opinion No. 502 did not specifically order the TAPS Carriers to establish a pooling mechanism.

6. The TAPS Carriers and BP (individually) sought rehearing of Opinion No. 502. The TAPS Carriers argued that the Commission erred in requiring a uniform rate and that the Commission could not rely upon the pooling mechanism in the TSA to address possible under-recovery. TAPS Carriers noted, as did BP, that the TSA, and the pooling mechanism therein, would soon expire because Alaska triggered the TSA's termination clause.

7. BP, on the other hand, stated that it did not object to a uniform rate provided the Commission also required an appropriate pooling mechanism be in place. BP contended that the pooling mechanism in the TSA was not sufficient both because it was about to expire and because it was not extensive enough. BP explained that under the TAPS Operating Agreement, while costs are allocated based on the carrier's ownership share of TAPS, a carrier's throughput is not necessarily equal to that share. Thus, BP argued that if a carrier's throughput is significantly lower than its ownership share, the carrier would recover only a portion of the costs assigned to it. BP contended that this was the situation it faced, and as a result, it would likely fall short of recovering its cost of service by millions of dollars if the Commission did not order an appropriate pooling mechanism in conjunction with the uniform rate.

¹¹ The Commission noted that at least one of the large interest owners in TAPS, BP, stated that it would not oppose a uniform rate if an acceptable Commission-approved pooling arrangement was put into place to address over- and under-recovery. *See* Opinion No. 502 at P 249.

8. In the November 20 Order, the Commission affirmed its position regarding the uniform rate and rejected the TAPS Carriers' arguments that pooling cannot be imposed absent the assent of all of the carriers.¹² The order also found merit in BP's argument and directed the TAPS Carriers to establish a pooling mechanism when the uniform rate becomes effective and to modify their governing Operating Agreement to the extent necessary.¹³ The Commission stated that the pooling mechanism should be all-inclusive, so that the revenue requirement is based on usage, not the ownership share.¹⁴

II. Indicated TAPS Carriers' Request for Rehearing

9. The Indicated TAPS Carriers assert that the only basis for the Commission to impose pooling on the TAPS Carriers is under section 5(1) of the ICA¹⁵ and that the Commission has not met the statutory requirements for taking such action.

¹² *Id.* P 55.

¹³ *Id.* P 68.

¹⁴ *Id.*

¹⁵ 49 U.S.C. app. § 5(1) (1988). Section 5(1) of the ICA provides:

Except upon specific approval by order of the Commission . . . it shall be unlawful for any common carrier . . . to enter into any contract, agreement, or combination with any other such common carrier or carriers for the pooling or division of traffic, or of service, or of gross or net earnings, or of any portion thereof . . . Provided, that whenever the Commission is of [the] opinion, after hearing upon application of any such carrier or carriers or upon its own initiative, that the pooling or division, to the extent indicated by the Commission, of their traffic, service, or gross or net earnings, or of any portion thereof, will be in the interest of better service to the public or of economy of operation, and will not unduly restrain competition, the Commission shall by order approve and authorize, if assented to by all the carriers involved, such pooling or division

The Indicated TAPS Carriers state that under ICA section 5(1), the Commission may approve a pooling of costs or revenues only with the assent of “all carriers involved.”¹⁶ The Indicated TAPS Carriers argue that ICA section 5(1) does not provide the Commission with authority to impose on the carriers a pooling arrangement to which they never consented.

10. The Indicated TAPS Carriers state that in a prior rehearing request they noted that the TSA, including section II-2(f) therein, would in all likelihood expire at the end of this year, after which time the TAPS Carriers’ voluntary cost-pooling would end. That, the Indicated TAPS Carriers assert, has occurred, because subsequent to issuance of the November 20 Order, Alaska gave notice that it was exercising its right to terminate the TSA effective January 1, 2009. Thus, the Indicated TAPS Carriers state that since December 31, 2008, there has not been a voluntary pooling in effect among the TAPS Carriers.

11. In support of their position that pooling requires the consent of all of the carriers involved, the Indicated TAPS Carriers cite to the *Escanaba* case.¹⁷ The Indicated TAPS Carriers argue that other Interstate Commerce Commission precedent reinforces this principle that the Commission cannot impose pooling on unwilling carriers by, for example, unilaterally modifying the terms previously agreed to in a voluntary pooling agreement.¹⁸ The Indicated TAPS Carriers argue that since here, not all of the TAPS Carriers assent to the pooling mandated by the Commission, and there is no longer a voluntary pooling arrangement in effect, section 5(1) prevents the Commission from forcing pooling on parties over the objections of the non-consenting carriers.

12. The Indicated TAPS Carriers contend the Commission cannot justify disregarding ICA section 5(1) by invoking its power “ancillary” to prescribing just

¹⁶ *Id.*

¹⁷ *Escanaba & Lake Superior R.R. Co. v. United States*, 303 U.S. 315 (1938) (stating that if the Commission authorizes pooling pursuant to section 5(1) of the ICA, the assent of all the carriers is necessary) (*Escanaba*).

¹⁸ *Citing Proposed Pooling of Railroad Earnings and Service Involved in Operation of the Pullman Co. Under Railroad Ownership*, 306 I.C.C. 138 (1959); *Express Earnings, Plan and Method of Division*, 278 I.C.C. 505 (1950); *American Rail Box Car Co. – Pooling*, 347 I.C.C. 862, 895 (1974).

and reasonable rates because the ICA expressly denies the Commission such authority absent the assent of all the carriers.

13. The Indicated TAPS Carriers further argue that the Commission failed to hold a hearing before ordering pooling, as required by ICA section 5(1). The Indicated TAPS Carriers explain that ICA section 5(1) provides that the Commission may act on a proposed pooling arrangement only “after hearing upon application of any such carrier or carriers or upon its own initiative.”¹⁹ The Indicated TAPS Carriers assert that here, although the Commission set the TAPS Carriers’ 2005 and 2006 interstate rates for investigation and hearing, pooling was not included as an issue to be heard at the hearing. The Indicated TAPS Carriers assert that the pooling issue first arose in this proceeding in parties’ briefs on exceptions to the Initial Decision in response to arguments on the uniform rate question.²⁰

14. The Indicated TAPS Carriers further contend that under the ICA, pooling may be ordered only if the Commission, after a hearing, finds that the pooling “will be in the interest of better service to the public or of economy in operation, and will not unduly restrain competition.”²¹ The Indicated TAPS Carriers argue that the Commission made no such finding here. The Indicated TAPS Carriers state that the November 20 Order did not address this issue explicitly, or explain how the imposed pooling would improve service. The Indicated TAPS Carriers further argue that there is no reason to conclude that the proposed pooling will affect service to the public at all. Moreover, the Indicated TAPS Carriers argue that here the Commission did not find that the proposed pooling “will not unduly restrain competition.” The Indicated TAPS Carriers contend that the finding of no

¹⁹ See 49 U.S.C. app. § 5(1). See also *Twin Cities and Head of Lakes Joint Passenger Train Service*, 237 I.C.C. 381, 382 (1940) (*Twin Cities*); *Railway Express Agency, Inc.*, 227 I.C.C. 517, 521 (1938) (*Railway Express*); *Puget Sound-Portland Joint Passenger Train Service*, 167 I.C.C. 308, 309 (1930), *modified*, 169 I.C.C. 244 (1930) (*Puget Sound*).

²⁰ Citing TAPS Carriers’ Brief on Exceptions, Docket No. IS05-82-002, *et al.*, at 105 n.137 (July 9, 2007).

²¹ 49 U.S.C. app. § 5(1); see also *Twin Cities*, 237 I.C.C. at 382; *Railway Express*, 227 I.C.C. at 521; *Puget Sound*, 167 I.C.C. at 309.

undue restraint on competition is crucial to the statutory scheme, since approval of a pooling by the Commission confers broad antitrust immunity on the parties to the pooling.

15. Beyond the Commission's lack of authority to order pooling, the Indicated TAPS Carriers argue that the November 20 Order is deficient because the exact nature of the pooling ordered by the Commission is ambiguous. They point out that the Commission directed that the pooling mechanism should be one in which the "revenue requirement is based on usage, not the ownership share."²² The Indicated TAPS Carriers state it is not clear from this statement how the "revenue requirement" would be matched to usage (particularly with respect to equity return), if all carriers are charging a uniform rate. Accordingly, the Indicated TAPS Carriers request clarification of what specific form of pooling the Commission intended, assuming the Commission has authority to require pooling.

16. The Indicated TAPS Carriers further argue the Commission erred in ordering the TAPS Carriers to amend the TAPS Operating Agreement to include a pooling mechanism because the Operating Agreement is a private commercial contract not subject to the Commission's jurisdiction. TAPS Carriers state that their Operating Agreement is not a tariff and does not contain rates or charges to shippers related to transportation. As such, the Indicated TAPS Carriers argue it does not fall within the matters subject to the Commission's jurisdiction under the ICA, which are limited to the rates and the charges of pipelines engaged in interstate transportation of oil and petroleum products. In addition to the Commission's lack of legal authority to require inclusion of a pooling mechanism in the Operating Agreement, the Indicated TAPS Carriers assert that the renegotiation of an agreement as complex as the TAPS Operating Agreement would require the expenditure of significant time and resources for the parties involved. Thus, the Indicated TAPS Carriers argue that the Commission's directive to require the TAPS Carriers to amend the TAPS Operating Agreement would be an inappropriate exercise of power because it interferes with the TAPS Carriers' freedom to enter into contracts of their choosing.

17. In addition, the Indicated TAPS Carriers argue that there is no basis for the Commission to order an amendment to the TAPS Operating Agreement as "a necessary incident to the Commission establishing a just and reasonable rate" because the Commission is a "creature of statute," having "no constitutional or

²² November 20 Order at P 68.

common law existence or authority, but only those authorities conferred upon it by Congress.”²³ The Indicated TAPS Carriers contend that while the Commission is authorized under the ICA to prescribe just and reasonable rates, it is clearly not authorized to require changes to non-jurisdictional agreements as an “incident” to such action, otherwise, incidental powers could “require tariff publication of all minutiae bearing upon cost,” a reading of the ICA that the D.C. Circuit explicitly rejected in the *ARCO Alaska* case.²⁴

III. BP’s Answer

18. BP moves for leave to answer the Indicated TAPS Carriers’ request for rehearing. The Indicated TAPS Carriers oppose the motion. While the Commission’s rules state that an answer may not be made to a request for rehearing absent authorization,²⁵ we will accept the answer under Rule 213 because it assisted the Commission in its decision-making process.

19. BP asserts that the Indicated TAPS Carriers’ rehearing request is without merit because it is based almost entirely on the faulty premise that the Commission does not have the authority to order pooling because it has not met the requirements of ICA section 5(1). BP contends this premise is erroneous because, as explained in the November 20 Order, the Commission was not acting under section ICA 5(1). Rather, BP explains that the Commission determined pooling was necessary in the circumstances present here to establish a just and reasonable rate. Thus, BP argues that the Indicated TAPS Carriers’ argument relating to ICA section 5(1) is irrelevant.

20. Moreover, BP argues that court precedent establishes that the Commission may invoke its ancillary authority when it is necessary to accomplish its statutory responsibilities.²⁶ BP explains that here, the Commission found that pooling was

²³ *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002).

²⁴ *ARCO Alaska Inc. v. FERC*, 89 F.3d 878, 885 (D.C. Cir. 1996) (*ARCO Alaska*).

²⁵ See 18 C.F.R. § 385.213(a)(2) (2008).

²⁶ Citing *ICC v. American Trucking Ass’n, Inc.*, 467 U.S. 354 (1984) (*American Trucking*); *United States v. Chesapeake & Ohio Railway*, 426 U.S. 500 (1976); *Trans Alaska Pipeline Rate Case*, 436 U.S. 631 (1978).

necessary to achieve just and reasonable rates given the unusual arrangement that exists for TAPS – a single pipeline owned in undivided joint interests by companies providing identical service and having essentially the same cost of service. BP argues that the fact that ICA section 5(1) describes where pooling can be ordered, does not limit the Commission’s authority to order pooling under other circumstances where the Commission finds pooling is necessary.

21. BP points out that the Indicated TAPS Carriers have themselves argued that if a uniform rate is required (without pooling), “some carriers will consistently over-recover their costs, while others will consistently under-recover their costs.”²⁷ BP argues that, clearly, such a result would not be just and reasonable. BP asserts that the pooling mechanism ordered by the Commission in the November 20 Order properly addresses this problem.

22. BP disagrees with the Indicated TAPS Carriers’ contention that it is not clear from the November 20 Order what specific form of pooling the Commission intended. BP states that the November 20 Order, in addressing BP’s concern that the TSA’s existing pooling provision was not sufficient, specified that the pooling mechanism should be one that reallocates all, rather than just a portion, of TAPS revenue.

IV. Indicated TAPS Carriers’ Response

23. The Indicated TAPS Carriers, in turn, respond to BP that the Commission’s ancillary powers may not override express statutory limitations. The Indicated TAPS Carriers argue that while the Commission may have certain ancillary powers in particular circumstances, such ancillary powers may not conflict with express requirements of ICA section 5(1). The Indicated TAPS Carriers assert that the Commission’s pooling order clearly “fall[s] within the ambit” of ICA section 5(1), and any attempt by the Commission to evade the explicit requirements of that section, including the requirement that such a pooling agreement be voluntary, must fail.

24. The Indicated TAPS Carriers contend that the cases cited by BP are inappropriate because, in those cases, the Commission’s implied power was deemed necessary to “fill a gap” in the statutory scheme in order to remedy a

²⁷ *Citing* TAPS Carriers’ July 21, 2008 Request for Rehearing of Opinion No. 502 at 7.

violation of the ICA. The Indicated TAPS Carriers argue that in none of those cases was there an express provision, such as ICA section 5(1), that governs the specific power in question.

25. Finally, the Indicated TAPS Carriers assert that BP's own pleading contradicts its assertion that the November 20 Order is clear on what type of pooling the Commission intended. The Indicated TAPS Carriers point out that BP stated the pooling it sought was a revenue pooling in which all collected revenues would be allocated on the basis of ownership, and not usage. The Indicated TAPS Carriers state that, in contrast, the November 20 Order describes the pooling as involving the allocation of "revenue requirement," not revenue, on the basis of "usage and not the ownership share."²⁸ The Indicated TAPS Carriers state that clearly, there is confusion as to the precise form of pooling the Commission intended to impose. Thus, the Indicated TAPS Carriers contend that clarification is necessary as to the type of pooling the Commission requires.

V. Discussion

26. The Commission denies the Indicated TAPS Carriers' request for rehearing of the Commission's decision to order pooling, but clarifies certain aspects of the November 20 Order. In this order, we will not address whether the Commission erred in requiring the TAPS Carriers to charge a uniform rate. That issue was already resolved on rehearing in the November 20 Order. For the purposes of this order, the issue is whether the Commission may require pooling under the circumstances presented here.

27. The Indicated TAPS Carriers' argue that the Commission cannot order pooling because the prerequisites for action under ICA section 5(1) have not been met. However, the Commission did not act under ICA section 5(1) when it ordered pooling in the November 20 Order. Rather, the Commission ordered the TAPS Carriers to establish a pooling mechanism as "a necessary incident to the Commission establishing a just and reasonable rate,"²⁹ pursuant to the Commission's ancillary authority.

28. The courts have recognized on multiple occasions that a commission may invoke its ancillary authority when it is necessary to accomplish its statutory

²⁸ November 20 Order at P 68.

²⁹ *Id.* P 67.

responsibilities.³⁰ In the *American Trucking* case, the Supreme Court upheld an agency's adoption of a novel remedy, stating:

The Commission's authority under the Interstate Commerce Act is not bounded by the powers expressly enumerated in the Act. As we have held in the past, the Commission also has discretion to take actions that are "legitimate, reasonable, and direct[ly] adjunct to the Commission's explicit statutory power." We have recognized that the Commission may elaborate upon its express statutory remedies when necessary to achieve specific statutory goals³¹

29. The Supreme Court explained that to lie within the Commission's discretionary power, the proposed remedy must satisfy two criteria: first, the power must further a specific statutory mandate of the Commission, and second, the exercise of power must be directly and closely tied to that last mandate.³²

30. Both of those criteria are satisfied here. The Commission was compelled to require pooling in furtherance of its statutory mandate to ensure that just and reasonable rates existed on TAPS. Earlier in this proceeding, the Commission determined that the practice of each TAPS Carrier charging an individual rate resulted in unjust and unreasonable rates because the differences in the carriers' rates were not based on differences in the cost of providing service, since they all provide the same service.³³ Parties, including the Indicated TAPS Carriers, pointed out that because of TAPS' unique cost/revenue allocation methodology (i.e., costs are allocated based on the carriers' ownership shares, while a carrier's revenues are based on throughput), a uniform rate would lead to under- or over-

³⁰ *American Trucking*, 467 U.S. 354, 365-71 (1984).

³¹ *Id.* at 364-65.

³² *Id.* at 367.

³³ *Id.*

recovery when a carrier's throughput differed from its ownership share.³⁴ In response, the Commission noted that a pooling mechanism, such as the one in the TSA, would resolve this problem.³⁵

31. However, on rehearing, BP argued that the existing pooling mechanism in the TSA would not suffice both because it was likely to expire and it was not extensive enough. The Commission agreed, and was thus in a unique situation where neither permitting the TAPS Carriers to charge individual rates, nor imposing a uniform rate without conditions, would result in a just and reasonable rate for TAPS. Accordingly, the Commission determined that it was a necessary incident to establishing a just and reasonable uniform rate on TAPS to order the TAPS Carriers to develop a pooling mechanism that would continue after the expiration of the TSA.

32. The Commission's use of its ancillary power was appropriate because the Commission did so in furtherance of its statutory mandate to ensure just and reasonable rates on oil pipelines, and that action was directly and closely tied to that mandate. It is evident that the Commission did not seek to impose a pooling mechanism on its own. Only when the Commission determined that a uniform rate was required to achieve a just and reasonable rate did the Commission impose a pooling mechanism. The purpose of the pooling mechanism is to ensure that carriers' do not over- or under-recover their costs.

33. The potential for under- or over-recovery as a result of TAPS' unique cost allocation methodology is not a new issue. When the TAPS Carriers originally filed the TSA with the Commission for approval in 1985, they recognized this was a problem. As such, the TAPS Carriers specifically sought Commission approval to include a pooling mechanism in the TSA. The Commission granted this request in its order approving the TSA, and in doing so, explained the importance of a pooling arrangement for TAPS:

Under the Settlement Agreement, TSM revenues are allocated on the basis of throughput. But under the TAPS Operating Agreement certain common TAPS operating costs are allocated according to ownership percentage. When TAPS is operating at capacity,

³⁴ November 20 Order at P 37.

³⁵ Opinion No. 502 at P 248.

there is no problem. At some point, however, throughput may fall below capacity, and a mismatch in the allocation of revenues and costs may occur. In that event, a settling owner receiving deliveries below its pro-rata ownership share of aggregate actual throughput would be unable to collect all its costs while a settling owner receiving deliveries above its pro-rata ownership share would collect costs incurred by other settling carriers. This [pooling] settlement provision mitigates any potential imbalance problem by providing for cross payments among the settling owners, through an agent, to reallocate certain costs on the same basis as TSM revenues (actual throughput).³⁶

34. Having sought Commission approval for a pooling mechanism in the TSA, the TAPS Carriers obviously recognized the necessity of such an arrangement on TAPS. This recognition by the TAPS Carriers that a pooling mechanism is needed continued through the hearing phase of this proceeding. In developing their cost-of-service evidence for 2005 and 2006, the TAPS Carriers' witness relied in part on cost allocations using the pooling arrangement in the TSA,³⁷ thereby indicating an expectation on the TAPS Carriers' part that it, or something similar, would continue into the future. Given the TAPS Carriers' history with pooling, it is unlikely that the Commission's decision to order the continuation of such a mechanism in this proceeding will result in the adverse consequences the Indicated TAPS Carriers now suggest could result from pooling.

35. Moreover, the reasons necessitating a pooling arrangement on TAPS in 1985 still exist today, if not more so. The cost allocation methodology on TAPS has not changed since that time. Yet what the Commission envisioned in 1985 as possibly occurring in the future has come to pass. In recent years throughput on TAPS has fallen below capacity and the pipeline is undersubscribed. Thus, absent a pooling mechanism, the TAPS Carriers will over- or under-recover their costs.

³⁶ TSA Order, 33 FERC ¶ 61,064, at 61,141 n.19 (1985).

³⁷ See Exhibit ATC-35 at 33.

36. As we have stated before, TAPS is a unique pipeline that presents a unique set of circumstances.³⁸ Congress recognized this when it expressly excluded TAPS from the Commission's indexing methodology for oil pipeline rates in the Energy Policy Act of 1992.³⁹ TAPS did not need the Commission's indexing methodology because, unlike other pipelines, it had the TSA, which set forth a ratemaking methodology specifically designed for TAPS. TAPS' distinctiveness also stems from the unique cost-revenue relationship described above, whereby the TSA allocates revenues based on throughput, while the TAPS Operating Agreement allocates costs based on ownership. The recent series of events (from the issuance of Opinion No. 502 and its determination that a uniform rate is necessary, to the expiration of the TSA) have not changed the fact that TAPS is different from other pipelines and may require different treatment. The allocation of revenue on TAPS still does not match the allocation of costs; however, unlike before, there is no pooling mechanism in the TSA to remedy this problem. Given these circumstances, it was appropriate for the Commission to use its ancillary powers to fashion an appropriate remedy and order the TAPS Carriers to continue pooling.

37. Because the Commission was not acting under the section 5(1) of the ICA when it ordered pooling, the Indicated TAPS Carriers' arguments regarding ICA section 5(1) hold no merit. While section 5(1) of the ICA describes certain circumstances where pooling can be ordered, it does not limit the Commission's authority to order pooling under other circumstances, such as here, where such action is necessary and incident to establishing a just and reasonable uniform rate.

³⁸ TSA Order, 33 FERC at 61,139.

³⁹ *See* 18 C.F.R. § 342.0 (b) (2008). Section 1084(2)(B) of the Energy Policy Act of 1992 provides:

(B) EXCEPTION.—The term “oil pipeline” does not include the Trans Alaska Pipeline authorized by the Trans Alaska Pipeline Authorization Act (43 U.S.C. 1651 *et seq.*) or any pipeline delivering oil directly or indirectly to the Trans Alaska Pipeline.

38. In the *TAPS Rate Case*,⁴⁰ the Court rejected the argument that because the ICA granted the Commission⁴¹ the power to order refunds as specifically set forth in ICA section 15(7), the Commission had no authority to order refunds in any other situation. In that case the Commission had suspended the TAPS Carriers' initial filed rates on TAPS for the maximum seven months, but permitted the TAPS Carriers to file for interim rates, which the Commission had calculated, but those interim rates would have to be subject to refund. The TAPS Carriers argued that the Commission exceeded its authority in doing so because of the absence of any express authority for such refund condition on interim rates, and also because section 15(7) of the ICA provides expressly for refunds in a limited category of circumstances, which did not include the circumstance present in that case. The Court dismissed the argument stating:

[W]e have already recognized ... that the Commission does have powers "ancillary" to its suspension power which do not depend on an express grant of authority. [Rather] the touchstone of ancillary power was a "direc[t] [relationship]" between the power asserted and the Commission's "mandate to assess the reasonableness of ... rates"⁴²

39. In that case, the Court found the Commission's refund condition was a "legitimate, reasonable, and direct adjunct to the Commission's explicit statutory power to suspend rates pending investigation."⁴³ In this case, the requirement of a pooling mechanism is a direct adjunct to the Commission's explicit statutory authority to establish a just and reasonable rate.

40. In addition, despite the fact that the Commission did not order the pooling under section 5(1) the ICA, the Commission's decision is not inconsistent with the

⁴⁰ *Trans Alaska Pipeline Rate Case*, 436 U.S. 531 (1977) (*TAPS Rate Case*).

⁴¹ The Commission referred to was the Interstate Commerce Commission which had jurisdiction over oil pipelines until October 1, 1977, when the jurisdiction was transferred to this Commission.

⁴² *TAPS Rate Case*, 436 U.S. at 654.

⁴³ *Id.* at 655.

intent of the statute. The Commission ordered the TAPS Carriers to continue a pooling arrangement similar to the pooling arrangement in the TSA. In approving the TSA's pooling provision, the Commission found that such an arrangement was proper under the ICA because it was "in the interest of better service to the public or of economy in operation" and would not "unduly restrain competition."⁴⁴ The Commission finds this still to be true here. It is in the public interest for the TAPS Carriers to charge a uniform rate for the identical transportation service they provide on TAPS, and in order for this to occur without some carriers over- or under-recovering their costs, there must be a pooling mechanism. Moreover, it will not unduly restrain competition for the TAPS Carriers to allocate their costs in the same fashion as they already allocate their revenues.⁴⁵ For these reasons, the Commission will require that as long as TAPS operates in the manner it has to date, with a mismatch in the allocation of costs and revenue, there must be a pooling mechanism to ensure just and reasonable rates.

41. In the November 20 Order, the Commission ordered the TAPS Carriers to modify their governing Operating Agreement to include a pooling mechanism.⁴⁶ On rehearing, the Indicated TAPS Carriers argue the Commission does not have jurisdiction to order them to amend their Operating Agreement. The Indicted TAPS Carriers contend that although the Commission has jurisdiction over the rates and charges of pipelines engaged in the transportation of oil in interstate commerce under the ICA, the TAPS Operating Agreement does not implicate any of these statutory provisions. The Indicated TAPS Carriers assert that their Operating Agreement is a private contract between the TAPS Carriers governing the operation of the system. To avoid any confusion, and because the Commission does not know what type of agreement the TAPS Carriers intend to replace the TSA, the Commission will modify the part of the November 20 Order that directed the TAPS Carriers to include a pooling mechanism in their Operating Agreement, and instead require the TAPS Carriers to include a pooling arrangement in their tariff. As we explained above, a pooling arrangement on TAPS is a necessary

⁴⁴ TSA Order, 33 FERC ¶ 61,064 at 61,140.

⁴⁵ The Commission notes that the TAPS Carriers' existing revenue allocation methodology is not at issue here. The pooling mechanism ordered by the Commission only impacts how the TAPS Carriers allocate their costs (i.e., costs must be allocated in the same manner as revenues, based on throughput).

⁴⁶ Opinion No. 502 at P 68.

incident to establishing a just and reasonable uniform rate, and so it is proper to require the TAPS Carriers to include such an arrangement in their tariff and to submit it to the Commission for review.

42. The Indicated TAPS Carriers' request that the Commission clarify the specific form of the pooling that should be implemented. The Commission clarifies that the TAPS Carriers should develop a pooling mechanism that reallocates all of TAPS Carriers' costs based on throughput or usage, so that the allocation of costs matches the allocation of revenues on TAPS. Beyond this, the Commission will not dictate the particulars of the pooling mechanism, as the TAPS Carriers, including BP, are in a better position to work out the details of such an arrangement themselves. The Commission will have an opportunity to consider the appropriateness of the pooling provision when it is submitted in the above-mentioned tariff filing.

The Commission orders:

The Indicated TAPS Carriers' request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.