ORAL ARGUMENT HAS NOT BEEN SCHEDULED

In the United States Court of Appeals for the District of Columbia Circuit

No. 20-1330

NGL SUPPLY WHOLESALE, L.L.C.,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION AND UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL ENERGY REGULATORY COMMISSION

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

Matthew R. Christiansen
General Counsel

Robert H. Solomon
Solicitor

Beth G. Pacella
Deputy Solicitor

For Respondent
Federal Energy Regulatory Commission
Washington, D.C. 20426

March 26, 2021

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties:

The parties before this Court are identified in the Petitioner's Rule 28(a)(1) certificate.

B. Ruling Under Review:

NGL Supply Wholesale, LLC v. Phillips 66 Pipeline LLC and Phillips 66 Company, 172 FERC ¶ 61,016 (2020), JA __.

C. Related Cases:

This case has not previously been before this Court or any other court, and counsel is not aware of any other related cases pending before this or any other court.

/s/ Beth G. Pacella
Beth G. Pacella
Deputy Solicitor

March 26, 2021

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

COURT CASES: **PAGE**

* Cases chiefly relied upon are marked with an asterisk.

TABLE OF AUTHORITIES

COURT CASES (cont'd): **PAGE**

ADMINISTRATIVE CASES:

TABLE OF AUTHORITIES

ADMINISTRATIVE CASES (cont'd): **PAGE**

TABLE OF AUTHORITIES

ADMINISTRATIVE CASES (cont'd): **PAGE**

STATUTES:

GLOSSARY

Commission or FERC	Federal Energy Regulatory Commission
Historically-based prorationing	Allocating capacity based on shipper loyalty, so shippers that regularly ship on a pipeline are allocated more of the pipeline's available capacity
NGL	Petitioner, NGL Supply Wholesale, L.L.C.
Order	*NGL Supply Wholesale, LLC v. Phillips 66 Pipeline LLC and Phillips 66 Company*, 172 FERC ¶ 61,016 (2020)
Phillips 66	Phillips 66 Company
Phillips Pipeline	Phillips 66 Pipeline LLC
Proprietary interconnection facilities	Conway, Kansas interconnection facilities owned by Phillips 66
Proration	Allocation of pipeline capacity during periods of excess demand
Summer	April through August, when a portion of the Blue Line pipeline flows from East St. Louis to Conway
Winter	September through March, when a portion of the Blue Line pipeline flows from Conway to East St. Louis

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BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUES

The Interstate Commerce Act provides the Federal Energy Regulatory Commission ("Commission" or "FERC") with jurisdiction over transportation of propane (and other petroleum-based products) by pipeline in interstate commerce. This appeal concerns a complaint filed by a propane supplier, NGL Supply Wholesale, L.L.C. ("NGL"), against an oil pipeline, Phillips 66 Pipeline LLC ("Phillips Pipeline"), and

another propane supplier, Phillips 66 Company ("Phillips 66"). NGL alleged that Phillips Pipeline is unreasonably denying NGL access to transportation service and instead is favoring its affiliate, Phillips 66.

In the challenged order, the Commission found that there was no merit to three of the allegations NGL raised and ordered further hearing regarding the fourth. *NGL Supply Wholesale, LLC v. Phillips 66 Pipeline LLC and Phillips 66 Company*, 172 FERC ¶ 61,016 (2020) ("Order"). NGL eventually withdrew its fourth allegation.

The issues presented on review are:

1. Whether the Commission reasonably determined, based on its precedent and substantial record evidence, that the interconnection facilities owned by Phillips 66 are not transportation facilities subject to Commission jurisdiction;

2. Whether the Commission reasonably determined, based on its precedent and substantial record evidence, that the policy Phillips Pipeline uses to allocate capacity when there is excess demand provides shippers an equal opportunity to regularly ship their products on the pipeline and, therefore, is not unduly discriminatory; and

3. Whether the Commission reasonably determined, based on its precedent and substantial record evidence, that an agreement between Phillips 66 and NGL for the exchange of propane is a sales agreement not subject to the Commission's jurisdiction.

STATUTORY AND REGULATORY PROVISIONS

Pertinent statutes and regulations are contained in the Addendum to this brief.

STATEMENT OF FACTS

I. The Interstate Commerce Act

Congress passed the Interstate Commerce Act in 1887 to regulate railroads, and created the Interstate Commerce Commission to administer the statute. *Frontier Pipeline Co. v. FERC*, 452 F.3d 774, 776 (D.C. Cir. 2006). In 1906, Congress extended the Interstate Commerce Commission's jurisdiction to oil pipelines. *Id.* In 1977, Congress transferred the Interstate Commerce Commission's oil pipeline authority to the newly-created FERC, to be exercised under the Interstate Commerce Act as it existed on October 1, 1977. *Id.* Accordingly, all references to the Interstate Commerce Act in this brief are to the 1977 version, which can be found in 49 U.S.C. § 1 *et seq.* (1976), reprinted in 49 U.S.C. app. § 1 *et seq.* (1988). Interstate

Commerce Commission decisions that predate the 1977 transfer are treated as if they were FERC decisions. *Frontier*, 452 F.3d at 776.

The Interstate Commerce Act provides the Commission with jurisdiction over pipelines transporting oil (including petroleum products such as propane) in interstate commerce. 49 U.S.C. app. §§ 1(1) and 3(a); *see also* Order P 12, JA ___; *Williams Olefins Feedstock Pipelines, L.L.C.*, 145 FERC ¶ 61,303 PP 14, 20 (2013) (Commission's ICA jurisdiction applies where oil or petroleum products that can be used for energy purposes, including propane, are moved in interstate commerce).

Interstate Commerce Act section 1(4) provides that "[i]t shall be the duty of every common carrier subject to this chapter to provide and furnish transportation upon reasonable request therefor . . . ." 49 App. U.S.C. § 1(4). Thus, an oil pipeline operating in interstate commerce is required to accept any shipments tendered to it upon reasonable request. *Belle Fourche Pipeline Co.*, 28 FERC ¶ 61,150 at 61,281 (1984). Since a pipeline's capacity may be insufficient to transport all tendered shipments, pipelines may adopt reasonable rules to allocate their capacity in times of excess demand. *Id.* (citing *Pa. R.R. Co. v. Puritan*

Coal Mining Co., 237 U.S. 121 (1915)); *see also Colonial Pipeline Co.*, 156 FERC ¶ 61,001 P 23 (2016) (that shippers may not be able to move the full volumes they wish to move on a capacity-constrained system does not, by itself, violate the common carrier obligation to provide service); *Platte Pipe Line Co.*, 117 FERC ¶ 61,296 PP 46, 48 (2006) (same).

In accordance with Interstate Commerce Act section 3(1), FERC-jurisdictional oil pipelines may not grant a shipper an undue or unreasonable preference or subject a shipper to any undue or unreasonable prejudice. 49 App. U.S.C. § 3(1); *see also*, *e.g.*, *Colonial Pipeline*, 156 FERC ¶ 61,001 P 15.

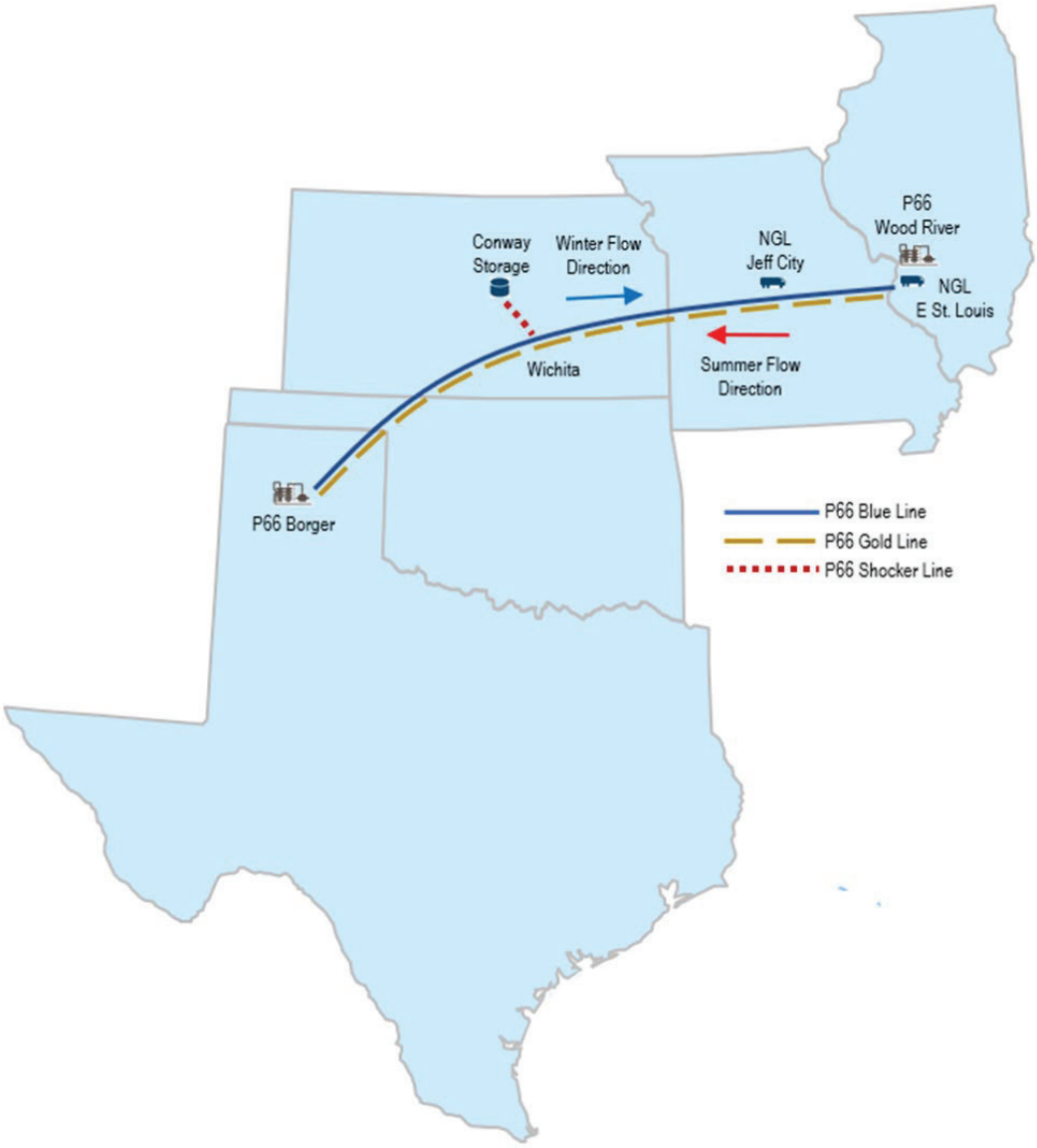
II. The Parties And The Blue Line Pipeline

Petitioner NGL is a wholesale propane supplier and terminal owner. *See* Order P 2, JA ___; R. 1, Complaint (public), Exhibit 2 P 2, JA ___. A terminal is a facility at which oil, petroleum and petrochemical products can be stored, and typically includes storage tanks, facilities for inter-tank transfer, pumping facilities, loading facilities to fill road tankers or barges, and pipeline connections or interconnections.

Intervenor Phillips 66 refines, processes, transports and markets crude oil, natural gas liquids, refined petroleum products and petrochemicals. Phillips 66 operates and is part owner of the Wood River Refinery in Illinois and the Borger Refinery in Texas. *See* Order P 4, JA ___.

Intervenor Phillips Pipeline, an affiliate of Phillips 66, is a FERC-jurisdictional oil pipeline that operates the Blue Line, a propane and butane pipeline running between Borger, Texas and East St. Louis, Illinois. *See* Order PP 3, 4, JA ___. The portion of the Blue Line between Conway, Kansas, and East St Louis, Illinois, is bi-directional: from September through March ("Winter"), that portion of the Blue Line flows east from Conway to East St. Louis; from April through August ("Summer") it flows west from East St. Louis to Conway. *Id.* at P 3, JA ___. Conway is a commercial hub for buyers and sellers of propane. *Id.*, JA ___.

NGL's complaint included the following map of the Blue Line:



R. 1 at 9, JA ___.

III. NGL's Complaint And The Answers

On December 3, 2019, NGL filed a complaint against Phillips Pipeline and Phillips 66. R. 1, Complaint, JA ___-__. The complaint asserted that: (1) Phillips 66's interconnection from the Williams

Companies, Inc. ("Williams") storage terminal in Conway, Kentucky to Phillips Pipeline's Blue Line provides FERC-jurisdictional interstate transportation service; (2) Phillips Pipeline's policy to allocate Blue Line capacity during periods of excess demand ("proration") is unduly discriminatory because it purportedly does not provide NGL a meaningful opportunity to become a regular shipper with greater access to capacity during those periods; and (3) during the Winter months, the Exchange Agreement NGL entered into with Phillips 66 to obtain propane provides transportation service subject to Commission jurisdiction.

NGL's complaint also raised challenges to Phillips Pipeline's transmix charges (i.e., charges related to the mixing of adjoining batches that occurs during pipeline operations). *See* Order PP 5, 23, JA ___, ___. The Commission determined that this portion of the complaint raised issues of material fact that could not be resolved on the existing record and ordered hearing and settlement judge procedures. *Id.* P 25, JA ___. NGL subsequently withdrew the transmix charges portion of its complaint. *See* FERC Docket No. OR20-5, Accession Nos. 20200810-5200 (Notice of Partial Withdrawal of

Complaint), 20200826-3013 (Final Report by Settlement Judge), 20200903-3055 (Order Terminating Settlement Judge Procedures).

Phillips Pipeline and Phillips 66 filed an answer to the complaint, rebutting NGL's assertions. R. 6, JA ___-__. NGL filed an answer to that answer. R. 8, ___-__.

IV. The Challenged Order

After reviewing the pertinent precedent and the record here, the Commission found no merit to the portions of NGL's complaint at issue. Order PP 9-22, JA ___-__. First, the Commission determined that Phillips 66's proprietary interconnection, which consists of smaller pipe that is not on the mainline pipeline system and metering facilities, is part of the terminal facilities used before jurisdictional transportation commences and so is not FERC-jurisdictional. Order PP 13-16 & nn.14-18, JA ___-__.

Second, the Commission determined that Phillips Pipeline's prorationing policy provides shippers that nominate volumes for transportation on the pipeline in accordance with the policy an equal opportunity to achieve regular shipper status and, therefore, that NGL

failed to meet its burden to show that the policy was unduly discriminatory. Order PP 17-22, JA ___-__.

And third, the Commission determined, consistent with precedent and the record, that the Exchange Agreement provided for non-jurisdictional sales of propane, not for FERC-jurisdictional transportation. Order PP 10-12 & nn.6-10, JA ___-__.

This appeal followed. (Under the Interstate Commerce Act, there is no mandatory rehearing requirement.)

SUMMARY OF ARGUMENT

The Commission's determinations regarding NGL's complaint are supported by precedent and substantial evidence in the record, and should be affirmed.

First, the Commission reasonably determined that Phillips 66's proprietary (Phillips 66-owned) interconnection, which consists of smaller pipe that is not on the mainline pipeline system and metering facilities, does not provide FERC-jurisdictional transportation service. Record evidence establishes that Phillips 66's interconnection facilities are not necessary or integral to move Williams terminal propane to the Blue Line because there are other ways to do so. Moreover, the

Commission's determination here is consistent with precedent finding that pipe and metering facilities that interconnect a storage terminal to a mainline pipeline system provide non-jurisdictional terminal services, not FERC-jurisdictional transportation service.

Second, the Commission reasonably determined that NGL had not met its burden to show that Phillips Pipeline's policy to allocate capacity in times of excess demand is unduly discriminatory. As the Commission found, shippers that nominate volumes for transportation on the Blue Line in accordance with the prorationing policy have an equal opportunity to become a Regular Shipper (i.e., a shipper that has shipped on the Blue Line in each of the past 12 months).

NGL asserts that it cannot become a Regular Shipper under the policy because for six months of the year it cannot purchase propane to nominate for shipment on the Blue Line. But since the Commission's Interstate Commerce Act jurisdiction is limited to oil pipeline transportation and does not include sales of petroleum products, the Commission appropriately evaluates a prorationing policy by determining whether shippers that nominate volumes for

transportation on the pipeline in accordance with the policy have an equal opportunity to become regular shippers.

The Commission also reasonably found there was no merit to NGL's claim that, since the Commission approved prorationing by pipeline segment in *Suncor Energy Mktg., Inc. v. Platte Pipe Line Co.*, 132 FERC ¶ 61,242 (2010), it should have required Phillips Pipeline to change its prorationing policy to apply by season. *Suncor* did not involve a pipeline, like here, that seasonally switches flow direction. And *Suncor* does not require that pipelines must prorate capacity by segment in all cases. Rather, *Suncor* was decided based on the specific circumstances presented there.

Third, the Commission reasonably determined that the Exchange Agreement is an agreement for the sale of propane by exchange, not a FERC-jurisdictional transportation agreement. NGL acknowledges that the Exchange Agreement provides for non-jurisdictional sales during the Summer months when the pipeline flows in the opposite direction of the exchanges. NGL asserts however that in the Winter, when the exchanges occur in the same direction as the Blue Line flows,

Phillips 66 must transport the propane it receives from NGL at Conway on the Blue Line for delivery to NGL's terminals.

But the record establishes that the Exchange Agreement does not require Phillips 66 to use pipeline transportation to effectuate the exchange. The record also shows that exchange agreements commonly include features intended to equalize the value of a product at the exchange points, such as a publicly reported basis differential, a pipeline transportation rate, or a fixed figure agreement. The Order on review cites the parties' arguments and discusses relevant cases setting out the limits of the Commission's Interstate Commerce Act jurisdiction. While NGL might prefer that the Order includes additional discussion, no more was required.

ARGUMENT

I. Standard Of Review

The Court reviews Commission actions under the Administrative Procedure Act's "arbitrary and capricious" standard. 5 U.S.C. § 706(2)(A). The scope of review under that standard is narrow. *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016). The court "must affirm the Commission's orders so long as FERC examined the relevant

data and articulated a rational connection between the facts found and the choice made." *PJM Power Providers Grp. v. FERC*, 880 F.3d 559, 562 (D.C. Cir. 2018) (internal quotation omitted).

The Court has not "expressly stated" whether it reviews the Commission's factual findings in orders under the Interstate Commerce Act under the substantial evidence standard, as it does when reviewing orders under other FERC-administered statutes. *United Airlines, Inc. v. FERC*, 827 F.3d 122, 127 (D.C. Cir. 2016). But "in their application to the requirement of factual support, the substantial evidence test and the arbitrary and capricious test are one and the same." *Id.* (citing *Butte Cty. v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010)). The substantial evidence standard "requires more than a scintilla, but can be satisfied by something less than a preponderance of evidence." *Minisink Residents for Envtl. Pres. and Safety v. FERC*, 762 F.3d 97, 108 (D.C. Cir. 2014) (internal quotation marks omitted). If the evidence is susceptible to more than one rational interpretation, the Court must uphold the agency's findings. *See Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966); *Emera Maine v. FERC*, 854 F.3d 662, 672 (D.C. Cir. 2017) (the relevant question "is not whether record evidence

supports [the petitioner's] version of events, but whether it supports FERC's") (internal quotation omitted) (alteration in original); *accord Big Bend Conservation Alliance v. FERC*, 896 F.3d 418, 423 (D.C. Cir. 2018) (finding that substantial evidence supported FERC's finding that a natural gas pipeline was non-jurisdictional); *see also Elec. Power Supply Ass'n*, 136 S. Ct. at 784 ("not our job" to determine if "FERC made the better call," but only to review if the Commission "engaged in reasoned decisionmaking").

The Court defers to the Commission's interpretation of its own precedent. *Int'l Transmission Co. v. FERC*, 988 F.3d 471, 481 (D.C. Cir. 2021) (citing *Mo. Pub. Serv. Comm'n v. FERC*, 783 F.3d 310, 316 (D.C. Cir. 2015)); *see also ANR Pipeline Co. v. FERC*, 863 F.2d 959, 963 (D.C. Cir. 1988) (noting "the Commission's superior capacity to construe its own decisions").

II. The Commission Reasonably Determined That Phillips 66's Proprietary Interconnection At The Williams Terminal Is Not FERC-Jurisdictional

NGL asserts that the Conway, Kansas interconnection facilities Phillips 66 owns ("proprietary interconnection facilities") are transportation facilities subject to FERC jurisdiction. Br. 20-29. Based

on Commission precedent and the record here, the Commission reasonably found otherwise. Order PP 13-16 & nn.14-18, JA ___-__.

A. The Proprietary Interconnection Facilities And Other Methods To Move Propane From The Williams Storage Terminal To The Blue Line

Phillips 66 manages propane, butane, and other petroleum products supplies at Conway, Kansas storage terminals, including the terminals owned by Williams and ONEOK Hydrocarbon, L.P. ("ONEOK"). R. 6, Phillips Answer to Complaint (public), Lindsey Affidavit at P 12, JA ___.

In November 2018, Phillips 66 and Williams entered into an agreement under which Phillips 66 would pay the costs for Williams to construct the Phillips 66 interconnection facilities, "to facilitate receiving and delivering normal butane, iso butane, propane, and y-grade interfaces from [the] Conway receipt point on the Blue Line into and out of the Williams Storage Terminal." Phillips Answer, Lindsey Affidavit P 14, JA ___; *see also* Phillips Answer at 37, *cited in* Order n.18, JA ___. The proprietary interconnection facilities consist of smaller pipe that is not on the mainline pipeline system and metering facilities. Order P 15, JA ___; Phillips Answer at 39, *cited in* Order

n.18, JA ___. Propane service on Phillips 66's interconnection facilities began in May 2019. Phillips Answer at 37, JA ___ (citing Lindsay Affidavit P 14, JA ___), *cited in* Order n.18, JA ___.

Before Phillips 66's interconnection facilities were in service, Phillips 66 used two methods to move propane purchased at the Williams storage terminal to the Blue Line: (1) tendering propane from the Williams terminal to Mid-America Pipeline's Central Line and then onto the Blue Line; and (2) pumping propane from the Williams terminal to the ONEOK terminal (also located at Conway, Kansas) and then onto the Blue Line. Phillips Answer at 37, JA ___ (citing Lindsay Affidavit P 15, JA ___), *cited in* Order n.18, JA ___. As NGL acknowledged below (R.8, NGL Answer to Phillips Answer at 20, JA ___), these two methods are available to NGL (and any other shipper). *See* Order n.18, JA ___ (citing Phillips Answer at 36-39, JA ___-__); Phillips Answer at 37, *cited in* Order at n.18, JA ___. Thus, NGL's assertions that it "cannot transport propane purchased at the Williams terminal unless it can negotiate access to the Conway interconnection facilities" (i.e., Phillips 66's proprietary interconnection), and that it "has been forced to purchase propane solely

at the smaller ONEOK terminal at Conway" (Br. 21 & n.9; *see also id.* at 27-28), have no basis. *See* Order n.18, JA ___ (citing Phillips Answer at 36-39, JA ___-__).

B. Phillips 66's Proprietary Interconnection Does Not Provide FERC-Jurisdictional Transportation

The Commission reasonably determined, based on its precedent and the record here, that Phillips 66's proprietary interconnection, which consists of smaller pipe that is not on the mainline pipeline system and metering facilities, is part of the terminal facilities used before jurisdictional transportation commences; therefore, that interconnection is not FERC-jurisdictional. Order PP 15-16 & nn.15-18, JA ___ (citing *TE Prods. Pipeline Co.*, 130 FERC ¶ 61,257, *on reh'g*, 131 FERC ¶ 61,277 P 12 (2010); *Tesoro Ref. and Mktg. Co.*, 135 FERC ¶ 61,116 P 17 (2011); Phillips Answer at 36-39, JA ___-__).

NGL complains that the Order does not cite to *Lakehead Pipe Line Co., L.P.*, 71 FERC ¶ 61,338 (1995), *on reh'g*, 75 FERC ¶ 61,181 (1996), which sets out the standard the Commission uses to determine if facilities are FERC-jurisdictional under the Interstate Commerce Act. Br. 21-23. But the Order cited to *TE Products*, 130 FERC ¶ 61,257, *on*

reh'g, 131 FERC ¶ 61,277, which discuss and apply the standard set out in *Lakehead*. Order PP 15-16 & nn. 15, 18, JA ___.

TE Products explains that "the jurisdictional test discussed in *Lakehead* focuses on whether the facilities are necessary or integral to transportation." 131 FERC ¶ 61,277 P 11; *see also TE Products*, 131 FERC ¶ 61,257 P 13 ("A service is subject to the [Interstate Commerce Act] and the Commission's jurisdiction only if it is 'integral' or 'necessary' to the pipeline transportation function.") (quoting *Lakehead*, 71 FERC ¶ 61,338 at 62,325, *on reh'g*, 75 FERC ¶ 61,181 at 61,601). As already discussed, *supra* p. 17, the record establishes that Phillips 66's interconnection facilities are not necessary or integral to move Williams terminal propane to the Blue Line because there are other ways to do so. Order at n.18, JA ___ (citing Phillips Answer at 36-39, JA ___-__); Phillips Answer at 37, JA ___ (citing Lindsay Affidavit P 15, JA ___); NGL Answer at 20, JA ___.

NGL acknowledges that the Commission found that the facilities in *TE Products* were not FERC-jurisdictional because they were not integral or necessary to the transportation function. Br. 24. NGL argues, however, that *TE Products* does not support the Commission's

determination here because that case involved storage and terminal facilities. *Id.* at 24-25; *see also id.* at 27. But as here, the terminal facilities the Commission found non-jurisdictional in *TE Products* included the pipe and metering facilities that interconnected the mainline pipeline system and the storage terminal. Order P 15, JA ___ (citing *TE Products*, 131 FERC ¶ 61,277 P 12); *see also TE Products*, 131 FERC ¶ 61,277 PP 7-9.

NGL next asserts that, "if FERC has jurisdiction over the service provided through the facilities owned by Phillips Pipeline that interconnect with ONEOK, then it must also have jurisdiction over the service provided by [Phillips 66] through the facilities that interconnect Williams." Br. 28. But as the Commission explained in *TE Products*, "provid[ing] terminalling services as part of [a provider's] tariff in conjunction with jurisdictional services does not make the service jurisdictional." 131 FERC ¶ 61,277 P 12, *cited in* Order P 15 & n.18, JA ___; *see also TE Products*, 130 FERC ¶ 61,257 P 14 (same); *TE Products*, 131 FERC ¶ 61,277 P 2 (noting that the pipeline included the non-jurisdictional terminal services in its tariff for the convenience of shippers). So even if Phillips Pipeline's tariff provided for service

over the interconnection facilities at the ONEOK terminal, that would not mean service over those facilities is FERC-jurisdictional. The answer to that question would depend on whether the facilities are necessary or integral to FERC-jurisdictional transportation. *TE Products*, 131 FERC ¶ 61,277 P 11; *see also TE Products*, 130 FERC ¶ 61,257 P 13; *see also Colonial Pipeline Co.*, 162 FERC ¶ 61,158 P 50 (2018) (as *TE Products* recognized, "there are a host of services that can be provided by a pipeline, its affiliate, or a third party, that are not necessary or integral to the transportation function and are therefore non-jurisdictional").

The Commission's reasonable interpretation here, of the scope of its transportation jurisdiction under the Interstate Commerce Act, is entitled to respect. *See W. Ref. Sw., Inc. v. FERC*, 636 F.3d 719, 723 (5th Cir. 2011) (applying *Chevron* deference to FERC jurisdictional determination under the Interstate Commerce Act); *see also City of Arlington v. FCC*, 569 U.S. 290, 297 (2013) (agency's jurisdictional determination made based on its expertise is due deference); *OXY USA, Inc. v. FERC*, 64 F.3d 679, 691, 701 (D.C. Cir. 1995) (same).

III. The Commission Reasonably Determined That NGL Had Not Met Its Burden To Show That Phillips Pipeline's Prorationing Policy Is Unduly Discriminatory

A. The Prorationing Policy

As discussed earlier, *supra* p. 4, FERC-jurisdictional oil pipelines are required to accept any shipments tendered to them upon reasonable request. 49 App. U.S.C. § 1(4); *see also Belle Fourche*, 28 FERC ¶ 61,150 at 61,281 (1984). But a pipeline's capacity may be insufficient to transport all tendered shipments. The Commission affords oil pipelines considerable latitude in developing appropriate methods to allocate capacity in times of excess demand. Order P 19, JA ___ (citing *Dixie Pipeline Co.*, 140 FERC ¶ 61,127 P 49 (2012); *Mid-America Pipeline Co., LLC*, 106 FERC ¶ 61,094 P 14 (2004); *SFPP, L.P.*, 86 FERC ¶ 61,022 at 61,115 (1999)).

One common prorationing methodology is to allocate capacity based on shipper loyalty, i.e., to allocate more of the available capacity to shippers that regularly ship on the pipeline ("historically-based" prorationing). Order P 19, JA ___; *Suncor*, 132 FERC ¶ 61,242 P 25. As the Commission has explained, historically-based prorationing may help a pipeline retain regular shippers that might otherwise seek

transportation on other pipelines. *Suncor*, 132 FERC ¶ 61,242 P 139, *cited in* Order P 19 & n.26, JA ___. Rewarding shipper loyalty in this way is not unduly discriminatory or preferential as long as the prorationing policy provides shippers an equal opportunity to become loyal shippers. *E.g.*, *Suncor*, 132 FERC ¶ 61,242 P 25, *cited in* Order P 19 & n.26, JA ___; *ConocoPhillips Alaska, Inc.*, 112 FERC ¶ 61,326 P 19 (2005), *cited in* Order P 19 & n.26, JA ___.

Phillips Pipeline uses a historically-based prorationing policy that allocates its available capacity among all shippers based on whether they are "Regular Shippers" (i.e., shippers that have shipped on the pipeline every month for the past 12 months) or "New Shippers" (i.e., shippers that have not shipped on the pipeline every month for the past 12 months). Complaint Exh. 4, Proration Policy, at 1, JA ___. New Shippers are collectively allocated 10 percent of available capacity, and individual New Shippers are allocated up to five percent of total available capacity. *Id.* at section II.A., JA ___. The remaining capacity is allocated to Regular Shippers, and any capacity those shippers do not use is re-allocated among all New Shippers. *Id.* at sections II.A. and II.E., JA ___.

B. The Prorationing Policy Provides Shippers An Equal Opportunity To Become Regular Shippers, Consistent With Commission Precedent

To determine whether a particular historically-based prorationing policy is unduly discriminatory or preferential, the Commission considers whether shippers that nominate volumes for transportation on the pipeline in accordance with the policy's requirements have an equal opportunity to become regular shippers. Order P 21 & nn.31-32, JA ___; *see also id.* at PP 19-20, JA ___-__. Since nothing prevents a shipper that nominates volumes on the Blue Line in 12 consecutive months from becoming a Regular Shipper, the Commission found that Phillips Pipeline's prorationing policy is not unduly discriminatory. Order P 21, JA ___.

NGL asserts that it cannot become a Regular Shipper under the prorationing policy because for six months of the year it cannot purchase propane to nominate for shipment on the pipeline. Br. 29-30, 33-36. But as the Commission explained, its jurisdiction under the Interstate Commerce Act extends only to oil pipeline transportation, not to sales of petroleum products. Order P 12, n.32, JA ___, ___. So the Commission appropriately considers whether a prorationing policy is

unduly discriminatory or preferential within the context of its jurisdiction—by determining whether shippers that **nominate volumes for transportation** on the pipeline in accordance with the policy's requirements have an equal opportunity to become regular shippers. *Id.* at P 21 & nn.31-32, JA ___; *see also id.* at PP 19-20, JA ___-__; *Suncor*, 132 FERC ¶ 61,242 P 143 (noting that the fundamental relationship in the common carrier system is that between the shipper and the pipeline, not that between the shipper and the entity that sells to or buys from the shipper).

Thus, for example, the Commission explained that in *Colonial Pipeline*, 156 FERC ¶ 61,001 PP 18-26 (2016), it rejected a proposed prorationing policy because it did not provide transportation capacity-nominating shippers an equal opportunity to become regular shippers. The lottery system the pipeline used to grant capacity nominations provided nearly impossible odds that a new shipper submitting nominations would obtain enough capacity to become a regular shipper. Order P 21, JA ___; *see also id.* at PP 19-20 & nn.24-29, JA ___-__ (citing additional Commission precedent approving or rejecting prorationing policies depending on whether they provided an equal

opportunity for shippers that nominated volumes for transportation, in accordance with the policy, to become regular shippers).

NGL is correct that the Commission's analysis in *Colonial Pipeline* was practical. *See* Br. 33. But NGL ignores that the practical analysis there, as here, focused on whether shippers that nominate capacity on the pipeline have an equal opportunity to become regular shippers. *See* Order PP 19-21, JA ___; *Colonial Pipeline*, 156 FERC ¶ 61,001 PP 18-26. The Commission found that the circumstances here established that Phillips Pipeline's prorationing policy provides capacity-nominating shippers an equal opportunity to become regular shippers; and it found that the circumstances in *Colonial Pipeline* did not. Order PP 19-21, JA ___; *Colonial Pipeline*, 156 FERC ¶ 61,001 PP 18-26.

NGL also challenges the Commission's reliance on *ConocoPhillips*, 112 FERC ¶ 61,326. Br. 35-36 (citing Order P 20, JA ___). NGL does not question that *ConocoPhillips* stands for the proposition that prorationing polices that provide an equal opportunity to become a regular shipper by transporting volumes each month are not unduly discriminatory against shippers that transport volumes only

occasionally or seasonally. NGL asserts however that, unlike here, *ConocoPhillips* involved a protesting shipper that, "by its own admission, *chose* only to ship occasionally on the pipeline, instead of shipping year-round." *Id.* at 35 (citing *ConocoPhillips*, 112 FERC ¶ 61,326 PP 18-19). But nothing in *ConocoPhillips* indicates why the shipper there shipped only occasionally or seasonally. The Commission's decision there, as here, was based on the fact that the prorationing policy provided shippers that nominate volumes for transportation on the pipeline in accordance with the policy an equal opportunity to become regular shippers. *ConocoPhillips*, 112 FERC ¶ 61,326 PP 18-19.

NGL contends that, since the Commission approved prorationing by pipeline segment in *Suncor*, 132 FERC ¶ 61,242, it should have required Phillips Pipeline to change its prorationing policy to apply by season. Br. 30-32. But as already discussed, the Commission had no basis to require Phillips Pipeline to change its prorationing policy, since NGL had not met its burden to show that the policy was unduly discriminatory. Order PP 19-21, JA ___-__.

In any event, the Commission pointed out that *Suncor* was inapposite here, since it did not involve a pipeline that, like the Blue Line, switches flow direction by season. Instead, *Suncor* involved two physical segments of a pipeline with different capacities. Order P 22 & n.34, JA ___ (citing *Suncor*, 132 FERC ¶ 61,242 P 4).

Moreover, the Commission explained that, even if seasonal changes in flow direction and different pipeline segments were analogous, *Suncor* does not stand for the proposition, as NGL asserts (Br. 30-32), that a pipeline must prorate capacity by segment in all instances. Order P 22, JA ___ (citing *Mid-America*, 106 FERC ¶ 61,094 P 14 (pipelines have discretion to craft prorationing policies that meet their specific circumstances)). In *Suncor*, the Commission rejected the pipeline's prorationing proposal because it would have prevented certain shippers from having an equal opportunity to obtain transportation on the pipeline. The Commission then evaluated the shippers' alternative proposal to apply historically-based prorationing separately to each segment of the pipeline. *Suncor*, 132 FERC ¶ 61,242 PP 19-23, 117, 136, 137. In the specific circumstances there, the Commission found the shippers' proposal acceptable and directed the

pipeline to adopt that proposal. *Id.* at PP 23, 136, 137; *see also Int'l Transmission Co. v. FERC*, 988 F.3d at 481 (in view of the deference due FERC, Court cannot conclude that the Commission's finding was undermined by other cases in which the Commission reached different results based on distinct records).

The Commission reasonably found that Phillips Pipeline's prorationing policy provides all shippers that nominate capacity on the pipeline in accordance with the policy an equal opportunity to become a regular shipper and, therefore, that NGL failed to satisfy its burden to establish that Phillips Pipeline's prorationing policy is unduly discriminatory.

IV. The Commission Reasonably Determined That The Exchange Agreement Is An Agreement For The Sale Of Propane By Exchange, Not A FERC-Jurisdictional Transportation Agreement

NGL asserts that its Exchange Agreement with Phillips 66 is a FERC-jurisdictional transportation agreement. Br. 37-47. But the Commission reasonably found, based on Commission precedent and the record here, that the Exchange Agreement is a non-jurisdictional agreement for sales of propane by exchange, not for FERC-jurisdictional transportation. Order PP 10-12 & nn.6-10, JA ___-__.

NGL acknowledges that the Exchange Agreement provides for non-FERC jurisdictional sales by exchange of propane in the Summer months when the exchanges cannot be achieved via transportation on the Blue Line, which flows in the opposite direction of the exchanges during the Summer. Br. 37-38.

NGL argues, however that the exchanges under the Agreement during the Winter months are FERC-jurisdictional transportation transactions because the Blue Line flows in the same direction as the exchanges during those months. Br. 38; *see also id.* at 39-40. In NGL's view, this means that, to accomplish an exchange under the Agreement, Phillips 66 must transport the propane it receives from NGL at Conway on Phillips Pipeline's Blue Line for delivery to NGL's terminals. *Id.* at 38. The record establishes otherwise.

As Phillips 66 explained, the Exchange Agreement does not require it to use pipeline transportation to effectuate the exchange. Phillips Answer at 23, 24, JA ___, ___, *cited in* Order P 11 & n.7, JA ___. Rather, the Agreement provides that, during the Winter months, NGL shall tender propane to Phillips 66 at Conway, and Phillips 66 shall tender an equal volume of propane at NGL's terminals in Jefferson City

and East St. Louis. *Id.* at 23-24, JA ___ (citing Lindsey Affidavit at P 28, JA ___); *see also* Order P 10, JA ___ (same). Phillips 66 can sell the propane NGL tenders at Conway to a third party at Conway, or it can have the propane NGL tenders transported to a destination other than NGL's terminals. Phillips Answer at 24, JA ___ (citing Lindsey Affidavit at PP 21, 26, JA ___, ___). Phillips 66 then can meet its obligation to tender propane to NGL's terminals by sourcing propane from other origin points on the Blue Line or from other supply sources. *Id.* ___ (citing Lindsey Affidavit at PP 21, 26, JA ___, ___); *see also id.* at 16, JA ___. This enables Phillips 66 to tender volumes to NGL's terminals as soon as NGL tenders its volumes at Conway. *Id.* at 24, JA ___ (citing Lindsey Affidavit at PP 21, 26, JA ___, ___); *see also id.* at 16, JA ___. Having the tendered propane transported from Conway to the NGL terminals on the Blue Line, by contrast, would take approximately 12 days. *Id.* at 24, JA ___ (citing Lindsey Affidavit at PP 21, 26, JA ___, ___).

NGL also argues that certain features of the Exchange Agreement—the nominations provision, the exchange fees provision, and the line fill provision—confirm that the Exchange Agreement

"contemplates physical transportation on the Blue Line." Br. 41-42. But again, the Exchange Agreement does not require Phillips 66 to have the propane NGL tenders to it at Conway transported on the Blue Line for delivery to NGL's terminals. Phillips Answer at 23, 24, JA ___, ___, *cited in* Order P 11 & n.7, JA ___.

And as Phillips 66 explained, exchange agreements commonly include pricing features intended to equalize the value of product at the exchange points, such as a publicly reported basis differential, a pipeline transportation rate, or a fixed figure agreement. *Id.* at 24, JA ___ (citing Lindsey Affidavit P 27, JA ___). The exchange fees here "compensate [Phillips 66] for the administrative costs and efforts to manage the winter exchange." Lindsey Affidavit P 28, JA ___. Phillips 66 "simultaneously receive[s] barrels at Conway and deliver[s] them at the NGL Terminals, and [Phillips 66] carrie[s] the financial and logistical risks associated with this exchange." *Id.* "Further, the fees reimburse[] [Phillips 66] for potential costs [Phillips 66] incur[s] in supplying volumes at the NGL Terminals, including throughput and pump fees." *Id.*

NGL asserts that *ConocoPhillips Co. v. Enter. TE Prods. Pipeline Co.*, 134 FERC ¶ 61,174 (2011), is distinguishable from the facts here because in that case it was physically impossible to transport on the pipeline between the two exchange points and negotiated prices were used to equalize the value of the products exchanged. Br. at 39-41. But the Order cited *ConocoPhillips* only for the proposition that "'[t]he fact that an oil pipeline engages in [an exchange] contract does not make it a jurisdictional issue.'" Order P 12, JA ___ (quoting *ConocoPhillips*, 134 FERC ¶ 61,174 P 54). In any event, while NGL—overlooking the very title of its "Exchange Agreement" with Phillips 66—seems to believe that an exchange can occur only in circumstances like those in *ConocoPhillips*, the Commission determined that exchanges are not so limited and that the Exchange Agreement here provides for non-jurisdictional sales. Order P 12, JA ___. The Commission's jurisdictional determination, which was made based on its expertise in administering the statute, is due deference and should be affirmed. *See City of Arlington*, 569 U.S. at 297; *OXY*, 64 F.3d at 691, 701.

NGL next claims that the Order "made no reference to any of NGL's evidence or any of its arguments," and "did not explain why it

concluded that the agreement governed the sale of a commodity rather than transportation." Br. 39. But the Order set out the significant arguments NGL raised and cited to NGL's Complaint (R. 1) and Answer (R. 8). Order P 10, JA ___. The Order also noted that Phillips' Answer (R. 6) explained why the Exchange Agreement was for non-jurisdictional sales and cited to that Answer. *Id.* P 11, JA ___. The Order then found that the Commission did not have jurisdiction over the Exchange Agreement, since it is a sales agreement. *Id.*, JA ___ (citing cases setting out the limits of the Commission's Interstate Commerce Act jurisdiction). While NGL might prefer that the Order included additional discussion, no more was required. *See*, *e.g.*, *Pub. Serv. Electric and Gas Co. v. FERC*, 989 F.3d 10, 20 (D.C. Cir. 2021) (it is sufficient for the Commission to summarize and respond to significant arguments); *Wis. Pub. Power, Inc. v. FERC*, 493 F.3d 239, 273 (D.C. Cir. 2007) (an agency's order will be sustained if the path of its decision may reasonably be discerned) (citing *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 497 (2004)).

Finally, NGL complains that the Commission failed to address its contention that, contrary to *Magellan Midstream Partners, L.P.*, 161

FERC ¶ 61,219 (2017), the Exchange Agreement allows Phillips 66 to provide FERC-jurisdictional transportation on terms other than those in Phillips Pipeline's tariff. Br. 43-47. But as NGL acknowledges, the Commission explained that it did not address this contention because it was premised on the Exchange Agreement being a FERC-jurisdictional transportation agreement, and the Commission had determined that it was not. *Id.* at 43; *see also* Order P 12, JA ___ ("As the Commission lacks jurisdiction over the sales of petroleum products, we find that the Commission lacks jurisdiction to rule on NGL's claims arising as a result of its supply arrangements with Phillips 66."). In these circumstances, NGL's arguments based on *Magellan* were of no significance, and the Commission did not err by not addressing them. *See Pub. Serv. Electric and Gas*, 989 F.3d at 20.

CONCLUSION

For the foregoing reasons, the petition for review should be denied.

Respectfully submitted,

Matthew R. Christiansen
General Counsel

Robert H. Solomon
Solicitor

/s/ Beth G. Pacella
Beth G. Pacella
Deputy Solicitor

Federal Energy Regulatory Commission
Washington, D.C. 20426
Tel: (202) 502-6048
Fax: (202) 273-0901
beth.pacella@ferc.gov

March 26, 2021

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g) and Circuit Rule 32(e), I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,325 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

I further certify that this brief complies with the type-face requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in Century Schoolbook 14-point font using Microsoft Word 2013.

/s/ Beth G. Pacella

Beth G. Pacella
Deputy Solicitor

Federal Energy Regulatory
Commission
888 First Street, N.E.
Washington, D.C. 20426
Phone: 202-502-6048
Fax: 202-273-0901
E-mail: beth.pacella@ferc.gov

March 26, 2021

ADDENDUM

STATUTES

TABLE OF CONTENTS

STATUTES: **PAGE**

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

AMENDMENTS

1976—Pub. L. 94–574 provided that if no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer as defendant.

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(c).	June 11, 1946, ch. 324, §10(c), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

§ 705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(d).	June 11, 1946, ch. 324, §10(d), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(e).	June 11, 1946, ch. 324, §10(e), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

ABBREVIATION OF RECORD

Pub. L. 85–791, Aug. 28, 1958, 72 Stat. 941, which authorized abbreviation of record on review or enforcement of orders of administrative agencies and review on the original papers, provided, in section 35 thereof, that: ''This Act [see Tables for classification] shall not be construed to repeal or modify any provision of the Administrative Procedure Act [see Short Title note set out preceding section 551 of this title].''

CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

§ 801. Congressional review

(a)(1)(A) Before a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report containing—

(i) a copy of the rule;

(ii) a concise general statement relating to the rule, including whether it is a major rule; and

(iii) the proposed effective date of the rule.

(B) On the date of the submission of the report under subparagraph (A), the Federal agency pro-

TITLE 49, APPENDIX—TRANSPORTATION

This Appendix consists of sections of former Title 49 that were not included in Title 49 as enacted by Pub. L. 95-473 and Pub. L. 97-449, and certain laws related to transportation that were enacted after Pub. L. 95-473. Sections from former Title 49 retain the same section numbers in this Appendix. For disposition of all sections of former Title 49, see Table at beginning of Title 49, Transportation.

CHAPTER 1—INTERSTATE COMMERCE ACT, PART I; GENERAL PROVISIONS AND RAILROAD AND PIPE LINE CARRIERS

§ 1. Repealed. Pub. L. 95–473, § 4(b), (c), Oct. 17, 1978, 92 Stat. 1466, 1470; Pub. L. 96–258, § 3(b), June 3, 1980, 94 Stat. 427

Section repealed subject to an exception related to transportation of oil by pipeline. Section 402 of Pub. L. 95–607, which amended par. (14) of this section by adding subdiv. (b) and redesignating existing subdiv. (b) as (c) subsequent to the repeal of this section by Pub. L. 95–473, was repealed by Pub. L. 96–258. For disposition of this section in revised Title 49, Transportation, see Table at beginning of Title 49. See, also, notes following Table.

Prior to repeal, section read as follows:

§ 1. Regulation in general; car service; alteration of line

(1) Carriers subject to regulation

The provisions of this chapter shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or

(b) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water; or

(c) Repealed. June 19, 1934, ch. 652, title VI, § 602(b), 48 Stat. 1102;

from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only insofar as such transportation takes place within the United States.

(2) Transportation subject to regulation

The provisions of this chapter shall also apply to such transportation of passengers and property, but only insofar as such transportation takes place within the United States, but shall not apply—

(a) To the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State and not shipped to or from a foreign country from or to any place in the United States as aforesaid, except as otherwise provided in this chapter;

(b) Repealed. June 19, 1934, ch. 652, title VI, § 602(b), 48 Stat. 1102.

(c) To the transportation of passengers or property by a carrier by water where such transportation would not be subject to the provisions of this chapter except for the fact that such carrier absorbs, out of its port-to-port water rates or out of its proportional through rates, any switching, terminal, lighterage, car rental, trackage, handling, or other charges by a rail carrier for services within the switching, drayage, lighterage, or corporate limits of a port terminal or district.

(3) Definitions

(a) The term "common carrier" as used in this chapter shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this chapter it shall be held to mean "common carrier." The term "railroad" as used in this chapter shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" as used in this chapter shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. The term "person" as used in this chapter includes an individual, firm, copartnership, corporation, company, association, or joint-stock association; and includes a trustee, receiver, assignee, or personal representative thereof.

(b) For the purposes of sections 5, 12(1), 20, 304(a)(7), 310, 320, 904(b), 910, and 913 of this Appendix, where reference is made to control (in referring to a relationship between any person or persons and another person or persons), such reference shall be construed to include actual as well as legal control, whether maintained or exercised through or by reason of the method of or circumstances surrounding organization or operation, through or by common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or through or by any other direct or indirect means; and to include the power to exercise control.

(4) Duty to furnish transportation and establish through routes; division of joint rates

It shall be the duty of every common carrier subject to this chapter to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this chapter to establish reasonable through routes with common carriers by water subject to chapter 12 of this Appendix, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

(5) Just and reasonable charges; applicability; criteria for determination

(a) All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful. The provisions of this subdivision shall not apply to common carriers by railroad subject to this chapter.

(b) Each rate for any service rendered or to be rendered in the transportation of persons or property by any common carrier by railroad subject to this chapter shall be just and reasonable. A rate that is unjust or unreasonable is prohibited and unlawful. No rate which contributes or which would contribute to the going concern value of such a carrier shall be found to be unjust or unreasonable, or not shown to be just and reasonable, on the ground that such rate is below a just or reasonable minimum for the service rendered or to be rendered. A rate which equals or exceeds the variable costs (as determined through formulas prescribed by the Commission) of providing a service shall be presumed, unless such presumption is rebutted by clear and convincing evidence, to contribute to the going concern value of the carrier or carriers proposing such rate (hereafter in this paragraph referred to as the "proponent carrier"). In determining variable costs, the Commission shall, at the request of the carrier proposing the rate, determine only those costs of the carrier proposing the rate and only those costs of the specific service in question, except where such specific data and cost information is not available. The Commission shall not include in variable cost any expenses which do not vary directly with the level of service provided under the rate in question. Notwithstanding any other provision of this chapter, no rate shall be found to be unjust or unreasonable, or not shown to be just and reasonable, on the ground that such rate exceeds a just or reasonable maximum for the service rendered or to be rendered, unless the Commission has first found that the proponent carrier has market dominance over such service. A finding that a carrier has market dominance over a service shall not create a presumption that the rate or rates for such service exceed a just and reasonable maximum. Nothing in this paragraph shall prohibit a rate increase from a level which reduces the going concern value of the proponent carrier to a level which contributes to such going concern value and is otherwise just and reasonable. For the purposes of the preceding sentence, a rate increase which does not raise a rate above the incremental costs (as determined through formulas prescribed by the Commission) of rendering the service to which such rate applies shall be presumed to be just and reasonable.

not in reorganization, as determined by the Commission.

(Feb. 4, 1887, ch. 104, pt. I, § 1a, as added and amended Feb. 5, 1976, Pub. L. 94-210, title VIII, §§ 802, 809(c), 90 Stat. 127, 146; Oct. 19, 1976, Pub. L. 94-555, title II, § 218, 90 Stat. 2628.)

§ 2. Repealed. Pub. L. 95–473, § 4(b), (c), Oct. 17, 1978, 92 Stat. 1466, 1470

Section repealed subject to an exception related to transportation of oil by pipeline. For disposition of this section in revised Title 49, Transportation, see Table at beginning of Title 49. See, also, notes following Table.

Prior to repeal, section read as follows:

§ 2. Special rates and rebates prohibited

If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property, subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful.

(Feb. 4, 1887, ch. 104, pt. I, § 2, 24 Stat. 379; Feb. 28, 1920, ch. 91, § 404, 41 Stat. 479; June 19, 1934, ch. 652, § 602(b), 48 Stat. 1102; Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543.)

§ 3. Repealed. Pub. L. 95–473, § 4(b), (c), Oct. 17, 1978, 92 Stat. 1466, 1470

Section repealed subject to an exception related to transportation of oil by pipeline. For disposition of this section in revised Title 49, Transportation, see Table at beginning of Title 49. See, also, notes following Table.

Prior to repeal, section read as follows:

§ 3. Preferences; interchange of traffic; terminal facilities

(1) Undue preferences or prejudices prohibited

It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

(1a) Export rates on farm commodities; Commission's power to carry out policy

It is declared to be the policy of Congress that shippers of wheat, cotton, and all other farm commodities for export shall be granted export rates on the same principles as are applicable in the case of rates on industrial products for export. The Commission is directed, on its own initiative or an application by interested persons, to make such investigations and conduct such hearings, and, after appropriate proceedings, to issue such orders, as may be necessary to carry out such policy.

(2) Payment of freight as prerequisite to delivery

No carrier by railroad and no express company subject to the provisions of this chapter shall deliver or relinquish possession at destination of any freight or express shipment transported by it until all tariff rates and charges thereon have been paid, except under such rules and regulations as the Commission may from time to time prescribe to govern the settlement of all such rates and charges and to prevent unjust discrimination: *Provided,* That the provisions of this paragraph shall not be construed to prohibit any carrier or express company from extending credit in connection with rates and charges on freight or express shipments transported for the United States, for any department, bureau, or agency thereof, or for any State or Territory or political subdivision thereof, or for the District of Columbia. Where carriers by railroad are instructed by a shipper or consignor to deliver property transported by such carriers to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect of the transportation of such property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (a) is an agent only and has no beneficial title in the property, and (b) prior to delivery of the property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of a shipment reconsigned or diverted to a point other than that specified in the original bill of lading, has also notified the delivering carrier in writing of the name and address of the beneficial owner of the property. In such cases the shipper or consignor, or, in the case of a shipment so reconsigned or diverted, the beneficial owner, shall be liable for such additional charges, irrespective of any provisions to the contrary in the bill of lading or in the contract under which the shipment was made. An action for the enforcement of such liability may be begun within the period provided in paragraph (3) of section 16 of this Appendix or before the expiration of six months after final judgment against the carrier in an action against the consignee begun within the period provided in paragraph (3) of section 16 of this Appendix. If the consignee has given to the carrier erroneous information as to who the beneficial owner is, such consignee shall himself be liable for such additional charges, notwithstanding the foregoing provisions of this paragraph. An action for the enforcement of such liability may be begun within the period provided in paragraph (3) of section 16 of this Appendix or before the expiration of six months after final judgment against the carrier in an action against the beneficial owner named by the consignee begun within the period provided in paragraph (3) of section 16 of this Appendix. On shipments reconsigned or diverted by an agent who has furnished the carrier in the reconsignment or diversion order with a notice of agency and the proper name and address of the beneficial owner, and where such shipments are refused or abandoned at ultimate destination, the said beneficial owner shall be liable for all legally applicable charges in connection therewith. If the reconsignor or diverter has given to the carrier erroneous information as to who the beneficial owner is, such reconsignor or diverter shall himself be liable for all such charges, and an action for the enforcement of his liability may be begun within the same period provided in the case of an action against a consignee who has given erroneous information as to the beneficial owner.

(3) Liability of shipper-consignee for freight where delivery is made to another party upon instruction

If a shipper or consignor of a shipment of property (other than a prepaid shipment) is also the consignee named in the bill of lading and, prior to the time of delivery, notifies, in writing, a delivering carrier by railroad or a delivering express company subject to

the provisions of this chapter, (a) to deliver such property at destination to another party, (b) that such party is the beneficial owner of such property, and (c) that delivery is to be made to such party only upon payment of all transportation charges in respect of the transportation of such property, and delivery is made by the carrier to such party without such payment, such shipper or consignor shall not be liable (as shipper, consignor, consignee, or otherwise) for such transportation charges but the party to whom delivery is so made shall in any event be liable for transportation charges billed against the property at the time of such delivery, and also for any additional charges which may be found to be due after delivery of the property, except that if such party prior to such delivery has notified in writing the delivering carrier that he is not the beneficial owner of the property, and has given in writing to such delivering carrier the name and address of such beneficial owner, such party shall not be liable for any additional charges which may be found to be due after delivery of the property; but if the party to whom delivery is made has given to the carrier erroneous information as to the beneficial owner, such party shall nevertheless be liable for such additional charges. If the shipper or consignor has given to the delivering carrier erroneous information as to who the beneficial owner is, such shipper or consignor shall himself be liable for such transportation charges, notwithstanding the foregoing provisions of this paragraph and irrespective of any provisions to the contrary in the bill of lading or in the contract of transportation under which the shipment was made. An action for the enforcement of such liability either against the party to whom delivery is made or the shipper or consignor may be begun within the period provided in paragraph (3) of section 16 of this Appendix, or before the expiration of six months after final judgment against the carrier in an action against either of such parties begun within the limitation period provided in paragraph (3) of section 16 of this Appendix. The term "delivering carrier" means the line-haul carrier making ultimate delivery.

(4) Interchange of traffic

All carriers subject to the provisions of this chapter shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term "connecting line" means the connecting line of any carrier subject to the provisions of this chapter or any common carrier by water, subject to chapter 12 of this Appendix.

(5) Terminal facilities; use of and compensation for

If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a common carrier by railroad owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power by order to require the use of any such terminal facilities, including main-line track or tracks for a reasonable distance outside of such terminal, of any common carrier by railroad, by another such carrier or other such carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced. If under this paragraph the use of such terminal facilities of any carrier is required to be given to another carrier or other carriers, and the carrier whose terminal facilities are required to be so used is not satisfied with the terms fixed for such use, or if the amount of compensation so fixed is not duly and promptly paid, the carrier whose terminal facilities have thus been required to be given to another carrier or other carriers shall be entitled to recover, by suit or action against such other carrier or carriers, proper damages for any injuries sustained by it as the result of compliance with such requirement, or just compensation for such use, or both, as the case may be.

(Feb. 4, 1887, ch. 104, pt. I, § 3, 24 Stat. 380; Feb. 28, 1920, ch. 91, § 405, 41 Stat. 479; Mar. 4, 1927, ch. 510, § 1, 44 Stat. 1447; Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543; Aug. 12, 1935, ch. 509, 49 Stat. 607; Sept. 18, 1940, ch. 722, title I, § 5(a), (c)–(f), 54 Stat. 902; Aug. 2, 1949, ch. 379, § 2(a), 63 Stat. 485.)

§ 4. Repealed. Pub. L. 95–473, § 4(b), (c), Oct. 17, 1978, 92 Stat. 1466, 1470

Section repealed subject to an exception related to transportation of oil by pipeline. For disposition of this section in revised Title 49, Transportation, see Table at beginning of Title 49. See, also, notes following Table.

Prior to repeal, section read as follows:

§ 4. Long and short haul charges; competition with water routes

(1) Charges for long and short hauls and on through route; exemption

It shall be unlawful for any common carrier subject to this chapter or chapter 12 of this Appendix to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this chapter or chapter 12 of this Appendix, but this shall not be construed as authorizing any common carrier within the terms of this chapter or chapter 12 of this Appendix to charge or receive as great compensation for a shorter as for a longer distance: *Provided*, That upon application to the Commission and after investigation, such carrier, in special cases, may be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property, and the Commission may from time to time prescribe the extent to which such designated carriers may be relieved from the operation of the foregoing provisions of this section, but in exercising the authority conferred upon it in this proviso, the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and no such authorization shall be granted on account of merely potential water competition not actually in existence: *Provided further*, That any such carrier or carriers operating over a circuitous line or route may, subject only to the standards of lawfulness set forth in other provisions of this chapter or chapter 12 of this Appendix and without further authorization, meet the charges of such carrier or carriers of the same type operating over a more direct line or route, to or from the competitive points, provided that rates so established over circuitous routes shall not be evidence on the issue of the compensatory character of rates involved in other proceedings: *And provided further*, That tariffs proposing rates subject to the provision of this paragraph requiring Commission authorization may be filed when application is made to the Commission under the provisions hereof, and in the event such application is approved, the Commission shall permit such tariffs to become effective upon one day's notice: *And provided further*, That the provisions of this para-

NGL Supply Wholesale, L.L.C. v. FERC and United States of America
D.C. Cir. No. 20-1330

Docket No. OR20-5

CERTIFICATE OF SERVICE

I hereby certify that, on March 26, 2021, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Beth G. Pacella
Beth G. Pacella
Deputy Solicitor

Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426
Telephone: (202) 502-6048
Fax: (202) 273-0901
Email: beth.pacella@ferc.gov