

127 FERC ¶ 61,047
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

BP Pipelines (Alaska) Inc.	Docket Nos. IS07-75-001 and IS08-78-001 Docket Nos. IS07-75-002 and IS08-78-002
ConocoPhillips Transportation Alaska, Inc.	Docket Nos. IS07-56-001 and IS08-62-001 Docket Nos. IS07-56-002 and IS08-62-002
ExxonMobil Pipeline Company	Docket Nos. IS07-55-001 and IS08-65-001 Docket Nos. IS07-55-002 and IS08-65-002
Koch Alaska Pipeline Company LLC	Docket Nos. IS07-48-002 and IS08-64-001 Docket Nos. IS07-48-003 and IS08-64-002
Unocal Pipeline Company	Docket Nos. IS07-41-001 and IS08-53-001 Docket Nos. IS07-41-002 and IS08-53-002

ORDER ON REHEARING AND COMPLIANCE AND ESTABLISHING HEARING
AND SETTLEMENT JUDGE PROCEDURES

(Issued April 16, 2009)

1. This matter involves the interstate rates for the Trans Alaska Pipeline System (TAPS). On December 29, 2008, the Commission issued an order¹ granting a motion for summary disposition of the TAPS Carriers'² 2007 and 2008 rate filings and ordering the TAPS Carriers to submit a compliance filing establishing the rates for 2007 and 2008 in conformance with the ratemaking methodology established in Opinion No. 502.³ On January 28, 2009, the TAPS Carriers submitted their compliance filing establishing rates for 2007 and 2008. On the same day, the State of Alaska (State) filed a request for

¹ *BP Pipelines (Alaska) Inc.*, 125 FERC ¶ 61,367 (2008) (December 29 Order).

² The TAPS Carriers consist of BP Pipelines (Alaska) Inc., ConocoPhillips Transportation Alaska, Inc., ExxonMobil Pipeline Company, Koch Alaska Pipeline Company, LLC, and Unocal Pipeline Company.

³ *BP Pipelines (Alaska) Inc.*, 123 FERC ¶ 61,287 (2008) (Opinion No. 502).

clarification, or in the alternative, rehearing of the December 29 Order. Subsequently a number of parties filed protests and comments on the compliance filing. In this order, the Commission denies the State's request for clarification or rehearing of the December 29 Order, accepts the tariff sheets containing the 2007 rate, and orders the TAPS Carriers to issue refunds accordingly. The Commission also accepts on an interim basis the tariff sheets containing the 2008 rate, subject to refund, orders preliminary refunds for 2008, and establishes hearing and settlement judge procedures.

I. Request for Clarification or Rehearing

A. Background

2. On December 1, 2006 and November 30, 2007, each of the TAPS Carriers filed their individual interstate rates for 2007 and 2008.⁴ These filings were the annual filings required by the Commission-approved settlement in *Trans Alaska Pipeline System* (TAPS Settlement).⁵ The TAPS Settlement prescribed the TAPS Settlement Methodology (TSM) for computing the rates for the transportation of petroleum through TAPS. Each of the TAPS Carriers' filings for 2007 and 2008 increased the rates over the existing rates.

3. The State and Anadarko Petroleum Corporation (Anadarko) protested the TAPS Carriers' 2007 and 2008 rate filings contending that the rate increases were unjust and unreasonable. In addition, the State argued that the rates (1) were unjustly discriminatory and unduly prejudicial under the TAPS Settlement and the Interstate Commerce Act (ICA) because the TAPS Carriers sought to charge interstate shippers more than intrastate shippers; and (2) included impermissible Dismantlement, Removal, and Restoration (DR&R) costs and imprudently incurred costs related to the Strategic Reconfiguration Project (SR Project).⁶

⁴ TAPS Carriers filed their 2007 rates in Docket Nos. IS07-75-000, IS07-56-000, IS07-55-000, IS07-48-000, and IS07-41-000, and the TAPS Carriers filed their 2008 rates in Docket Nos. IS08-53-000, IS08-78-000, IS08-62-000, IS08-65-000, and IS08-64-000.

⁵ 33 FERC ¶ 61,064 (1985); 35 FERC ¶ 61,425 (1986).

⁶ The SR Project is a construction project that the TAPS Carriers have undertaken to help minimize oil transportation costs and increase efficiency on TAPS. The SR Program principally involves the electrification and automation of four pump stations on TAPS.

4. The Commission, by orders issued December 28, 2006, and December 28, 2007, accepted and suspended each of the rate filings, making them effective January 1, 2007, and January 1, 2008, respectively, subject to refund.⁷ The Commission also ordered the proceedings on the 2007 and 2008 rates to be held in abeyance, pending the outcome of the proceeding involving the 2005 and 2006 rates in Docket No. IS05-82-000, *et al.* The 2005 and 2006 rates had formerly been protested and set for hearing.

5. In the 2005-2006 rate case, the Administrative Law Judge (ALJ) divided the proceeding into two phases.⁸ The first phase was the adjudication of the protestors' claims that the TAPS Carriers' rate filings were unjust and unreasonable and the State's claim that the rates were unduly discriminatory. The second phase, to address the State's claims that the TAPS Carriers' 2005-2006 rates improperly included imprudently incurred costs related to the SR Project, was held in abeyance until the Commission resolved the first phase of the proceeding.

6. On May 17, 2007, the ALJ issued an Initial Decision in the first phase of the 2005-2006 proceeding finding that the TAPS Carriers' proposed interstate rates for those years based upon the TSM were unjust and unreasonable.⁹ In a separate order, the ALJ continued to hold the SR phase of the 2005-2006 proceeding in abeyance, and noted that if the Commission affirmed the Initial Decision, the SR phase of the proceeding for those years would be moot because the 2004 refund floor would prevent any further refunds.¹⁰

7. On June 20, 2008, the Commission issued Opinion No. 502, which generally affirmed the Initial Decision in the 2005-2006 rate cases. Opinion No. 502 found that the TAPS Carriers' proposed interstate rates for 2005 and 2006 based upon the TSM were unjust and unreasonable and determined that the TAPS Carriers must calculate their rates using the methodology set forth in Opinion No. 154-B.¹¹ The Commission also affirmed that there should be a uniform rate for all of the TAPS Carriers, ordered limited refunds

⁷ *BP Pipelines (Alaska) Inc.*, 117 FERC ¶ 61,352 (2006), and *Unocal Pipeline Company*, 121 FERC ¶ 61,300 (2007).

⁸ *BP Pipelines (Alaska) Inc.*, 116 FERC ¶ 63,056 (2006).

⁹ *BP Pipelines (Alaska), Inc.*, 119 FERC ¶ 63,007 (2007) (Initial Decision).

¹⁰ *Order of Chief Judge Continuing Suspension of Procedural Schedule and Cancelling Prehearing Conference*, Docket No. IS05-82-003, *et al.* (Oct 3, 2007) (unpublished order).

¹¹ *Williams Pipe Line Co.*, 31 FERC ¶ 61,377 (1985) (Opinion No. 154-B).

(given that the 2004 rates were the floor for any refunds), and directed the TAPS Carriers to submit a compliance filing to establish rates for 2005 and 2006. On July 21, 2008, the TAPS Carriers submitted a compliance filing establishing rates for 2005 and 2006.

8. After the Commission issued Opinion No. 502, Anadarko, Tesoro Corporation, and Tesoro Alaska Company (Anadarko/Tesoro) filed a motion requesting that the Commission summarily reject the TAPS Carriers' 2007 and 2008 rate filings on the grounds that they were inconsistent with Opinion No. 502. Anadarko/Tesoro also requested that the Commission order the TAPS Carriers to refund the amounts collected above the preexisting clean rate, which Anadarko/Tesoro contended was the 2006 rate established in accordance with Opinion No. 502.

9. On November 20, 2008, the Commission issued an order generally denying rehearing, but granting rehearing, in part, of Opinion No. 502, by requiring the TAPS Carriers to take further action with respect to the uniform rate issue.¹² The order also accepted the TAPS Carriers' July 21, 2008 compliance filing which established rates for 2005 and 2006 pursuant to the Opinion No. 154-B methodology.

10. The December 29 Order found that summary disposition of the TAPS Carriers' 2007 and 2008 rate filings was appropriate, but denied Anadarko/Tesoro's request to order refunds down to the level of the 2006 rate. Instead, the Commission ordered the TAPS Carriers to submit a compliance filing establishing interstate rates for 2007 and 2008 under the ratemaking principles established in Opinion No. 502.

B. The State's Request for Clarification or Rehearing

11. The State requests clarification that the State's 2007-2008 SR claims are severed from the portion of the 2007-2008 rate proceeding concerning the implementation of Opinion No. 502, and are consolidated with the SR claims currently held in abeyance in the 2005-2006 proceeding. The State asserts that when the Commission originally accepted and suspended the TAPS Carriers' 2007-2008 rates, the order did not distinguish or sever the SR claims, but held all of the claims relating to those rates in abeyance. In light of this, the State requests the Commission to clarify that the SR claims are not part of the Opinion No. 502 compliance proceedings and will be adjudicated in a separate proceeding. The State argues that the 2007-2008 SR claims should be consolidated with the SR claims in the 2005-2006 rate proceeding because it would be most efficient to hear all of the SR claims in a single proceeding. Moreover, the State argues that all of the SR claims should continue in abeyance because the SR Project has

¹² *BP Pipelines (Alaska) Inc.*, 125 FERC ¶ 61,215 (2008).

not yet been completed. Finally, the State requests clarification that the rates ultimately resulting from the TAPS Carriers' 2007-2008 compliance filings will be subject to refund pending the resolution of the SR claims.¹³

C. Subsequent Events

12. On March 11, 2009, in Docket No. IS05-82-000, the State filed a motion to lodge a stipulation between itself and the TAPS Carriers regarding the 2005-2006 SR claims (Stipulation). The Stipulation resolves all outstanding issues regarding the SR phase of the 2005-2006 rate proceeding. More specifically, the parties agreed that “[u]nder the ruling in Opinion No. 502, the refund floor for 2005 and 2006 rates is the 2004 rates. As a consequence, the State’s SR Claims are moot as to the refunds related to 2005 and 2006 rates. Therefore, there is no reason for further proceedings regarding the severed SR claims that have been held in abeyance in the 2005 and 2006 dockets.”¹⁴ Additionally, the parties agreed that “[t]o the extent SR costs incurred prior to 2007 are in the costs used to calculate the 2007 and/or 2008 rates... the State is free to challenge the inclusion of such SR costs in the compliance filings regarding the 2007 and/or 2008 rates filed by the TAPS Carriers... and the TAPS Carriers are free to defend against any such challenge by the State.”¹⁵ No party opposed the Stipulation.

13. On March 12, 2009, the ALJ issued an order granting the parties motion to lodge the Stipulation on the 2005-2006 SR issues.¹⁶ The ALJ stated that by virtue of the Stipulation, all outstanding issues in the 2005-2006 rate proceeding are moot, obviating the need for a hearing. Accordingly, on March 16, 2009, the Chief ALJ issued an order terminating the hearing procedures in Docket No. IS05-82-003.¹⁷

¹³ The TAPS Carriers and Anadarko/Tesoro filed responses to the State’s request for clarification and rehearing.

¹⁴ Stipulation at P 5.

¹⁵ Stipulation at P 8.

¹⁶ *Order Granting Motion to Lodge Stipulation*, Docket No. IS05-82-003, *et al.* (Mar. 12, 2009) (unpublished order).

¹⁷ *Order of Chief Judge Terminating Hearing Procedures*, Docket No. IS05-82-003, *et al.* (Mar. 16, 2009) (unpublished order).

D. Discussion

14. In light of the Stipulation, the Commission finds the State's request for clarification regarding whether the 2007-2008 SR claims should be consolidated with the 2005-2006 SR claims to be moot. In the Stipulation, the parties agreed that all outstanding issues regarding the SR phase of the 2005-2006 rate proceeding have been resolved, and as a result, the Chief ALJ terminated the hearing procedures. Thus, there is no 2005-2006 SR proceeding with which to consolidate the 2007-2008 SR claims.

15. The State also requests clarification that the State's 2007-2008 SR claims are severed from the remainder of the 2007-2008 rate proceeding. As explained above, when the Commission originally accepted and suspended the TAPS Carriers' 2007-2008 rates, the Commission did not sever the SR issues, but held all claims relating to those rates in abeyance.¹⁸ The December 29 Order did not change this. Therefore, the parties' 2007-2008 SR claims continue to be a part of the rest of the 2007-2008 rate proceeding. As explained below in the Compliance Filing section of this order, the ALJ will determine the most appropriate way to handle the proceeding for the 2007 and 2008 TAPS rates. This includes whether to establish a separate hearing for the SR issues, and if established, whether to hold that hearing in abeyance. The Commission therefore denies the State's request for clarification or rehearing of the December 29 Order.

II. Compliance Filing

A. Summary of the Filing

16. On January 28, 2009, the TAPS Carriers submitted a filing in compliance with the December 29 Order establishing the 2007 and 2008 rates for TAPS. The TAPS Carriers state that they calculated the 2007 and 2008 rates under the approach set forth in Opinion No. 502. Specifically, the TAPS Carriers established a single uniform rate using the Commission's Opinion No. 154-B methodology. The TAPS Carriers further explain that they designed the rates using a barrel-mile rate design.¹⁹

¹⁸ See *BP Pipelines (Alaska) Inc.*, 117 FERC ¶ 61,352 (2006); *Unocal Pipeline Co.*, 121 FERC ¶ 61,300 (2007).

¹⁹ The TAPS Carriers state that the barrel-mile rate design was endorsed by the Initial Decision in Docket No. IS05-82-000, *et al.* See *BP Pipelines (Alaska) Inc.*, 119 FERC ¶ 63,007, at P 228 (2007).

17. The TAPS Carriers state that they prepared the rate calculations using actual costs and throughput for 2007 and 2008. They explain that as a starting point for the 2007 calculations, they used the actual data from TAPS Carriers' FERC Form 6 reports. However, because they have not filed their 2008 FERC Form 6 reports, the TAPS Carriers used the actual operating results for 2008 taken from the books and records of the TAPS Carriers and Alyeska Pipeline Service Company, the TAPS Carriers' agent for the operation of TAPS. The TAPS Carriers state that these results will eventually be incorporated in the TAPS Carriers' FERC Form 6 reports for 2008.

18. In addition, the TAPS Carriers request that the Commission determine as a threshold matter that the TAPS Carriers' 2004 filed rates constitute the applicable refund floor for 2007 and 2008. The TAPS Carriers contend that because the 2005, 2006, 2007, and 2008 rate filings were all suspended and made subject to a refund obligation, none of those rates could constitute a clean rate at the time the succeeding rate took effect. Thus, the TAPS Carriers argue that for refund purposes, the 2004 filed rates, which were not protested, are the last clean rate and should be the applicable refund floor for the 2007 and 2008 rates. The TAPS Carriers argue that the refund floor cannot be set at the 2006 rate because that rate was not established, even in principle, until the issuance of Opinion No. 502, which was after the Commission accepted and suspended the 2007 and 2008 rate filings.

19. The TAPS Carriers argue that the Commission should determine the refund floor as a threshold matter because to the extent the 2004 refund floor applies, there will be no rate issues to litigate for 2007. The TAPS Carriers explain that the uniform rate calculated for 2007 is lower than the 2004 rates, and so any disputes about the 2007 rate cannot affect the refunds because they would only serve to lower the rate. The TAPS Carriers state that by comparison, the uniform rate for 2008 is higher than the 2004 rates. Therefore, the TAPS Carriers state that any disputes regarding the 2008 rate are not mooted by the 2004 refund floor.

B. Comments and Protests

20. Petro Star, Inc. (Petro Star), Flint Hills Resources Alaska, LLC (Flint Hills), the State, and Anadarko/Tesoro filed comments and protests regarding the TAPS Carriers' compliance filing.

21. The TAPS Carriers, Petro Star, and the State filed answers. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure prohibits an answer to a protest and answer unless otherwise ordered by the decisional authority.²⁰ We will accept the

²⁰ 18 C.F.R. § 385.213(a)(2) (2008).

answers filed by the TAPS Carriers and Petro Star and the answers to answers filed by the State and the TAPS Carriers because they have provided information that has assisted us in our decision-making process.

1. Petro Star and Flint Hills' Comments

22. Petro Star and Flint Hills both agree with the TAPS Carriers' position that the 2004 rates constitute a refund floor for the 2007 and 2008 rate proceedings.

2. The State's Protest

23. The State disputes that the TAPS Carriers' 2004 rates constitute a refund floor for 2007 and 2008. The State argues no such limit should apply because the Commission is remedying unjust discrimination and undue preference by the TAPS Carriers in violation of section II-11(e) of the TAPS Settlement²¹ and sections 2 and 3(1) of the ICA. The State contends that limiting refunds to the difference between the 2004 interstate rate and the TAPS Carriers' proposed 2007 and 2008 interstate rates will not remedy the unjust discrimination created by these rates.

24. The State argues that the Commission can grant refunds below the 2004 refund floor under two modes of authority. First, the State asserts that settlement agreements may vest the Commission with authority it would not otherwise be able to exercise.²² Specifically, the State argues that section II-11(e) of the TAPS Settlement, which prohibits unjust discrimination, permits the Commission to grant relief broader than that expressly authorized under the ICA. Second, the State contends that the Commission has ancillary powers which do not depend on an express statutory grant of authority and that these ancillary powers include the authority to grant refunds, even in circumstances where the rates in question are not increases.²³

²¹ The State cites section II-11(e) of the TAPS Settlement, which states:

Notwithstanding any other provision of this Agreement, all tariff rates or surcharges charged by a TAPS Carrier shall be subject to the legal prohibitions upon unjust discrimination against and undue preference to shippers.

²² See *Kuparuk Transp. Co.*, 55 FERC ¶ 61,122, at 61,366 (1991) (*Kuparuk*); *Laclede Gas Co. v. FERC*, 873 F.2d 1494, 1499 (D.C. Cir. 1989) (*Laclede Gas*).

²³ See *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 654, 655 (1978); *United Gas Improvement Co. v. Callery Props. Inc.*, 382 U.S. 223, 229 (1965).

25. The State raises several other issues regarding the TAPS Carriers' 2007 and 2008 rate filings, including whether: (1) the rates impermissibly include DR&R costs and imprudent expenditures relating to the SR Program; (2) the life of the line estimate used by the TAPS Carriers of 2034 is erroneous because it is inconsistent with an estimate of 2075 made by one of TAPS Carriers' affiliates; (3) the TAPS Carriers erroneously included Enterprise Products Partners in the proxy group for the calculation of the return on equity (ROE); (4) the TAPS Carriers failed to adjust the proxy group's ROE for income tax treatment of master limited partnership unit holdings; and (5) the TAPS Carriers improperly used actual costs and throughput for 2007 and 2008, rather than test year data.

3. Anadarko/Tesoro's Protest

26. Anadarko/Tesoro requests that the Commission order an immediate reduction of the 2007 and 2008 TAPS rates at least down to the level of the 2007 and 2008 rates in the TAPS Carriers' compliance filing, which are substantially lower than the rates previously filed by the TAPS Carriers for 2007 and 2008 under the TSM.²⁴ Anadarko/Tesoro contends it is unjust and unreasonable for the TAPS Carriers to continue collecting the higher TSM-based rates when the Commission already found them to be unlawful in the December 29 Order. Moreover, Anadarko/Tesoro asserts there is no dispute that the final rates determined in this proceeding for 2007 and 2008 cannot be higher than the rates proposed by the TAPS Carriers in the compliance filing.

27. Anadarko/Tesoro further requests that the Commission summarily reject the TAPS Carriers' ROE calculation for 2008 because it is based on actual data from 2008.

28. In addition, Anadarko/Tesoro requests that the Commission set for further investigation in a single consolidated proceeding all 2007 and 2008 rate issues not resolved by summary disposition. Anadarko/Tesoro asserts that the Commission should deny the State's request to sever the SR issues from the remainder of the 2007-2008 rate proceeding because the SR issues are so interrelated with the other rate issues that it would be impractical, inefficient, and prejudicial to sever them for separate treatment. Finally, Anadarko/Tesoro requests that the Commission convene a technical conference to evaluate all of the issues that have been raised in the 2007 and 2008 rate proceeding, including the SR claims. Anadarko/Tesoro states that at the technical conference, parties

²⁴ Anadarko/Tesoro states that the rates filed by the TAPS Carriers pursuant to the TSM average \$4.94 per barrel for 2007 and \$5.10 per barrel for 2008. Anadarko/Tesoro states that in contrast, the compliance filing rates are \$2.77 per barrel for 2007 and \$3.45 per barrel for 2008.

can make recommendations and attempt to reach a consensus on the appropriate procedures for resolving all outstanding issues.

4. TAPS Carriers' Answer

29. The TAPS Carriers agree that further proceedings appear necessary on the 2008 rates and the Commission should set the 2008 compliance filing for hearing procedures. The TAPS Carriers argue that instead of a technical conference, a prehearing conference before an ALJ is a more efficient way to move the case forward. The TAPS Carriers assert that the 2008 proceeding should address all challenges to the 2008 compliance filing, including any SR claims, because progress has been made towards completion of the SR Program.²⁵ The TAPS Carriers assert that it is also important not to delay resolving the SR issues because SR costs are included in the 2008 compliance rate and may affect the refund amount for that year. The TAPS Carriers argue that a separate but concurrent hearing on the SR issues would make efficient use of the parties' resources.

30. The TAPS Carriers argue that the Commission should deny Anadarko/Tesoro's request for summary disposition and reject the other challenges to the ROE and capital structure. The TAPS Carriers further assert that the depreciable life of TAPS was decided in Opinion No. 502 and should not be revisited here. The TAPS Carriers contend that all other comments on the compliance filing raise factual issues and should be addressed in the 2008 hearing.

31. With respect to the 2008 filed rates, the TAPS Carriers argue that the Commission should not lower those rates to the 2008 compliance level because the December 29 Order did not require the TAPS Carriers to change the current rates or establish a forward-looking rate. The TAPS Carriers further argue that they used actual data to establish the 2008 rates²⁶ and that it would be improper for the Commission to set a

²⁵ The TAPS Carriers state that two of the four pump stations slated for electrification under the SR Program have been completed, while the third pump station is close to completion. The TAPS Carriers state that the fourth pump station should be substantially complete by the end of 2010. *See* TAPS Carriers' Feb. 27, 2009 Motion for Leave to Respond and Response to the State and Anadarko/Tesoro's Comments on the Compliance Filing at 6.

²⁶ The TAPS Carriers argue that it was proper for them to use actual data in calculating the 2008 rates because the use of actual data for locked-in periods is consistent with Commission precedent. *See Williams Natural Gas Co.*, 80 FERC ¶ 61,158, at 61,678-79 (1997); *Southwestern Pub. Serv. Co.*, 60 FERC ¶ 61,052, at 61,189 (1992); *Arkansas-Louisiana Gas Co.*, 22 FERC ¶ 61,125, at 61,199 (1983).

forward-looking rate based on these actual numbers because forward-looking rates should be based on test-period data.

5. The State's Response to the TAPS Carriers' Answer

32. The State argues that the TAPS Carriers should no longer be permitted to charge the 2008 TSM rates, and instead, the Commission should require the TAPS Carriers to determine a new "going-forward" rate. The State argues that the TAPS Carriers should do this by submitting a new compliance filing that recalculates the rates for 2008 using test-period data from 2007, instead of actual data for 2008.

33. The State also argues that the scope of this case and its procedural posture should be determined by the Commission and should not be set for hearing. In addition, the State reiterated the position it took in the Request for Rehearing and Clarification of the December 29 Order that the SR issues should be held in abeyance until the completion of the SR Project.

6. The TAPS Carriers' Response to the State's Answer

34. The TAPS Carriers disagree with the State's argument that they should establish a forward-looking rate. The TAPS Carriers argue that the December 29 Order did not require them to compute such a rate and instead stated that the compliance filing rates were to "be for 2007 and 2008 based on the circumstances relevant to those periods."²⁷ The TAPS Carriers further point out that the December 29 Order stated that the Commission would "establish the rates for 2007 and 2008, and order the appropriate refunds"²⁸ once the Commission had reviewed the comments on the compliance filing. The TAPS Carriers argue that these two statements indicate the Commission intended the compliance filing rates to apply to the locked-in periods of 2007 and 2008. The TAPS Carriers argue that because they complied with the December 29 Order, they should not be required to calculate a forward-looking rate.

35. In addition, the TAPS Carriers assert that recent developments support their position that the 2008 SR claims should not be held in abeyance. The TAPS Carriers explain that in a recent order by the Regulatory Commission of Alaska (RCA), the ALJ stated that the parties have agreed that the SR issues pending both before the RCA and the Commission "should be coordinated between and heard concurrently before both

²⁷ Opinion No. 502 at P 19.

²⁸ *Id.*

commissions, if feasible.”²⁹ The TAPS Carriers argue that a joint RCA-Commission hearing on the SR issues should move forward along with the hearing on the 2008 rates.

C. Discussion

36. As explained below, the Commission resolves on a summary basis the issues of the useful life of the pipeline and the appropriate refund floor for 2007 and 2008. Because the 2007 rate falls below the refund floor, the Commission accepts the tariff sheets submitted in the compliance filing containing the 2007 rate, and orders the TAPS Carriers to issue refunds for 2007 limited to the difference between the existing TSM rate and the refund floor. The Commission also accepts on an interim basis the tariff sheets submitted in the compliance filing containing the 2008 rate, which is above the refund floor, subject to refund, orders preliminary refunds for 2008, and establishes hearing and settlement judge procedures.

1. Useful Life of the Pipeline

37. The Commission rejects the State and Anadarko/Tesoro’s argument that a longer useful life should be used for setting depreciation rates than the useful life adopted in Opinion No. 502, which extended that life from 2011 to 2034. In Opinion No. 502, the Commission affirmed the ALJ’s finding that the “correct end-life of TAPS is 2034 as corroborated by several witnesses.”³⁰ In their comments, the State and Anadarko/Tesoro do not contest this finding; they merely reference statements that the economic production of the pipeline could continue beyond 2034. Thus, the comments provide no basis for changing a finding, which was based on record evidence and made only a year ago in Opinion No. 502, that the useful life of the line is 2034.

2. Refund Floor

38. The Commission finds that the TAPS Carriers’ 2004 filed rates constitute the applicable refund floor for the 2007 and 2008 rate filings. The Commission’s power to issue refunds in oil pipeline cases derives from section 15(7) of the ICA.³¹ Pursuant to that section, when a party files for a rate increase, the Commission may accept the filing subject to refund, but the refunds are limited to the amount of the increase over the prior

²⁹ *Order Vacating Hearing Dates and Establishing Certain Procedural Requirements*, RCA Docket No. P-08-9, *et al.* (Mar. 12, 2009).

³⁰ Opinion No. 502 at P 126.

³¹ 49 U.S.C. app. § 15(7) (1988).

lawful rates in effect.³² Court and Commission precedent make clear that refunds may be ordered only for amounts exceeding the preexisting lawful rate.³³ The preexisting lawful rate, also called the “last clean rate” or the “refund floor,” is the last rate in effect not subject to refund.³⁴ Thus, when a number of rate increases are “pancaked,” or filed one after another, the last unchallenged rate that was in effect establishes the refund floor.³⁵ A decision in the first of two pancaked rate increases, if issued after the second increase was accepted subject to refund, does not constitute a new refund floor if such decision is issued after the date of acceptance of the second rate increase.³⁶

39. Here, the 2005, 2006, 2007, and 2008 TAPS’ TSM rate filings were all protested.³⁷ When the Commission accepted and suspended the rates for each of these

³² *Id.*

³³ *Amoco Production Co. v. FERC*, 271 F.3d 1119, 1122 (D.C. Cir. 2001) (citing *Distrigas of Mass Corp. v. FERC*, 737 F.2d 1208 (1st Cir. 1984) (*Distrigas*)); *Federal Power Commission v. Sunray DX Oil Co.*, 391 U.S. 9, 22-25 (1968) (*Sunray*). Although these cases interpret the Commission’s refund power under the Natural Gas Act (NGA), the Commission finds the NGA refund provision is analogous to the refund provisions in the ICA, and so the reasoning in these cases applies here.

³⁴ *Pacific Gas & Elec. Co.*, 87 FERC ¶ 61,218, at 61,861 n.18 (1999) (citing *Sunray*, 391 U.S. at 21-24).

³⁵ *Lakehead Pipeline Co.*, 71 FERC ¶ 61,338, at 62,318-19 (1995).

³⁶ *See Wyoming Interstate Co.*, 89 FERC ¶ 61,303, at 61,938 (1999); *Distrigas*, 737 F.2d 1208, 1224 (1st Cir. 1984).

³⁷ To aid in explaining the appropriate refund floor, the following table summarizes the different rates during this time period:

Year	TSM-Filed Rate (\$/Bbl)	Protested	Rate Recalculated pursuant to Opinion No. 502 (\$/Bbl)
2004	\$3.00 to \$3.20	No (refund floor)	n/a
2005	\$3.52 to \$3.97	Yes	\$1.92*
2006	\$3.78 to \$4.41	Yes	\$2.02*

(continued...)

years, subject to refund, the 2004 rates were the last clean rates. The new just and reasonable rates for 2005 and 2006 were not established until November 20, 2008, the date of the Commission’s Order on Compliance and Rehearing of Opinion No. 502. The final 2005 and 2006 rates may become the refund floor for new rate filings, but they would not apply to previously-filed and accepted rates, even if subject to refund. This means that in the 2007 and 2008 rate proceedings, refunds can be no more than the difference between the proposed TSM rate increase and the 2004 rates.³⁸

40. The State contends that because the TAPS Carriers’ proposed rates for 2007 and 2008 are unjustly discriminatory and unduly preferential in violation of the TAPS Settlement and sections 2 and 3 of the ICA, the Commission can order full refunds below the 2004 refund floor. The Commission disagrees. The State’s argument that when discrimination is shown the refund floor is not applicable has already been rejected by the Commission in Opinion No. 502.³⁹ Moreover, the State’s argument that the TAPS Settlement confers upon the Commission additional refund authority holds little merit because the TAPS Settlement is no longer in effect. The 2007 and 2008 rates at issue here were filed in compliance with the December 29 Order, and not pursuant to the TAPS Settlement.

41. The Commission also rejects the State’s claim that the Commission can order refunds below the refund floor pursuant to its ancillary powers. In the very case cited by the State in support of its position, the court rejected the existence of such power where “language in the [Interstate Commerce] Act plainly requires a contrary result.”⁴⁰ Here,

2007	\$4.94	Yes	\$2.77
2008	\$5.10	Yes	\$3.45

* Accepted by the Commission. *BP Pipelines (Alaska) Inc.*, 125 FERC ¶ 61,215 (2008).

³⁸ In this case, the 2007 refunds will be for the entire amount of the difference between the filed TSM rate and the 2004 rates because the 2007 compliance filing rate falls below the 2004 refund floor. However, the 2008 compliance filing rate of \$3.45 per barrel is above the 2004 refund floor rate of \$3.00-\$3.20 per barrel, and so the 2004 refund floor will only come into play for the 2008 rate if the final just and reasonable rate determined in the hearing is below the refund floor.

³⁹ Opinion No. 502 at P 133.

⁴⁰ *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 656 (1978).

the concept of a refund floor derives from a statutory scheme, as the court clearly explained in the *Distrigas* case.⁴¹ The other cases cited by the State do not support its position either. *Kuparuk*⁴² and *Laclede Gas*,⁴³ both involved enforcement by the Commission of settlement terms that specifically provide for refunds. While section II-1 and Exhibit D of the TAPS Settlement expressly provided for specified rate refunds, those provisions set the amount of the rates and refunds only until 1985.⁴⁴ Moreover, as explained above, the TAPS Settlement is no longer in effect and the 2007 and 2008 rates were not filed pursuant to the TAPS Settlement. For all of the foregoing reasons, the Commission finds no basis on which it should order refunds below the 2004 refund floor.

3. 2007 TAPS Rates

42. The Commission finds that because the 2007 compliance filing rate falls below the 2004 refund floor, no further proceedings regarding the 2007 rates are necessary. The individual TAPS Carriers' rates for 2004 ranged from \$3.00-\$3.20 per barrel. In the TAPS Carriers' compliance filing, they assert that the uniform interstate rate for 2007 is \$2.77 per barrel, and cannot go higher if the 2007 rate is set for hearing. Because the 2007 uniform rate proposed by the TAPS Carriers in their compliance filing falls below the highest individual rate for 2004, no further proceedings are required with respect to the 2007 compliance filing. Therefore, there is no need to litigate the actual rate for 2007.⁴⁵ Accordingly, the Commission orders the TAPS Carriers to issue refunds for 2007 limited to the difference between the charged 2007 TSM rate and the 2004 refund floor.

⁴¹ See *Distrigas*, 737 F.2d 1208, 1224 (1st Cir. 1984) (citing *Sunray*, 391 U.S. 9 (1968)).

⁴² *Kuparuk*, 55 FERC ¶ 61,122 at 61,366 (1991).

⁴³ *Laclede Gas*, 873 F.2d 1494, 1499 (D.C. Cir. 1989).

⁴⁴ TAPS Settlement § II-1 and Exhibit D.

⁴⁵ To the extent the 2007 compliance filing rate (or components of that rate) impact or were used in determining the 2008 compliance filing rate, parties are free to challenge these amounts in the 2008 rate proceeding and the TAPS Carriers are free to defend against any such challenges.

4. 2008 Rates

43. In the TAPS Carriers' compliance filing, they propose a uniform rate for 2008 that is higher than the 2004 refund floor. Therefore, in order to establish the appropriate refund amount for 2008, the Commission must determine whether the TAPS Carriers' proposed rate is just and reasonable, and if not, set the just and reasonable rate. However, the compliance filing submitted by the TAPS Carriers raises a number of issues of material fact that cannot be resolved on the record before us and are more appropriately addressed in the hearing and settlement judge procedures ordered below. The 2008 rate issues to be resolved through hearing and settlement judge procedures include, but are not limited to, whether (1) the ROE and capital structure were properly determined; (2) test-period or actual data should be used to calculate the rate; (3) DR&R expenses were improperly included in the rate; (4) the correct rate base, operating expenses, and throughput were used in calculating the rate; and (5) the rates improperly included imprudent costs related to the SR Project.

44. Anadarko/Tesoro requests that the Commission summarily reject the TAPS Carriers' ROE calculation for 2008. The Commission denies this request because the Commission may only summarily dispose of an issue "when there is no genuine issue of fact material to the decision,"⁴⁶ and the ROE claims raised by Anadarko/Tesoro do not meet this standard. The issue of whether the TAPS Carriers used the correct data in calculating the ROE constitutes a factual dispute that should be resolved at the hearing. This includes whether it was appropriate for the TAPS Carriers to use actual instead of test period data in the ROE calculation. The various inputs used by the TAPS Carriers to determine the ROE should be properly examined through hearing and discovery procedures, and not resolved on a summary basis. Because the parties raise genuine issues of fact regarding the appropriate data for calculating the ROE for 2008, the Commission denies Anadarko/Tesoro's request for summary disposition of this issue.

45. The Commission also denies Anadarko/Tesoro's request for a technical conference. Holding a technical conference to determine the procedural posture of this case would be an inefficient use of both the Commission's and the parties' resources when the matter can be better resolved at a prehearing conference. The presiding judge is in the best position to determine the procedural posture of this proceeding. This includes whether to establish a separate hearing for the SR issues, and if established, whether to hold that hearing in abeyance or to move forward and coordinate the hearing with the SR proceeding before the RCA.

⁴⁶ 18 C.F.R. § 385.217 (2008).

46. As to the TAPS Carriers' 2008 rate filing itself, the State argues that the TAPS Carriers should be required to determine a "going-forward" rate by submitting a new compliance filing that recalculates the rates for 2008 using test-period data from 2007, instead of actual data for 2008. The State asserts that the newly calculated rate should be prospective and replace the 2008 rates that the TAPS Carriers are currently charging. On the other hand, the TAPS Carriers argue that the December 29 Order did not require them to compute such a rate and instead stated that the compliance filing rates were to "be for 2007 and 2008 based on the circumstances relevant to those periods."⁴⁷

47. We reject both contentions. Under the TAPS Settlement, the TAPS Carriers made annual filings to establish new rates, effective the first of January the following year. However, the TAPS Settlement is no longer in effect and the TAPS Carriers made no rate filing for 2009. Under these circumstances, the Commission accepts the 2008 compliance filing on an interim basis,⁴⁸ subject to refund, orders preliminary refunds for 2008, and sets the 2008 rate issues for hearing and settlement judge procedures.

48. The Commission may set interim rates where equitable concerns necessitate such action and there is a possibility that the final rates will be lower than the interim rates.⁴⁹ Here, the Commission is establishing an interim rate out of equitable concern for the TAPS shippers, who should not have to continue to pay a rate (*i.e.*, the 2008 TSM rate) that the Commission found to be unjust and unreasonable in the December 29 Order.⁵⁰ Moreover, while there is no chance the final rate for 2008 will be higher than TAPS

⁴⁷ December 29 Order P 19.

⁴⁸ The authority to accept the 2008 compliance rates stems from the Commission's remedial authority in section 15(1) of the ICA. *See also Exxon Mobil Oil Corp. v. FERC*, 487 F.3d 945 at 969 (2007) (*Exxon Mobil*); *BP West Coast*, 374 F.3d 1263 at 1305 (2004) (stating that the Commission had authority to direct a pipeline to file interim rates subject to refund if there was a possibility that the final rates would be lower than the interim rates).

⁴⁹ *See Exxon Mobil*, 487 F.3d at 964 n.5; *SFPP, L.P.*, 100 FERC ¶ 61,353, at 62,265 (2002) (stating that the reason the Commission accepted the rates on an interim basis was "out of equitable concern for the East Line shippers that are not eligible for reparations in this proceeding.").

⁵⁰ An interim rate is particularly important for Anadarko/Tesoro because it pays TAPS rates indirectly through net back pricing for its oil shipped by others on TAPS, and so is not protected by refunds.

Carriers' 2008 compliance filing rate, there is a possibility that the final rate will be lower than the 2008 compliance filing rate. Thus, the Commission accepts the 2008 compliance filing on an interim basis, subject to refund, until all challenges to the 2008 compliance filing have been resolved through the hearing and settlement procedures established herein.

49. We reject the State's argument that the TAPS Carriers should be required to submit a new compliance filing that recalculates the rates for 2008 using test-period data from 2007, instead of actual data for 2008. The 2008 rate that the TAPS Carriers submitted in their compliance filing will only be effective on an interim basis. Whether the TAPS Carriers should have used test-period data to calculate this rate is an issue that will be determined at the hearing establishing the final rate. Requiring the TAPS Carriers to re-file their compliance filing using test-period data would only delay the hearing and settlement procedures established herein. Moreover, the interim rate is subject to refund. Thus, if the State's argument for the use of test-period data is successful and the 2008 compliance filing rate is reduced, the State will be made whole through refunds. For these reasons, the Commission denies the State's request.

50. While the interim rates are subject to refund, the Commission orders the TAPS Carriers to issue preliminary refunds for 2008. Because the final rate for 2008 will not be higher than the 2008 compliance filing rate, there is no reason to wait until the end of the hearing to order initial refunds. Thus, the TAPS Carriers should issue preliminary refunds for 2008 in the amount of the difference between the 2008 TSM rate and the 2008 compliance filing rate.

51. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their disputes before hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.⁵¹ If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise, the Chief Judge will select a judge for this purpose.⁵² The settlement judge

⁵¹ 18 C.F.R. § 385.603 (2008).

⁵² If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of the date of this order. The Commission's website contains a list of the Commission's judges and a summary of their background and experience (www.ferc.gov – click on Office of Administrative Law Judges).

shall report to the Chief Judge and the Commission within 30 days of the date of the appointment of the settlement judge, concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

The Commission orders:

(A) The State's request for clarification, or in the alternative rehearing, of the December 29 Order is denied.

(B) The Taps Carriers' compliance filing containing rates for 2007 is hereby accepted and the TAPS Carriers are ordered to issue refunds, as discussed in the body of this order.

(C) The TAPS Carriers' compliance filing containing rates for 2008 is accepted on an interim basis, subject to refund, as discussed in the body of this order.

(D) The TAPS Carriers are ordered to issue preliminary refunds for 2008, as discussed in the body of this order.

(E) Anadarko/Tesoro's request for summary disposition is denied, as discussed in the body of this order.

(F) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R., Chapter I), a public hearing shall be held concerning the TAPS Carriers' 2008 compliance filing. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (G) and (H) below.

(G) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2008), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

(H) Within thirty (30) days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief Judge on the status

of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(I) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, N.E., Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.